

FORENSIC MEDICINE AND FEMALE VICTIMHOOD IN VICTORIAN AND EDWARDIAN ENGLAND*

Scholars of sexual crime have long acknowledged that mistrust of female complainants often underlies low conviction rates, both historically and in the present day.¹ This mistrust has deep roots, but is not a transhistorical phenomenon. There is a complex historical relationship between periods of religious concern about morality, high prosecution rates and intense scrutiny of female behaviour. Carolyn Conley notes that the Reformation marked a period in which women were often ‘tainted as criminals’ by their victimization; this approach to victimhood waned with the decline of ‘religious zeal’ in the eighteenth century, but so did prosecution rates.² Garthine Walker has also shown that early modern ‘acquittals for rape were not generally presented in popular trial reports as the consequence of victims’ contributory negligence, of their having somehow “asked for it”’.³ In the nineteenth century there was a renewed tendency to scrutinize female complainants and to blame them for encouraging, or failing adequately to resist, sexual advances.

Concerns about female behaviour and respectability strengthened in line with a range of social shifts, including

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¹ On low conviction rates in trials for sexual violence, compared with other crimes, see Carolyn A. Conley, ‘Rape and Justice in Victorian England’, *Victorian Studies*, xxix (1986), 521. Although conviction rates in Devon, Gloucestershire, Somerset and Middlesex were often relatively high at trial, it is likely that only a low proportion of cases actually reached this stage of proceedings.

² Carolyn A. Conley, ‘Sexual Violence in Historical Perspective’, in Rosemary Gartner and Bill McCarthy (eds.), *The Oxford Handbook of Gender, Sex, and Crime* (Oxford, 2014), 218.

³ Garthine Walker, ‘Rape, Acquittal and Culpability in Popular Crime Reports in England, c.1670–c.1750’, *Past and Present*, no. 220 (Aug. 2013), 140.

religious movements, urbanization and demographic trends.⁴ These trends are well documented elsewhere, and historians are in broad agreement about a tightening of moral value systems in the late nineteenth century.⁵ Working-class female sexualities were under close scrutiny, particularly those of precocious girls and 'fallen' unmarried women. These — perhaps largely imagined — females represented a range of contemporary 'respectable' fears, as they apparently: stood in opposition to Christian values; embodied the Victorian enemies of dirt and disorder; threatened the future of the nation, through illegitimacy and infanticide; and, for middle- and upper-class men, posed the dangers of blackmail and extortion.⁶ Men were also held increasingly responsible for their sexual behaviour by the turn of the century, as part of a shift in models of ideal 'civilized' masculinity and the growing valorization of male self-control, but this did not entirely counter the growing scrutiny of female complainants.⁷ Despite a general acceptance in scholarship of these parallel trends, there is little recognition of the tension between them in cases of alleged sexual violence; it was not possible for the courts simultaneously to punish men and women.

The article focuses on this tension and considers why female behaviours and life histories were increasingly scrutinized in the courts, despite growing intolerance of male violence. It draws on evidence from 2,213 pre-trial statements for sexual

⁴ Demographic trends of concern included rising rates of unmarried women, and falling middle-class fertility; see Michael Anderson, 'The Social Implications of Demographic Change', in F. M. L. Thompson (ed.), *The Cambridge Social History of Britain, 1750–1950*, 3 vols. (Cambridge, 1990), ii, 28.

⁵ Stephen Garton, *Histories of Sexuality* (London, 2004), 123.

⁶ The scholarship on these trends is too extensive to reference in full, including specific articles on each of the trends. Some useful overviews of changes over time in ideas around sex, working-class femininity, and morality, can be found in Lesley A. Hall, *Sex, Gender and Social Change in Britain since 1880*, 2nd edn (Basingstoke, 2012); Michael Mason, *The Making of Victorian Sexuality* (Oxford, 1994); Sarah Toulalan and Kate Fisher (eds.), *The Routledge History of Sex and the Body: 1500 to the Present* (London, 2013).

⁷ On the growing link between 'manliness', self-control and sexuality in the nineteenth century, see Alan Hunt, 'The Great Masturbation Panic and the Discourses of Moral Regulation in Nineteenth- and Early Twentieth-Century Britain', *Journal of the History of Sexuality*, viii (1998), 589. On changing models of masculinity, see John Tosh, *Manliness and Masculinities in Nineteenth-Century Britain: Essays on Gender, Family and Empire* (Harlow, 2005). On how these changing ideas about masculinity shaped class-based ideas about male violence, including rape, see J. Carter Wood, 'A Useful Savagery: The Invention of Violence in Nineteenth-Century England', *Journal of Victorian Culture*, ix (2004).

offences from the Middlesex Sessions and Devon, Somerset and Gloucestershire Quarter Sessions between 1850 and 1914, and focuses particularly on female complainants and on the cases with medical testimony.⁸ These courts all tried misdemeanours, such as attempted rape or sodomy, indecent assault, carnal knowledge of girls in the misdemeanour age group, and attempted carnal knowledge of girls in the felony age group.⁹ Cases of sexual crime were not reported in detail in the *Proceedings of the Old Bailey* by the nineteenth century, and few trial transcripts survive, making these pre-trial statements an incomparable resource in terms of their detail and survival rate. Although missing many elements of the trial, such as the questions posed to witnesses or judges' comments, pre-trial statements are good indicators of the evidence that would come to be given and provide unparalleled insight into cases of suspected sexual assault. Many of the complainants in these cases actually made more serious charges, which may have been downgraded in the apparent absence of sufficient evidence or the higher likelihood of conviction in misdemeanour trials. These pre-trial statements are supplemented here by newspaper reports from the same regions, for a better understanding of the cultures around female victimhood and the processes by which cases reached — or did not reach — trial.

These cases indicate that growing fears about disorderly female sexualities outweighed comparable concerns about male violence. During this period the law gradually turned against narrow framings of 'real' cases of sexual violence, which involved the stereotype of a chaste woman who physically resisted her assailant, but wider culture did not rapidly change to do the same. Newspapers continued to report on issues such as the 'respectability' of complainants and prisoners. Sympathy for female victims waned despite, or more likely because of,

⁸ 87 per cent of pre-trial statements from Middlesex and 97 per cent from Gloucestershire, Somerset and Devon involved female complainants. Some punctuation has been added to the pre-trial statements cited in this article, to aid readability without changing meaning.

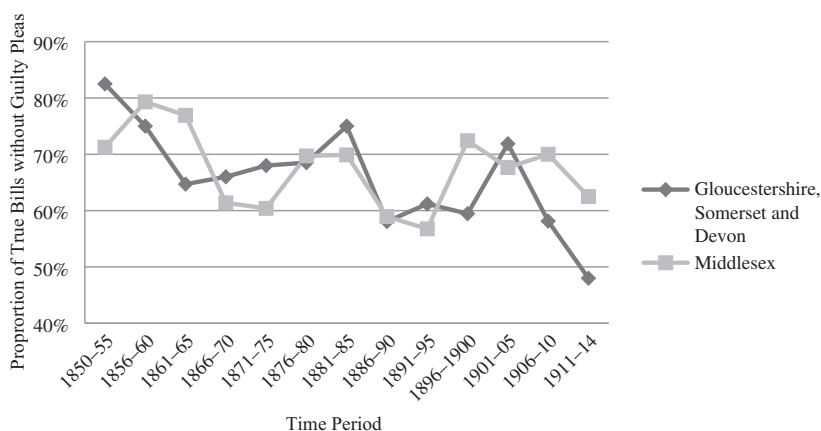
⁹ Legislation in 1861, 1875, 1880 and 1885 shifted the age of misdemeanour and felony categories for carnal knowledge and indecent assault gradually upwards; the felony clause applied to girls under the age of ten at the start of the period, and under thirteen by the end, while the misdemeanour clause increased from twelve to sixteen years over this period. For details, see Victoria Bates, *Sexual Forensics in Victorian and Edwardian England: Age, Crime and Consent in the Courts* (Basingstoke, 2016), 13.

legislative efforts to shift away from stereotypes around 'real' victimhood and to raise the age of sexual consent. Feminist campaigns to promote protection of women, and particularly girls, in the latter decades of the nineteenth century had complex and sometimes contradictory effects. Many social purity campaigners supported raising the age of consent as much to control disorderly working-class sexualities as to protect girls, and other campaigns consolidated stereotypes of the 'right' kind of feminine victimhood. The courts also remained dominated by men, from prosecutors to expert witnesses, jurors and judges. As demonstrated in the figure below, conviction rates actually plummeted in the immediate aftermath of the 1885 Criminal Law Amendment Act, which raised the age of sexual consent from 13 to 16 years. These findings are in themselves not new, but a significant question still remains about *how* such trends were able to occur, despite legal changes that broadened definitions of non-consent and removed sexual history as a legally relevant issue.

To address this question three key themes are considered here in turn: the right to trial; a complainant's reputation; and the adequacy of their non-consent. Each of these social concerns was articulated implicitly in court by a wide range of witnesses, who used their discretion to circumvent legislative change. In particular, medical practitioners had a uniquely important role in explicitly articulating and scientifically validating these social concerns. The issue of reputation and non-consent overlapped with specific types of medical testimony, on virginity and the physical struggle, respectively. While the law was trying to move away from stereotypes that emphasized the virginal victim and physical resistance, forensic medicine was consolidating these frameworks. For this reason, forensic medicine played a key — and overlooked — role as a bridge between society and the courts.¹⁰ Medical witnesses often focused on the same groups that were the subjects of wider social anxieties: unmarried girls

¹⁰ Similar claims about the power of Victorian forensic medicine to reinforce a so-called 'justice gap' are made in Ivan Crozier and Gethin Rees, 'Making a Space for Medical Expertise: Medical Knowledge of Sexual Assault and the Construction of Boundaries between Forensic Medicine and the Law in late Nineteenth-Century England', *Law, Culture and the Humanities*, viii (2012), 302. However, Crozier and Rees focus on published literature and on the construction of authority through 'boundary work', rather than on the judicial process in practice.

TRIAL CONVICTION RATES



Reproduced by permission of Palgrave Macmillan from Victoria Bates, *Sexual Forensics in Victorian and Edwardian England: Age, Crime and Consent in the Courts* (Basingstoke, 2016).

close to the age of puberty and in young adulthood. They also made value judgements, for example with implicit connections — or at least alignments — between unchastity, precocity and consent. This is not to claim that medical witnesses were deliberately using their testimony to make moral points. Rather, they were members of middle-class male communities — commonly local to the complainants and prisoners — and were not disconnected from wider social trends. Forensic medicine did not create such concerns but provided a rare opportunity to articulate them openly in the courts, and to validate them scientifically, carefully treading the line between growing cultural anxieties around the behaviours of disreputable females and a law that was increasingly intolerant of male abuses.

In recent work on sexual violence and gender, Kristin Bumiller observes that ‘legislative change has . . . not brought about the hoped for transformation of “rape culture”’.¹¹ The same was true of the nineteenth century, in which forensic medicine provided some of the most explicit articulation of — and

¹¹ Kristin Bumiller, ‘Explaining the Volte-Face: Turning Away from Criminal Law and Returning to the Quest for Gender Equality’, in Rosemary Gartner and Bill McCarthy (eds.), *The Oxford Handbook of Gender, Sex, and Crime* (Oxford, 2014), 119.

scientific basis for — putting women under the microscope (figuratively and literally) in the face of contradictory legislative change. In making these claims this article contributes to a wider historiography of medicine and gender, which has long observed the role of medicine and science in legitimizing gender- and class-based social concerns.¹² It also builds on a long tradition of scholars using the courts for their insights into changing gender roles, for example showing the relative sympathy afforded to women in infanticide cases, demonstrating female agency in pursuing financial rights in court, and showing growing anxieties about gendered forms of juvenile delinquency.¹³ Cases of sexual crime provide their own particular insight into social change. They show how changing ideas about respectable femininity shaped the bodily and embodied features of ‘victimhood’, and shed light on the delicate negotiation between fears about disorderly male and female sexualities. The Victorian and Edwardian courts were microcosms of wider society, where social tensions were exacerbated, exaggerated and staged.

I

REACHING TRIAL

Late feminism would come to label many of the trends outlined earlier as ‘victim blaming’. To some extent this is a useful way of understanding the increased scrutiny of female behaviours in Victorian and Edwardian courts, but it does have its limits. The judicial process often, in practice, actually removed or undermined women’s rights to claim to be a victim in the first place. Those considered ‘real’ victims were typically those who

¹² Such arguments are particularly evident in late twentieth-century feminist scholarship on the role of medicine in enforcing gender roles, for example through hysteria diagnoses, such as Elaine Showalter, *The Female Malady: Women, Madness and English Culture, 1830–1980* (New York, 1985). Michel Foucault’s influential work on the history of sexuality also explores these themes of gender, sexuality and medicine; see Michel Foucault, *The History of Sexuality*, trans. Richard Hurley (New York, 1978).

¹³ See, for example, Hilary Marland, ‘Getting Away with Murder? Puerperal Insanity, Infanticide and the Defence Plea’, in *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550–2000*, ed. Mark Jackson (Aldershot, 2002); Margot Finn, ‘Women, Consumption and Coverture in England, c.1760–1860’, *The Historical Journal*, xxxix (1996).

fulfilled the social as well as legal criteria for victimhood, and were rarely those 'blamed'. Unpicking the meaning and influence of so-called 'victim blaming' necessitates examining the questions posed to, and about, all potential victims in cases of suspected sexual violence; it must be understood not only in relation to specific cases of apparent injustice or perceived unfair acquittal. Many cases that we might identify as 'victim blaming' did not in fact involve a victim, in the eyes of the law. While some cases involved 'blame' (for example, implying that a woman encouraged a man's behaviour), others involved fundamental mistrust of a woman's character or testimony (often not even reaching trial on this basis). Rather than 'victim blaming', this process is perhaps better understood as that of the construction or denial of 'real' victimhood. The first step in understanding this process is considering which cases actually reached trial, and — by extension — which females were denied the right to claim victimhood in the first instance.

The dismissal of cases before trial is one of the most significant, but most poorly understood, processes by which victimhood was denied to girls and women. With only limited survival of transcripts for cases that were not passed forward for trial, and selective newspaper reports, it is difficult to formulate a reliable picture of the many women whose cases never reached a jury. From the fragments that survive, it seems likely that a significant number of women are hidden from the history of sexual violence, in consequence of their cases not reaching the courts or being dismissed at early stages of proceedings. Acknowledging this is a crucial first step in understanding the evidence received at trial: a high conviction rate at trial, or high proportion of medical evidence of violence, does not necessarily mean a high level of support for complainants. Conversely, reading into the absence of certain types of case at trial, we might conclude that women who did not align with Victorian gender ideals were denied the right to claim victimhood.

A number of individual, social, cultural and financial factors fed into whether a woman made it to a police station or court, and the extent to which her claim was considered worthy of trial once there. Working-class female complainants showed increasing willingness to use the courts to pursue their claims in the late nineteenth century, but it is likely that many still felt unable to present their case to the police. For some women this decision was

based on concerns about reputation, which explains why few upper-class women appeared as complainants. It also seems likely that there was some self-denial of the claim to victimhood, in line with cultural constructions thereof, and an awareness of the types of cases that were (un)successful. Women may not have wanted to risk public scrutiny if they felt that their case was unlikely to be successful, or that they were not a suitable 'victim', and consequently chose not to pursue a charge. Such a theory is impossible to prove, but it must be acknowledged as a possibility that women internalized wider cultural models of 'real' victimhood (and its opposites). Occasional references in court transcripts to proposals to 'settle' cases financially rather than go to the police also indicate that this might have been a common practice, especially for poorer women.¹⁴

Carolyn Conley and Louise Jackson have both observed the extent to which cases were dismissed before trial. In her book *Child Sexual Abuse in Victorian England*, Jackson found that in Thames Police Court 53 per cent of cases were acquitted or dismissed, and in Hampstead Police Court only one quarter of cases were committed for trial.¹⁵ The others were either convicted on lower charges, or dismissed. Some of these decisions were made on the basis of the potential for higher conviction rates on lower charges, but assumptions about 'real' victims also fed into such decisions. In her study of criminal justice in Kent, Conley notes that almost a third of cases involving domestic servants making charges against employers were dismissed before trial. She cites magistrates who explicitly referred to the character of complainants and prisoners in their decision to dismiss cases in the late nineteenth century, leaving little doubt that — often against legal guidelines — they were continuing to act with discretion on the basis of broader ideas about gender, class and respectability.¹⁶

The judicial system did not exist in isolation from wider social trends. Petty jurors were drawn from the public, and police and magistrates were part of local communities and engaged with

¹⁴ For example, London Metropolitan Archives (hereafter LMA), Pre-Trial Statements, John Roberts tried at the Middlesex Sessions in July 1869 for indecent assault, MJ/SP/E/1869/015.

¹⁵ Louise A. Jackson, *Child Sexual Abuse in Victorian England* (London, 2000), 23.

¹⁶ Carolyn A. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (Oxford, 1991), 84–8.

wider culture. One important aspect of this culture was the rise of the news media, which reported on cases that were dismissed or tried. Newspapers did not just passively reiterate cases that corroborated stereotypes around sexual violence and 'real' victimhood; they were an active part of their propagation by selectively reporting cases that appealed to popular opinion on crime.¹⁷ In so doing, they — perhaps unwittingly — reinforced many of the stereotypes of 'real' victims. By extension, they excluded a large number of women from the right to claim victimhood. Such cultural constructions could have real-life implications as they reached magistrates, judges, jurors, expert witnesses, and even complainants and prisoners in a context of rising literacy rates. Many local newspapers had a significant circulation amongst the lower-middle and middle classes.¹⁸ The *Times* had an average daily circulation of 38,141 in the mid nineteenth century and outstripped its London rivals until the rise of the cheaper popular presses at the end of the century, which served to heighten further, rather than dampen, sensationalist rhetoric around crime.¹⁹ The most famous example of this, the 'Maiden Tribute of Modern Babylon' exposé in the *Pall Mall Gazette*, stoked up significant public sentiment in the 1880s in the service of protecting young girls from a 'white slave trade'.²⁰ It also served to construct a particular type of young, innocent female victimhood and brought increasingly into public debate a figure who was her opposite: the sexually 'precocious' girl, prone to blackmail and extortion. The media's increasingly sensationalist reporting style in the late nineteenth century fed back into the courts, and into

¹⁷ Such media construction and propagation of gender ideals was also evident in relation to other types of crime reporting; see, for example, Daniel J. R. Grey, "'Agonised Weeping': Representing Femininity, Emotion and Infanticide in Edwardian Newspapers', *Media History*, xxi (2015).

¹⁸ Charles Mitchell, *The Newspaper Press Directory* (London, 1846).

¹⁹ David Brown, 'Cobden and the Press', in *Rethinking Nineteenth-Century Liberalism: Richard Cobden Bicentenary Essays*, ed. Anthony Howe and Simon Morgan (Aldershot, 2006), 81 n. 5. On the rise of the popular presses, see Virginia S. Berridge, 'Popular Journalism and Working Class Attitudes 1854–1886: A Study of *Reynold's Newspaper*, *Lloyd's Weekly Newspaper* and the *Weekly Times*' (Univ. of London, unpublished Ph.D. thesis, 1976).

²⁰ For example, W. T. Stead, 'The Maiden Tribute of Modern Babylon III: The Report of our Secret Commission', *Pall Mall Gazette*, 8 July 1885.

the reception of expert evidence given at trial. In 1890, an article in the medical journal the *Lancet* complained that:

Cases are discussed with freedom prior to judicial proceedings, because each fresh piece of information bearing on the case is inserted in the paper, and the public at large read the comments and the startling headings to the paragraph and thus become biased before they are really aware of it.²¹

Even relatively high circulation figures underestimate the extent to which newspapers were shared, rented and read aloud.²² Roger Schofield estimates that five-sixths of the London population had regular access to newspapers by the 1840s in consequence of the sharing and circulation of newspapers.²³ The courtroom was not cut off from wider society or from the stereotypes about 'real' victimhood perpetuated by the printed media.

Newspaper reports should not be taken as direct insights into the working of the courts, but they are valuable precisely for this reason. They demonstrate how particular types of victimhood were denied in culture, and begin to highlight the role of forensic medicine in this process. Certain types of cases were not represented as likely to reach trial: those in which complainants were not 'respectable', and those in which they did not sufficiently resist a man's advances. Multiple newspapers implicitly linked a description of a 'respectable young woman' or a 'respectably-attired young woman' to the decision to 'commit a prisoner for trial'.²⁴ The right to present as a victim was, in contrast, often denied in cases in which a prisoner was described as 'respectable'.²⁵ Such reports indicate broad cultural connections between 'real' victims, victimhood-denial and whether women presented as 'respectable' or not in court. Other scholars provide further evidence to support these findings. The extensive work of Judith Rowbotham and Kim Stevenson on Victorian sexual offences, for example, shows the centrality of 'respectability'

²¹ H. A. Lediard, 'Our Criminal Procedure: Scientific Imperfections and Remedy', *Lancet*, 18 Oct. 1890, 813.

²² Charles Upchurch, *Before Wilde: Sex Between Men in Britain's Age of Reform* (Berkeley, Calif., 2009), 134.

²³ Roger S. Schofield, 'Dimensions of Illiteracy in England, 1750–1815', in *Literacy and Social Development in the West: A Reader*, ed. Harvey J. Graff (Cambridge, 1981).

²⁴ For example, in 'The Police Courts', *Daily News*, 4 Oct. 1853; 'Extraordinary Charge', *Sheffield & Rotherham Independent*, 19 Dec. 1862.

²⁵ For example, in 'Middlesex Sessions, March 10', *Times*, 11 Mar. 1852, 7.

both to cultural stereotypes of 'victimhood' and to the performed, embodied role of 'victim' in court.²⁶

Less well observed is the weight that these newspapers also gave to testimony that scientifically validated their casual observations about 'respectable' attire, or otherwise, in pre-trial decision-making. The most significant direct correlation between medical testimony and social or cultural notions of 'respectability' was evidence about female virginity or sexual history. Few unchaste complainants were given the right even to present themselves to a jury, again making 'victim denial' a more appropriate phrase than 'victim blame'. Newspapers were seemingly particularly keen to report on such cases, explicitly highlighting medical testimony and its role in validating concerns about false claims by girls of poor character. In one Middlesex case of alleged indecent assault from 1868, *Reynolds's Newspaper* reported that:

The surgeon who had examined the prosecutrix was then recalled, and gave such evidence as left no doubt that the prosecutrix could not have been so innocent as she had represented herself to be. [Magistrate] Mr Cooke said no jury would convict on such evidence, and he should discharge the prisoner.²⁷

While legally unable to dismiss a case on the basis of a woman's unchastity, a magistrate was able to dismiss it on the basis of insufficient evidence. In the light of this legal position, the claim that 'no jury would convict on such evidence' seems ambiguous; it is not clear whether the magistrate was referring to insufficient evidence or — more subtly — to the existence of medical evidence that raised questions about the complainant's character. It seems particularly significant that the court recalled a medical practitioner to question him on the subject of chastity, even though it served no obvious legal purpose. Some courts evidently encouraged the blurring of medical, moral and legal boundaries. Perhaps most significantly, newspapers were keen to pick up on such stories, or selectively publish such aspects of court cases.

Medical testimony on female character often focused on those social groups that were most commonly the subjects of scrutiny, and the media propagated these frameworks of thought.

²⁶ For example, *Criminal Conversations: Victorian Crimes, Social Panic, and Moral Outrage*, ed. Judith Rowbotham and Kim Stevenson (Columbus, 2005).

²⁷ 'Charge of Indecent Assault', *Reynolds's Newspaper*, 2 Feb. 1868, 5.

According to another newspaper article from 1862, evidence was given at a Middlesex police court for an alleged rape on 'Esther Whiting, a precocious-looking girl, between fourteen and fifteen years of age' in which:

Dr George Pearse, 10, Regent-street, Westminster, divisional surgeon, said he was called to the station between twelve and one on Tuesday morning and examined the prosecutrix, upon whom he found no marks of violence, nor were there the least indications that the offence had been recently committed; at the same time, however, there was no doubt that her ruin had been affected [*sic*] some time since. Witness added that she told him two facts which she had not mentioned to the magistrate, one being that the defendant had given her half-a-crown previous to committing the assault in the kitchen . . . [Magistrate] Mr Paynter observed that it was quite clear no jury would convict upon such evidence, after the testimony of Dr Pearse that the girl had not been violated recently, but at a more distant period . . . there was not the slightest evidence against the defendant, whom he discharged.²⁸

The newspaper report indicates that medical evidence about her previous unchastity played a significant part in the dismissal of this case, particularly when alongside evidence that placed doubt upon her reliability. Whether or not this was truly the case, newspaper reports of this kind operated to consolidate such cultural frameworks over the course of the late nineteenth century: potential future juries were told through the media that they 'would not convict' on the basis of medical evidence that showed unchastity. This precocious and unchaste girl exemplified dangerous working-class sexualities. A girl who was precocious in body and behaviour did not fulfil the characteristics of a respectable female victim, who — particularly at such a young age — was expected to be innocent and childlike.

As with medical evidence on unchastity, newspapers often used medical testimony to reinforce a physical model of consent and resistance in their reporting. Scholars such as Joanna Bourke have long shown the significance of the physical struggle and the idea that 'no means yes' to models of 'real' sexual violence.²⁹ Less attention has been paid to the ways in which this model was consolidated and strengthened even in the face of growing legal concerns about male violence. Again, medical testimony and reports thereof provide an understanding of the mechanisms by which social concerns about disorderly female sexuality

²⁸ 'Unfounded Charge', *Lloyd's Weekly Newspaper*, 26 Oct. 1862, 7.

²⁹ Joanna Bourke, *Rape: A History from 1860 to the Present Day* (London, 2007), 21–49.

outweighed parallel trends relating to men. In July 1885, for example, the *Bristol Mercury and Daily Post* reported on a case of suspected sexual violence against a girl in Gloucestershire. The girl was over the age of consent, but likely fairly young as she was a servant. The paper wrote: 'Dr Andrew Currie deposed that there were no marks of violence upon the prosecutrix except that her arms were scratched somewhat. In his opinion the prosecutrix could not have resisted very much, or there would have been greater evidence of injury. The bench dismissed the case'.³⁰ This report on the medical evidence is noteworthy for referring to the limited degree of resistance, rather than its complete absence, and for echoing a wider cultural mistrust of servant girls. The notion that a woman might feign some resistance to protect her modesty, but ultimately submit to male advances, continued to place responsibility upon the female. The limited scratches on this complainant's arms might theoretically have been explained in a range of terms, for example the woman 'submitting' from exhaustion or fear; instead, they were framed as insufficient resistance. The newspaper's focus on this evidence also implies a direct connection with the dismissal of the case. Whether or not this was true, it operated to reinforce a link between (in)sufficient resistance and the characteristics of 'real' victimhood.

It was also not uncommon for newspapers to report on cases in which medical witnesses linked (un)chastity with consent. In 1858, *Lloyd's Weekly Newspaper* reported on a Middlesex police court, in which the medical witness supported a fourteen-year-old girl's claim of recent sexual intercourse having occurred, but indicated that she had not been a virgin beforehand and that signs of resistance were absent. According to the newspaper, the magistrate declared that:

from what he could ascertain from the surgeon's evidence it was not the first thing of the sort the girl had been corrupted with; and although the prisoner had done wrong, still he could not say a rape had been committed, as the girl had said nothing about the matter, had not called out, and did not scratch his face. — The prisoner was then discharged.³¹

Medical evidence was an important part of this cultural construction of victimhood, or rather the denial of victimhood.

³⁰ 'District News: Alleged Rape', *Bristol Mercury and Daily Post*, 31 July 1885, 7.

³¹ 'Atrocious Cases', *Lloyd's Weekly Newspaper*, 25 July 1858, 9.

The newspaper also highlighted the prisoner's respectability, against which the girl's apparent lack thereof was more striking.³²

The news media must be read as a cultural product, but it did also reflect — and likely reinforce — some real trends in the treatment of complainants in sexual assault trials. It is significant that many of the cases that reached trial adhered to media stereotypes of female victimhood. By their conspicuous absence, it seems that a high proportion of women were denied the right to claim victimhood on the basis of factors such as perceived poor character. Medical evidence was also particularly likely to reach trial when it reinforced popular models of victimhood. 40 per cent of Middlesex Sessions and Quarters Sessions cases with medical evidence and complainants over the age of sixteen, for whom consent was a legally relevant issue, included evidence about signs of bodily violence. The mean average conviction rate across all cases was a relatively high 67 per cent. These kinds of figures indicate that once cases reached trial, they were often already modelled on stereotypes of 'real' victimhood unless there was compelling additional evidence such as direct witnesses to an assault. They also raise the possibility that medical testimony was part of the wider social, cultural and legal construction of victimhood and denial thereof.

II

RESPECTABILITY AND REPUTATION

Respectability was a complex and significant issue in Victorian and Edwardian England. Although interwoven with issues of class and gender, it was not tied in a simple or direct way to either.³³ A working-class girl could be 'respectable', and needed to be to fulfil the role of a victim in court. This respectability was in part a social question and was articulated as such in court: Was she often seen in public with men? Did she drink? It was also in

³² On the historical and continued significance of 'respectability' in rape trials, see Kim Stevenson, 'The Respectability Imperative: A Golden Rule in Cases of Sexual Assault?', in *The Golden Age: Essays in British Social and Economic History 1850–1870*, ed. Ian Inkster *et al.* (Aldershot, 2000); Alison Phipps, 'Rape and Respectability: Ideas about Sexual Violence and Social Class', *Sociology*, xliii (2009).

³³ On the context-specific nature of 'respectability', see Mike Huggins, 'Exploring the Backstage of Victorian Respectability', *Journal of Victorian Culture*, xxii (2017).

part a question of demeanour and the performance of femininity in court, as noted in the news: Was she demure? Was she dressed well? Was she suitably emotional, without being hysterical? These questions were not legal ones, but were ever present in trials for sexual offences. Over the modern period, the law increasingly emphasized that a woman's sexual history and respectability were not relevant in such cases. In contrast, witnesses drew on wider social trends in continuing to hint at such questions. Newspapers repeatedly reported on whether a complainant and prisoner appeared 'respectable', and a strengthening adversarial system played an important role in encouraging them to do so. Medical evidence about sexual history was only one part of this wider tableau of evidence about 'respectability', but it was particularly significant because of legal restrictions. Medical witnesses, unlike others, were legally permitted to talk at length about a complainant's sexual history because it was a necessary part of interpreting other bodily signs. This evidence articulated many of the same wider cultural concerns as other witnesses, but in an apparently more legitimate scientific framework.

Respectability was a central issue in the construction of 'real' victimhood, evident in cultural and judicial sources alike. The concept was so powerful that women in court were occasionally able to use it to their own advantage. In one Middlesex case from 1851, a servant girl — girls in service were always treated as inherently suspect in sexual assault cases — testified that 'I said to him if you are a man treat me as a respectable female for I am not what you take me to be. I struggled and got away from him'.³⁴ The significance of this comment is evidenced by the fact that a newspaper picked up her testimony almost verbatim: 'She told him that if he was a man he would treat her as a respectable female, as she was not what he supposed her to be, and she struggled and got away from him'.³⁵ This prisoner was found guilty. In other cases, prosecutors pushed on questions of respectability. Although they were not permitted to ask outright about a woman's character or reputation, they often hinted at the question within permitted frameworks: testing, for example, a complainant's honesty by interrogating the consistency of their story. Newspaper reports

³⁴ London, LMA, Pre-Trial Statements, John Start tried at the Middlesex Sessions on 15 Sept. 1851 for assault with intent, MJ/SP/E/1851/017.

³⁵ 'Middlesex Sessions, Sept. 17', *Standard*, 18 Sept. 1851.

provide some insight into this adversarial process, which is often missing from pre-trial statements, for example in the following case from Middlesex in 1862:

Bell . . . was a man of very respectable character. Mr Pater sharply cross examined the prosecutrix, and elicited from her that she had to-day given stronger evidence than she gave before the magistrate, as was proved by the depositions.³⁶

This report on the 'not guilty' verdict juxtaposed the prisoner's 'respectability' with the complainant's implicit lack of integrity, implicitly connecting the three issues.

Although much late-Victorian rhetoric about sex, respectability and morality focused on the cities, court records indicate little difference in practice between these cultures in Middlesex and the South West. There was also only limited change over time, with a consolidation of existing trends to place the burden of proof on female complainants. There was some change of tone in the last decades of the nineteenth century, in line with a general tightening of the law on masculine violence, but this was limited. In 1889, for example, *Trewman's Exeter Flying Post* reported the following from its Quarter Sessions:

Mr Thorne prosecuted, and said although he appeared in that capacity, he might say in the prisoner's favour that the place in which the assault was committed was not of the very highest respectability . . . he did not want to say anything against her character, but he thought there was a breed of distinction between this and many other cases that came before them . . . In passing sentence, the Chairman said the prisoner had made himself liable to severe punishment, and under the indictment the Court might have sent him to penal servitude. In any case it was necessary that women should be protected, and the Court must inflict upon him a considerable term of imprisonment to mark their sense of the offence. He would be sentenced to nine calendar months' imprisonment.³⁷

This case indicates that even prosecutors were continuing to push forward ideas about female character and respectability, but that there was some increasing resistance to this from 'the Court' as a formal legal body. This trend echoes wider findings in the history of masculinity, which show decreasing tolerance of male violence by the turn of the century.³⁸ Broader trends in conviction and sentencing rates, though, indicate that the opposite was

³⁶ 'Middlesex Sessions, Oct. 7', *Times*, 8 Oct. 1862, 9.

³⁷ 'Devon Quarter Sessions: An Assault', *Trewman's Exeter Flying Post or Plymouth and Cornish Advertiser*, 19 Oct. 1889.

³⁸ M. J. Wiener, *Men of Blood: Violence, Manliness, and Criminal Justice in Victorian England* (Cambridge, 2004).

true overall.³⁹ It may be significant that a number of similar reports emerged from Devon in the late 1880s, perhaps indicating that one particular chairman was roused by the mid-1880s high-profile child and women protection movement; such trends seem to be more individual than geographical. This point raises important, albeit largely unanswerable, questions about the degree to which individual magistrates and judges shaped trial outcomes based on personal inclinations or even on their local knowledge and networks. It is also notable that the aforementioned prisoner pleaded guilty, meaning that he bypassed jury members who were propertied men, firmly embedded in local communities, whose attitude to female complainants remained ambivalent at best.

Overall, complainants, newspapers, other witnesses, prosecutors, magistrates, Justices of the Peace and chairmen all helped to build up pictures of 'respectability' that shaped trial outcomes. Each of these, though, could generally only hint at the relevance of the issue. Some could reach the subject through sideways questions about the consistency of testimony, whether a complainant had consumed alcohol, or their appearance on the stand. Medical witnesses, in contrast, were able to speak directly on the topic of sexual history and to do so at great length. These witnesses tended to focus on certain social groups: primarily unmarried working-class girls. In even asking such questions of particular social groups, medical testimony contributed to a wider culture of equating 'real' victimhood with definitions of 'respectability' that revolved around gender norms: chastity, temperance and modesty. This testimony also had an effect on trial outcomes because of the relative authority given to 'expert' evidence about the body.

A total of 722 medical practitioners were called in the 2,213 depositions, although 120 of these did not testify in court.⁴⁰

³⁹ See figure above. During the period 1850–5, judges in Middlesex and in Gloucestershire, Somerset and Devon handed down — on average — 45 per cent and 39 per cent, respectively, of the maximum sentences to prisoners in trials for sexual offences. By 1891–5 the comparable figures were 36 per cent and a particularly low 21 per cent; these figures did recover after the turn of the century and by 1911–14 were almost at their mid-century rates.

⁴⁰ 217 from Gloucestershire, Somerset and Devon; 505 from Middlesex. Some cases involved multiple complainants and some involved multiple medical practitioners. Overall there were 602 medical witnesses and 608 distinct pieces of medical testimony in pre-trial statements.

Medical practitioners were consulted in a wide range of ways. Complainants' families called upon medical advice almost as often as the police; in cases involving younger complainants, a medical examination was commonly part of the process of deciding whether or not to prosecute. Professional status was seemingly not a key motive for calling in a particular medical practitioner in these local courts, and the overall balance between surgeon-apothecaries or surgeons and those with the highest qualifications, physicians or Doctors of Medicine, was relatively even up to 1914. The issue of police surgeons provides the only significant point of disparity between medical practitioners called by the police and the general public, and between London and the South West. Police surgeons had been attached to most divisions of the Metropolitan Police since 1829, ostensibly to provide treatment for the police but also to examine prisoners or alleged victims of crime. Out of the 602 medical witnesses, 197 were police surgeons and all but fourteen of those were based in Middlesex. It is important not to overstate the degree to which these police surgeons were specialists in sexual crime, but they certainly did have close relationships with the police. While not every police division called in their police surgeons in cases of suspected crime, some did so relatively regularly.⁴¹ Matthew Brownfield was called by the Poplar police, part of the K division, twelve times between 1864 and 1889. The twenty-one Middlesex medical practitioners who gave evidence more than five times were all police surgeons.

Examining the *Medical Directory* for all medical practitioners who testified in the Middlesex and South-West trials indicates that few medical witnesses had formal expertise in cases of sexual crime.⁴² Even police surgeons' medico-legal roles were broad and operated in conjunction with other disparate duties

⁴¹ A surviving list of divisional surgeons for the K division of the Metropolitan Police, which covered the Stepney region of Middlesex, included nine different medical practitioners who were each attached to a specific police station in 1892. During the period 1850–89, only three of these police stations had called in their respective police surgeons in cases of suspected sexual crime.

⁴² Only six *Medical Directory* entries for the 602 medical practitioners made reference to publications in the field of forensic medicine, of which five related to murder and one to sexual offences. A further ten medical practitioners had published in the field of midwifery and childbirth, indicating a very small degree of gynaecological and obstetrical specialist knowledge. Occasional other forms of specialism can be identified in Middlesex cases, for example a lecturer on chemistry was consulted in 1870. In the south-west counties, an assistant medical inspector of

(cont. on p. 135)

such as treating sick police and assessing levels of drunkenness. More important than training is seemingly the relationships that practitioners had with the police and public, and/or their centrality to local communities. The Devon mother of a 10-year-old complainant stated in 1870 that 'Dr Laity now present is my doctor' and another medical practitioner in a Somerset case from 1871 commented that 'I have attended [the complainant] some years'.⁴³ Most such cases involved younger complainants and relatively sympathetic evidence from doctors who were able to compare signs with young complainants' 'natural' states. When medical witnesses were not family or regular doctors to complainants, or police surgeons, they tended to be local to them. All medical witnesses consulted by parents lived within two miles of Middlesex complainants and five miles of provincial complainants. The maximum distance travelled to or by medical practitioners called by the police was 2.8 miles in Middlesex and 5.3 in Gloucestershire, Somerset and Devon. While we cannot draw too many conclusions on the basis of geography alone, it is clear that medical practitioners were part of local networks and in many cases knew the police, complainants and potentially even the prisoner if they were also local.

Medical witnesses' testimony was always based officially on their status as 'men of science', but it seems likely that they were also influenced by these personal factors. Sometimes this may have favoured the complainant, as in cases of the family doctor, but in others 'local knowledge' may have worked against them. The significance of medical witnesses' testimony lay precisely in this unique and sometimes ambiguous position, at the intersection between scientific, social and legal concerns. Particularly in local courts, rather than high-profile courts such as the Old Bailey, they were not 'experts' brought in from outside. Instead, they had a number of existing relationships — with

(n. 42 cont.)

schoolchildren and a 'prizemedallist in forensic medicine' were consulted in 1911 and 1897, respectively. However, such cases were atypical.

⁴³ Devon Heritage Centre (hereafter DHC), Pre-Trial Statements, George Menheneot tried at the Devon Quarter Sessions on 20 Oct. 1870 for carnal knowledge, QS/B/1870/Michaelmas; Taunton, Somerset Heritage Centre (hereafter SHC), Pre-Trial Statements, Abraham Escott tried at the Somerset Quarter Sessions on 28 June 1871 for assault with intent to commit a rape, Q/SR/684.

police, patients and other community members. This position may be key to the way that they validated wider social concerns and middle-class male anxieties, albeit often implicitly and perhaps not even deliberately.

Although few had formal or specialist training in forensics or sexual offences, these medical witnesses were able to testify about a complainant's sexual history as expert witnesses in order to give their opinion on the meaning of bodily signs. 'Men of science' had formally been permitted to give such opinions 'within their own science' since 1782, marking them out as distinct from other kinds of lay witness. This formalization made forensic medicine an increasingly important presence in the courtroom, especially when it articulated wider social concerns to which other witnesses were not permitted to speak. The formalization of medical witnesses' ability to speak on unchastity as 'men of science' was particularly timely. In a parallel and contemporaneous trend, the right to do so was being removed from other witnesses. Virginity had once been a key question in cases of sexual assault. In December 1715, for example, London's Old Bailey court tried 'William Willis . . . for a Rape upon the Body of Phebe Shaw, a Virgin, under 14 Years of Age, on the 8th of October last'.⁴⁴ Such phrasing was common in the early eighteenth century, during which the loss of virginity was seemingly as central to sexual crime as the absence of consent. It echoed an older model of sexual violence as a property crime, affecting a woman's marriageability, even though this framework had been challenged as long ago as the sixteenth century.⁴⁵ References to 'virginity' only disappeared from charges in the late eighteenth century, being completely absent by the nineteenth century. Albeit part of a much longer trend, virginity was thus officially removed as a legal concern by the Victorian period. In consequence, female consent and the will became more central to legal concerns than complainants' sexual histories.

While virginity was diminishing as a legal issue, it was growing as a social one. Middle-class birth rates fell and concerns about heredity rose over the late nineteenth century, which contributed to a growing concern about the 'wrong' kinds of girls breeding.

⁴⁴ London, Old Bailey, *The Proceedings of the Old Bailey*, William Willis tried at the Central Criminal Court in Dec. 1715 for rape, t17151207-52.

⁴⁵ Conley, 'Sexual Violence in Historical Perspective', 218.

Related to these anxieties, working-class pre-marital unchastity, illegitimacy and infanticide were all areas of particular social attention.⁴⁶ A legislative emphasis on consent rather than on character could not eliminate such concerns or their influence on trial verdicts, but they did make it more difficult for witnesses to speak on the subject of virginity in court.

Medico-legal practice brought together these divergent social and legal trends. Medical textbooks outwardly supported the law's emphasis on consent, rather than on character, but on the stand medical witnesses continued to speak about the sexual history of complainants. They were uniquely able to do so, because they apparently needed to refer to a complainant's virginity in order to explain their interpretations of physical evidence. The signs that sexual intercourse had occurred would be different if a female had been a virgin before an alleged offence. If somebody was accustomed to sexual intercourse, it was theoretically possible for an offence to leave no physical trace. Such evidence was justified in scientific terms, as a necessary part of expert witnesses' work: they needed to refer to a complainant's sexual history, in order to give their opinion on the meaning of certain bodily signs. Medical evidence also had moral undertones. It is significant that medical testimony only discussed virginity when its presence or absence could apparently not be assumed: cases involving pubescent girls and unmarried young women. These groups of complainants were also those most subject to scrutiny, in wider society and culture. Overall, then, the turn away from virginity as a legitimate form of evidence was somewhat counterproductive. Evidence about virginity was not removed from the courtroom, but became concentrated in the hand of one influential group: medical witnesses.

The hymen, as an example, illustrates further how a woman's sexual history was key to interpreting some bodily signs. Medical textbooks acknowledged that married women could have hymens intact, and that some virgins were born with them absent, but in general the hymen was thought to be a good indicator of whether penetrative sexual contact had occurred. Because an absent or

⁴⁶ On the growing panic about infanticide in the mid-nineteenth century see, for example, Anne-Marie Kilday, *A History of Infanticide in Britain, c.1600 to the Present* (Basingstoke, 2013).

damaged hymen did not reveal when a sexual act took place, textbooks instructed medico-legal witnesses on how to identify signs of recent sexual contact in comparison with congenitally absent hymens or — in particular — with past sexual activity. The 1860 edition of J. L. Casper's *Handbook of Forensic Medicine* stated that:

The *carunculae myrtiformes*, which remain after the destruction of the hymen, occur in various forms. If they are recent, they appear as two, three, or more small excrescences, more or less reddened and irritated, on each wall of the vagina; when older they become withered and smaller and at last can scarcely be recognized at all. It is important to pay attention to these differences, because the medical jurist may be asked not only if defloration has taken place, but *when* this has happened.⁴⁷

Such comments were widespread in the growing medico-legal literature of the late nineteenth century. In the 1881 edition of their *Principles of Forensic Medicine*, William A. Guy and David Ferrier similarly wrote that: 'When the destruction of the hymen is recent, the *carunculae myrtiformes* are found swollen and inflamed; but they gradually wither and shrink with time'.⁴⁸ The absence of *carunculae myrtiformes* could apparently mean either that the hymen was congenitally absent or that it had been destroyed a long time before the alleged offence, by sexual intercourse or masturbation.⁴⁹ This emerging medico-legal knowledge established an increasingly clear justification for discussing sexual history in relation to the signs of sexual crime.

Medical textbooks couched virginity, or the lack thereof, as part of an objective diagnostic process and emphasized that it should have no bearing on trial outcomes. They thus established a particular form of medico-legal evidence, which carefully adhered to the law while playing down the moral dimensions of their testimony. Subtly in textbooks, and perhaps more obviously in court, moral and social concerns did linger, however. As noted earlier, medical witnesses focused their testimony on virginity on particular social groups. At the same time, they declared no bias on the basis of character. The pre-eminent medical jurist Alfred

⁴⁷ J. L. Casper, *Handbook of Forensic Medicine*, trans. G. W. Balfour, 3rd edn, ii (London, 1860), 279–80. Emphasis in original.

⁴⁸ William A. Guy and David Ferrier, *Principles of Forensic Medicine*, 5th edn (1844; London, 1881), 61.

⁴⁹ Francis Ogston, *Lectures on Medical Jurisprudence* (London, 1878), 104.

Swaine Taylor wrote throughout the editions of his best-selling medico-legal text that:

When a charge of this kind is made by a prostitute, it is justly received with suspicion, and the case is narrowly scrutinized. Something more than medical evidence would be required to establish a charge under these circumstances. The question turns here, as in all cases of rape upon adult women, on the fact of *consent* having been previously given or not.⁵⁰

Taylor aligned with the law in stating that consent was the key issue in cases of alleged sexual crime, but this extract also has strong moral undertones. The statement that prostitutes' claims were often 'justly' treated with suspicion carried with it an implicit wider social assumption, about the greater likelihood of prostitutes both to consent and to lie. Even though justified in medical terms, as there was a lack of physical evidence when women were accustomed to sexual intercourse, it seems significant that Taylor highlighted prostitutes rather than married women as his example. He did later strengthen claims about the irrelevance of a woman's sexual history, newly noting in 1910 that 'It must be remembered that the law protects a prostitute against involuntary connection just as it protects children and chaste women'.⁵¹ The complete failure of any charges by prostitutes to reach court, in the large sample considered for this article, indicates that there was indeed a need to strengthen this point. Rather than virginity and character becoming less important in trials in the late nineteenth century, they had seemingly remained central issues.

The significance of testimony about previous sexual experience, for unmarried complainants, is perhaps most evident in its *absence*. As noted earlier, cases involving the absence of signs of virginity, or doubts about a complainant's chastity, were very likely to be dismissed during pre-trial processes. In cases that did reach trial, seemingly on the basis of other corroborative evidence, medical witnesses ostensibly followed the guidelines given in medico-legal literature. In practice medical witnesses were also selective about how — and for whom — they spoke about virginity and its signs. They interpreted the hymen as much in line with social concerns as

⁵⁰ Alfred Swaine Taylor, *Manual of Medical Jurisprudence*, 4th edn (1844; London, 1852), 856.

⁵¹ Alfred Swaine Taylor, *The Principles and Practice of Medical Jurisprudence*, ed. Thomas Stevenson, 6th edn, ii (1865; London, 1910), 116.

with medical ones: medical witnesses only declared unchastity to be a potential explanation for a damaged or absent hymen in cases involving pubescent girls and unmarried young women.⁵² They focused on 'problem' social groups within their discussions of virginity, in relation to age, marital status and social class. In 1878, for example, surgeon Albert Benthall examined a 13-year-old servant girl and testified that:

I examined her and in this case there were only the vestiges of the hymen. I am of opinion she is not a virgin. There were no marks of violence or bruises of any kind and if penetration had taken place the day before for the first time a very serious swelling and injury would have been visible.⁵³

Another witness had also questioned this complainant's conduct with the prisoner, but the medical witness was uniquely placed to provide firm evidence of her apparently poor character. The general tendency to raise such questions about certain types of complainant, such as young servant girls, must also be viewed as part of a wider culture of mistrust around these females. This prisoner was acquitted, in line with similar outcomes cited earlier.

Due to the pre-trial processes, which excluded many unchaste unmarried women from the right to claim victimhood at trial, most medical references to virginity in court actually related to its recent presence. This element of medical testimony is also worthy of some note. The scrutiny of female virginity (and the negative implications for a complainant of its absence) must be understood in relation to its opposite: a lingering emphasis on the destruction of virginity as a 'loss' that exacerbated a crime. In one Middlesex case from 1869, for example, surgeon James Paul testified that he found 'recent partial rupture of the Hymen . . . I believe that up to within 48 hours of my examination of this child, she was a Virgin'.⁵⁴ Some cases also reached trial in which medical witnesses testified about continued virginity, primarily in cases of alleged non-penetrative assault in which such evidence supported a girl's character without undermining her claim. In such cases, medical witnesses made statements

⁵² On the age dimensions of medical evidence on the hymen, see Bates, *Sexual Forensics*, 76–104.

⁵³ London, LMA, Pre-Trial Statements, Henry Emeny tried at the Middlesex Sessions on 28 Aug. 1878 for carnal knowledge, MJ/SP/E/1878/027.

⁵⁴ London, LMA, Pre-Trial Statements, Joseph Dungay tried at the Middlesex Sessions on 23 Dec. 1869 for carnal knowledge, MJ/SP/E/1869/025.

such as 'she appeared to be a virgin' or 'she was a virgin'.⁵⁵ These complainants in particular fulfilled the characteristics of ideal victimhood.

Judges continued to hand higher sentences to prisoners in cases in which a loss of virginity was proven. When a prisoner was found guilty of an indecent assault on a nine-year-old girl in 1874, for example, the *Times* reported that 'the Judge sentenced the prisoner to be imprisoned and kept to hard labour for nine calendar months, remarking that it was a most abominable case, and that the child was probably ruined for life'.⁵⁶ Again, such newspaper reports consolidated a wider cultural framework in which virginity was part of constructing the 'victim' and her opposites. Victorian judges seemingly conceptualized the loss of virginity in new terms, differing from earlier property frameworks of sexual crime. In opposition to the dirt of the working-class precocious girl, these 'real' victims had been clean and pure. The loss was no longer one that was understood in terms of value and marriageability, but in terms of moral purity and corruption. For girls who remained virgins, the loss of purity might occur in the mind: in one Middlesex case from 1877, the judge 'remarked on the terrible effects which might flow from corrupting the mind of so young a child'.⁵⁷ The denial of victimhood for many female complainants took place alongside the rise of a new kind of victim. Medical witnesses again played a role here, in identifying these girls as 'real' victims and implicitly also excluding others from the framework of victimhood.

Scientific, legal and moral questions were blurred in the courtroom. Medical witnesses often testified on medico-moral matters, including chastity, in part because they were encouraged or permitted by the courts to do so. Local courts proved receptive to medical testimony that rearticulated long-held concerns, while also providing mechanisms to articulate new anxieties about morality, gender, class and age. As Ivan Crozier and Gethin Rees note, in their work on Victorian

⁵⁵ London, LMA, Pre-Trial Statements, Edmund Trubshaw tried at the Middlesex Sessions on 24 Feb. 1874 for indecent assault, MJ/SP/E/1874/004; London, LMA, Pre-Trial Statements, Giovanni Bianchi tried at the Middlesex Sessions on 8 April 1884 for attempted carnal knowledge, MJ/SP/E/1884/017.

⁵⁶ 'Middlesex Sessions', *Times*, 19 June 1874, 11.

⁵⁷ 'Middlesex Sessions', *Times*, 25 Jan. 1877, 11.

forensic medicine and the construction of authority in cases of alleged sexual crime, 'the production of new authority rests very heavily on established norms, not on total newness'.⁵⁸ As virginity and sexual history dropped out of legal view, they actually became a growing concern of magistrates and jurors. Medical witnesses were uniquely positioned to enable these concerns to reach the courtroom, with a scientific justification for speaking about virginity and sexual history. Medical testimony itself was underpinned by moral concerns, as well as legitimizing other courtroom actors' discussions of virginity. Medical evidence also played an important role in denying to unmarried unchaste girls the right to be a 'victim' in the eyes of the law, by constructing their opposite: the innocent, virginal 'real' victim.

III

RESPONSIBILITY FOR RESISTANCE

Consent, like respectability, was a multifaceted concept. At its most basic in legal terms, any evidence of non-consent should have been sufficient to support a claim of sexual violence. In practice, non-consent had long been conceptualized in largely physical terms: Was there a struggle? Did the complainant not only resist, but do so to the utmost of their ability? Were their clothes torn? Was there a mark of a struggle on the ground? Were they tired or 'insensible' from the effort of resisting? Non-consent was not a purely bodily issue, but this emphasis on the physical struggle often meant that medical evidence played an important role in the (un)making of victimhood. As with virginity, while other witnesses were being encouraged to move away from a purely physical model of consent, medical witnesses operated to consolidate and reinforce it. This supported a trend to criticize women for failing to 'truly' resist, through an inadequate or feigned struggle.

Respectability and resistance were often interwoven in newspaper accounts, which constructed 'true' victimhood and implicitly denied it to others. The *Times*, reporting on one Middlesex case in 1865, noted that:

Police-constable 491 A said that when the prosecutrix came to the station he thought she was a lunatic from her being so excited, and she was almost

⁵⁸ Crozier and Rees, 'Making a Space for Medical Expertise', 302.

exhausted. When she reached the station she fainted. He believed her to be a very respectable young woman. The jury returned a verdict of *Guilty*.⁵⁹

Such reports implicitly aligned respectability, the appropriate display of feminine emotion, and a 'not guilty' verdict. They supported a cultural model of resistance that witnessed 'against the will' through the complainant's body in the aftermath of an offence: exhaustion from a struggle and overwhelming emotion from the shock. This report indicates that lay witnesses could, and did, comment on the issue of consent. It was not uncommon for witnesses to refer to witnessing a struggle or for a policeman to comment on such signs at the crime scene, nor was it uncommon for 'true' resistance to be linked to respectability.

Medical testimony on resistance must be viewed as part of this wider cultural construction of the resisting female. It also facilitated a certain kind of interrogation of female behaviours and particular criteria on which to deny their right to claim victimhood. Medical witnesses' access to a complainant's body meant that they could not only testify that a woman resisted, but could comment on the degree and sufficiency of resistance. In so doing, they fed directly into widely held beliefs about feigned resistance or 'consent to force', and kept the responsibility firmly on women's bodies to demonstrate non-consent rather than on men to gain consent. Medical witnesses also fed into the link between respectability and consent. They often linked inadequate resistance implicitly to unchastity, fuelling a stereotype of disreputable girls prone to lies, blackmail or promiscuity. Local courts and jurors were seemingly receptive to this medical model of the 'will', which allowed social concerns to be articulated in the courtroom. As with virginity, medical testimony reinforced such scrutiny of female behaviour at a time when the law was seeking to challenge it.

In the late nineteenth century, case law began a gradual but important challenge to the idea that — as Garthine Walker notes in relation to early modern trials — 'sexual submission indicated consent'.⁶⁰ In 1870, for example, one Central Criminal Court case determined that a jury did not have to accept 'consent extorted by terror or induced by the influence of a person in

⁵⁹ 'Middlesex Sessions, March 23', *Times*, 24 Mar. 1865, 11.

⁶⁰ Garthine Walker, 'Rereading Rape and Sexual Violence in Early Modern England', *Gender and History*, x (1998), 6.

whose power [a girl aged between ten and twelve] feels herself'.⁶¹ The growing legal focus on male responsibility to gain consent, rather than on the female responsibility to resist, was significant but should not be overstated. Case law decisions in this area focused on particular types of victim, such as respectable women and young children, who were more likely to fulfil the criteria for 'real' victimhood. Taylor wrote in *Medical Jurisprudence* in the 1850s that 'An eminent judicial authority has suggested to me that . . . injustice is often done to respectable women by the doctrine that resistance was not continued long enough'.⁶² This 'judicial authority' apparently noted that such respectable women might 'succumb' from terror, although — in line with case law decisions — no comparable claims were made for other women.

Case law decisions continued to focus on the importance of physical resistance for other kinds of complainants. An 1865 judgment found that a jury should be satisfied that a complainant 'was, by physical violence or terror, fairly overcome, and forced against her will, she resisting as much as she could, so as to make the prisoner see and know that she was really resisting to the utmost'.⁶³ Despite the conceptual significance of its shift away from a physical model of the 'will', in practice the law actually accentuated a tendency to differentiate between 'real' victims — or those who had a right to claim victimhood at trial — and others. Medical testimony served to reinforce this trend, by focusing heavily on the physical struggle in relation to perceived 'problem' groups such as unmarried pubescent girls. It was also particularly important in promoting the idea that women should show resistance 'to the utmost', rather than any signs of resistance being adequate corroborative evidence of a crime.

Medical textbooks broadly supported a multifaceted model of consent, but emphasized that medicine was interested only in physical resistance; consent, as a whole, was a question for the jury. They strengthened this position over time, in line with the law. The 1905 *Principles and Practice of Medical Jurisprudence*, for example, newly emphasized that 'fear or other moral restraint or

⁶¹ *R v. Woodhurst* (1870) Cox CLC 443.

⁶² Alfred Swaine Taylor, *Medical Jurisprudence*, 5th edn (1844; London, 1854), 653.

⁶³ *Regina v. Rudland* (1865) 4 F and F 495.

deception' might be relevant to this question, but that 'Medical evidence cannot go beyond its province of attempting to say whether or not connection has taken place'.⁶⁴ Over the course of the late Victorian and Edwardian periods, while the law was shifting slowly away from a physical model of consent and resistance, forensic medicine embedded and strengthened its focus on the body. Medico-legal textbooks had long stated the importance of looking for signs of a struggle upon the body of a complainant, particularly those over the age of sexual consent. Implicit within this literature was an assumption that marks of violence on the female body were a sign of resistance, linked to the legal question of consent, rather than of male violence for its own sake. In 1910, the edition of Taylor's *Principles and Practice of Forensic Medicine* also added the following statement:

Bruises upon the arms particularly may be considered to be reasonable evidence of attempts at struggling, impressions of fingernails, too, would be suggestive. Strong corroborative evidence of a tale of struggle might be obtained from an examination of the accused for similar marks of bruises or scratches about the arms or face, and possible even about his penis, though this is much less likely.⁶⁵

This comment actually increased the burden of physical evidence, by indicating that signs of a struggle should be evident not only on the woman herself, but also upon the prisoner. As with the discussion of virginity earlier, medico-legal experts aligned themselves with the law in principle while — in practice — they created opportunities for social concerns about female respectability and behaviour to enter the courtroom.

Medical testimony also reinforced other widely held beliefs, which placed a burden on female complainants. One connected idea, particularly in rape cases, was that a penetrative sexual assault was impossible if a woman was resisting. As one Devon general practitioner testified in 1889, in the context of a girl aged seventeen, 'I think it impossible for a man standing up to commit a rape on a girl who is conscious'.⁶⁶ This comment clearly conceptualized rape — legally 'against the will' — in terms of the physical struggle, and did not acknowledge that

⁶⁴ Alfred Swaine Taylor, *The Principles and Practice of Medical Jurisprudence*, ed. Fred J. Smith, 5th edn, ii (1865; London, 1905), 120.

⁶⁵ Alfred Swaine Taylor, *The Principles and Practice of Medical Jurisprudence*, ed. Thomas Stevenson, 6th edn, ii (1865; London, 1910), 131.

⁶⁶ Exeter, DHC, Pre-Trial Statements, Frederick Trembath tried at the Devon Quarter Sessions on 16 Oct. 1889 for indecent assault, QS/B/1889/Michaelmas.

'submission' to a crime could occur without constituting consent. Such ideas created something of a paradox: rape was only possible if a woman did not struggle to her full ability, in which case it did not legally constitute rape. This paradox fed into the idea that 'no' might not really mean 'no', and that any apparent resistance might be feigned or half-hearted. Women needed to provide specific claims, such as falling 'insensible' from exhaustion or fear, in order to present as a 'real' victim.⁶⁷ Although some medical practitioners supported women in these claims, they often operated from a base level of suspicion: rape victims were guilty of insufficient or feigned resistance, unless they could prove otherwise. It seems likely that some charges were dismissed, or downgraded to 'attempted' rape, when complainants did not fulfil the highly specific criteria required for 'real' victimhood. As Carolyn Conley also finds in her study of Victorian Kent, a complainant was treated as 'suspect' — perhaps the object of a seduction rather than rape — unless she was 'the victim of a brutal public assault by a total stranger'.⁶⁸

Due to the centrality of bodily violence to models of 'real' victimhood, a high proportion of cases that reached court included evidence about resistance. As with questions about female virginity, medical evidence on resistance focused on unmarried young women and post-pubescent girls. Taylor specifically labelled one section of his book 'young females after puberty', in which he wrote that 'in a true charge, we should expect to find not only marks of violence about the pudendum, but also injuries of greater or less extent upon the body and limbs'.⁶⁹ The question of 'extent' here supported the wider implicit interest in degree and sufficiency of resistance within medical literature, rather than simply its presence or absence. In theory, medicine placed emphasis on older girls because these complainants were above the age of sexual consent, making resistance a legal question in this context. In practice, medical testimony never aligned clearly with the law on sexual consent. Medical testimony also sometimes strayed into

⁶⁷ Victoria Bates, "'Under Cross-Examination She Fainted": Sexual Crime and Swooning in the Victorian Courtroom', *Journal of Victorian Culture*, xxi (2016).

⁶⁸ Carolyn A. Conley, 'Rape and Justice in Victorian England', *Victorian Studies*, xxix (1986), 536.

⁶⁹ Alfred Swaine Taylor, *A Manual of Medical Jurisprudence*, 8th edn (1844; London, 1866), 601.

discussing resistance when it was technically irrelevant in law, particularly if girls were close to the age of sexual consent or precocious in appearance. Taylor's emphasis on puberty rather than the law on sexual consent may have particular significance, indicating social and moral concerns more than legal ones.⁷⁰

Medicine's role in interrogating female character and claims to victimhood, against the official letter of the law, was tolerated by some courts and even actively encouraged by others. When a girl under the age of sexual consent was apparently indecently assaulted in Devon in 1888, for example, surgeon John Ley testified as follows: 'I examined her for bruises but I failed to find any . . . she is a strong muscular girl who would not shew [*sic*] bruises unless some strong violence had been used'.⁷¹ The courts permitted such testimony because bruises might provide proof that an offence had taken place, and the medical practitioner made no claims for its relevance to the legally irrelevant question of consent. Implicit within such comments, though, was the notion that this offence might have taken place without 'strong' violence. On the basis of the girl's mature physical appearance, the medical witness also implied that she might even have been capable of resistance. With only circumstantial evidence otherwise supporting the case, the prisoner in this case was acquitted. This acquittal may simply have been the consequence of a lack of evidence, but it remains significant that medical testimony even raised the issues of violence and bodily strength. By placing a greater burden on physically precocious girls to demonstrate their resistance, even if they were below the age of consent, medical witnesses made space in court for wider social concerns about this group. This medical witness also chose — or was encouraged — to testify about this girl's sexual history, although he did find her to be a virgin.

Medical witnesses also often implicitly linked a failure to resist with unchastity, with implications for the question of consent. In a Somerset case involving the alleged attempted rape of an

⁷⁰ Taylor did update his text in line with changes in the age of sexual consent, but often with a delay. His main emphasis remained, throughout, on puberty and maturity.

⁷¹ Exeter, DHC, Pre-Trial Statements, William Helmore tried at the Devon Quarter Sessions on 17 Oct. 1888 for indecent assault, QS/B/1888/Michaelmas. Newspaper reports and the trial account state different ages for this complainant, 10 and 12, but both were under the age of consent for the alleged crime.

18-year-old complainant, for example, surgeon Henry Marcus Kemmis testified that 'The ordinary signs of virginity were destroyed and had been destroyed some time before that night'.⁷² Although apparently a separate point, it seems significant that this surgeon also raised questions about the extent of the complainant's resistance. He testified that 'It would have been completely impossible for a young man like the prisoner to have connexion with the prosecutrix while she was struggling and kicking without some signs of violence being visible'.⁷³ This testimony was again framed in physical terms and underpinned by the idea that women were capable of physically resisting rape. In combination, his testimony on the girl's apparent lack of resistance and prior unchastity may have contributed to the decision for the case to be dismissed as a 'no bill'. Although never explicit, this testimony carried extensive moral undertones about the behaviour of unmarried girls and the assumed links between previous character and the likelihood of consent.

Stephen Robertson's study of medical testimony in cases of sexual violence in New York City, in a similar period, provides an important comparison for these findings.⁷⁴ Robertson notes that the law took an increasingly broad definition of rape, extending beyond physical resistance, and that medical evidence also — in consequence — turned gradually away from the idea that a healthy woman could not be raped. He finds that broader definitions of non-consent often focused on middle-class women, and that juries and trial jurors often continued to focus on physical violence. In many ways these trends are very similar to those found here in England, across different categories of sexual offence against females. In both contexts the priority given to physiology over psychology in the courts, and the legacy of older models of sexual violence, hindered an evidence base for broader definitions of non-consent. In both, also, medico-legal writers acknowledged the broader aspects of consent, but in

⁷² Taunton, SHC, Pre-Trial Statements, Richard O'Brien and Robert Phelps not tried (no bill) at the Somerset Quarter Sessions in April 1885 for attempted rape, Q/SR/739.

⁷³ Taunton, SHC, Pre-Trial Statements, Richard O'Brien and Robert Phelps.

⁷⁴ Stephen Robertson, 'Signs, Marks, and Private Parts: Doctors, Legal Discourses, and Evidence of Rape in the United States, 1823–1930', *Journal of the History of Sexuality*, viii (1998).

practice physical violence continued to be of great importance at trial. Differing slightly from the US context, English medico-legal writers expanded their emphasis on physical violence in the early twentieth century. There was also no comparable shift in England, to that identified by Robertson for the US: a decline in medical support for 'myths' about resistance by the last quarter of the nineteenth century, and a growing presence of trial cases involving threats — rather than physical violence — by the early twentieth century. In contrast, stereotypes of 'real' female victimhood seemed to become increasingly embedded in England, precisely when the law began to challenge them. Medicine may have played a role in facilitating this trend, as it did not move towards the idea that 'no meant no' to the same degree as the US profession. As noted earlier, it must also be understood as a result of the particular social context of late nineteenth-century England.

IV

CONCLUSIONS

The history of female victimhood in cases of sexual crime is one of both continuity and change. Some women had long been blamed for encouraging male advances or insufficiently rebuking them, and medical testimony about chastity and physical resistance was nothing new. However, the late nineteenth and early twentieth centuries were also periods of particular note. The burden on female complainants to fulfil the requirements of 'real' victimhood became even more conspicuous in trials and press reports at this time, even in the face of a tightening of the law that sought to crack down on male violence. This apparent tension between social and legislative changes has not yet been adequately explained. Forensic medicine was one key mechanism that allowed these two trends to coexist. It did so for three connected reasons: first, the subjects of chastity and physical resistance became newly concentrated in the hands of medical witnesses; second, they were increasingly conceptualized as scientific matters for 'expert' and (in theory, if not in practice) increasingly specialist witnesses; finally, this kind of testimony created a space in the courtroom for social concerns to be framed as legal or medico-legal ones. It is perhaps this latter

point that is key to claims about the significance of forensic medicine as a facilitator of change. As concerns about the promiscuity of disreputable females heightened in the late nineteenth century, forensic medicine provided an apparently legitimate space for these concerns to be articulated in criminal trials. It created space to interrogate female behaviours and victimhood, even if it did not create the desire to do so.

A number of other mechanisms connected with forensic medicine to frame ideas about 'victimhood'. This article has pointed to the ways in which the courts and medical testimony can operate as a lens into these wider social trends. It supports scholarship on the growing newspaper industry's role in perpetuating certain models of 'real' sexual violence and victimhood, including related medical evidence, which jurors may then have carried with them into the courts.⁷⁵ Other scholars have posed questions about the possible role of the adversarial system in encouraging questions about female behaviour.⁷⁶ This article has supported such claims, showing that other witnesses — typically under questioning — spoke about complainants' general conduct with men, and that prosecutors often encouraged such trends. Forensic medicine was not a sole driver of change, but it was one key mechanism by which medical evidence in the court allowed for and encouraged the growing burden placed upon female complainants in late Victorian and Edwardian England. This finding supports important work in other contexts, such as that of Elizabeth Kolsky who shows that English medico-legal frameworks had similar implications in colonial India. 'The modernisation of law and the development of a new medico-legal understanding of rape', she argues, 'introduced evidentiary standards that placed a heavy burden on Indian women seeking judicial remedy in colonial courts'.⁷⁷ In the light of the potential power of medico-legal ideas for the propagation of race and gender-based constructions of 'real'

⁷⁵ Kim Stevenson examines the role of the *Times* in constructing victimhood, in Kim Stevenson, 'Unequivocal Victims: The Historical Roots of the Mystification of the Female Complainant in Rape Cases', *Feminist Legal Studies*, viii (2000).

⁷⁶ Garthine Walker, 'The History of Sexuality? A View from the History of Rape', at <<https://garthinewalker.wordpress.com/2014/01/22/the-history-of-sexuality-a-view-from-the-history-of-rape/>> (accessed 9 Apr. 2019).

⁷⁷ Elizabeth Kolsky, '"The Body Evidencing the Crime": Rape on Trial in Colonial India, 1860–1947', *Gender & History*, xxii (2010).

victimhood — locally, nationally and internationally — it seems that a wider acknowledgement of their significance for social and cultural history is overdue.

The historic making — and denial — of victimhood needs to be deconstructed and interrogated further. Victimhood cannot be examined simply in terms of trial outcomes and sentences, but needs to be understood in terms of courtroom scripts: the questions that were asked, to whom they were posed, and the implications of the answers. These processes often served to exclude complainants from the right to articulate their victimhood, not only in the courts, but beforehand. Women may even have unknowingly internalized or embodied cultural models of ‘real’ victimhood, and presented themselves — or not — accordingly to the police or in court. The processes of making and denying victimhood were often discrete and almost invisible. Critical histories of gender, sexuality and victimhood necessitate a better understanding of the structures and processes that operated to include and exclude women from ‘victim’ status; forensic medicine is just one such example. More broadly, they necessitate a better understanding of the lives of those who were absent as victims, in the courts and in culture.

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