

BUGGERY TRIALS IN SAINT JOHN, 1806: THE CASE OF JOHN M. SMITH

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In 1806 Saint John schoolmaster and Church of England lay reader John Middleton Smith stood accused of buggery and attempted buggery. Historians who study sexual behaviour and gender roles are all too familiar with the obstacles inherent in recovering from the past that which occurred in private. Recovering the history of homosexuality – the crime “not to be named among Christians” – is further complicated by layers of circumspection necessitated by the dire legal consequences visited on sodomites.¹ In late eighteenth and early nineteenth century Britain and British North America sodomy (or buggery) constituted a felony punishable by death. A conviction for the misdemeanour crime of attempted buggery usually resulted in a fine, gaol sentence and the pillory.

The case of John Middleton Smith is exceptional in that the usual silence and attends such matters does not prevail. While the bench notes of the presiding judge are not extant, Smith’s prosecutor, Solicitor General Ward Chipman, preserved an extensive file of depositions, indictments, petitions and correspondence arising from the case. A compilation of legal precedents drawn by Attorney General Jonathan Bliss also survives.² These remarkable documents permit examination of key events in the downfall of one sodomitical male in a detail that is probably unique in eighteenth and early nineteenth-century British North America. In particular, they relate part of Smith’s life history before his arrival

*As this paper illustrates, Lorna Hutchinson (1942-1990) was a gifted historian in the making. While her notes indicate that she intended revision to the present work so as to place more emphasis on the deference/dependence matrix in Loyalist Saint John, the article stands admirably as she left it - a discerning treatment of an unusual subject. The *Journal* is grateful for permission to proceed with publication.

¹The term homosexual was actually coined by Karoly Maria Benkert in 1869 and came into general usage in the 1880s and 1890s largely through Havelock Ellis’ works. See J. Weeks, “Discourse, Desire and Sexual Deviance: Some Problems in a History of Homosexuality” in K. Plummer, ed., *The Making of the Modern Homosexual* (Totowa, N.J.: B & N Imports, 1981) at 82. See also D.F. Greenberg, *The Construction of Homosexuality* (Chicago: University of Chicago Press, 1988) at 409-411.

The change in general usage from ‘sodomite’ to ‘homosexual’ indicates a major shift in perceptions. A sodomite was a sinner who had committed the act of sodomy, not a person who invariably sought partners of his own sex for sexual encounters or adopting an alternate lifestyle. See M. McIntosh, “The Homosexual Role” in *The Making of the Modern Homosexual*, *supra* at 37. See also R. Trumbach, “London’s Sodomites: Homosexual Behaviour and Western Culture in the 18th Century” (1977) 1 *Journal of Social History* at 15-16.

²For Ward Chipman Sr.’s file of documents related to the Smith case, see Hazen Collection, Chipman Papers, F4A, New Brunswick Museum [NBM]. For Bliss’ collection of authorities, see Odell Family Miscellaneous papers: F84, NBM. Professor D.G. Bell re-discovered these documents and pointed them out to the writer.

in Saint John and the activities that gave rise to charges against him in 1806.

Most historical studies of homosexuality have focused on the sodomitical sub-cultures of large European urban centres such as London, Paris and Geneva. The size of these cities and the great populations passing through allowed for the existence and perpetuation of such sub-cultures. Anonymity, casual contacts and passing encounters of the molly-houses and the designated lanes and fields of London provided a measure of safety within which the sodomite might operate.³ Eighteenth century and early nineteenth-century London's homosexual sub-culture comprised men of the middle and lower classes. They were servants, tradesmen, printers, schoolmasters, law office clerks and soldiers. They congregated in molly-houses, usually on a Sunday evening. These establishments, such as the one kept by Mother Clap in Holborne, were often only a back room in a public house. Activities might involve singing and dancing or rituals that mimicked aspects of heterosexual relationships and family life. "Husband" and "wife" "married" (i.e., had intercourse) resulting in mock pregnancy and re-enactment of childbirth.⁴

Records of the sodomitical experience in colonial British North America remain scarce. Population centres were small in comparison to their European counterparts and public activities more circumscribed.⁵ Lacking the anonymity of the sub-culture, the sodomite would have to create a personal network of contacts. An error in judgement could prove fatal. This paper explores the correlation between one particular case, occurring in a small, twenty-year-old town in Loyalist America, and comparable research conducted in England in relation to the late eighteenth and early nineteenth centuries. As well, the case of John Middleton Smith illuminates the actions and reactions of various facets of a Loyalist society in the delicate matter of an (apparently) ordained clergyman with excellent connections to the political and social elite charged with the crime "not to be named among Christians."

John Smith seems to have been an ordained Anglican minister forced to leave his British parish because of his "cursed conduct".⁶ On the voyage from England to the West Indies (probably Jamaica) the ship was wrecked and Smith's credentials were lost. He did not send to England for replacements nor, on

³An excellent overview of fairly recent historiography is found in R. Trumbach, "Sodomitical Subcultures, Sodomitical Roles, and the Gender Revolution of the Eighteenth Century: the Recent Historiography" (1985) *Eighteenth-Century Life* 109. See also Greenberg, *supra*, note 1.

⁴Trumbach, *supra*, note 1 at 15, 17, and Greenberg, *supra*, note 1 at 332-338. Sodomy was not the monopoly of the fashionable and aristocratic.

⁵Greenberg, *supra*, note 1 at 354-355, 383, relates briefly the American pre-Civil War experience.

⁶Deposition of Caleb Wetmore: Hazen Collection, Chipman Papers, F4A, NBM. Smith said that he came from England to the West Indies, but did specify whether he was originally from England or boarded ship there.

account of his subsequent conduct, could he apply to Bishop Charles Inglis in the Maritimes. In the West Indies a number of gentlemen "had very often used him as a woman." These included an unnamed doctor by whom he became "pregnant"; a Mr. Ken[n]edy, his great love, who chased him through a cane-field when he caught Smith spying on him as he copulated with a young woman at a whorehouse; and a young man who courted him so assiduously that Smith was obliged to leave the West Indies.⁷ He went next to Baltimore, staying at the Fountain Inn. On arrival he was stricken with fever and confined to bed for a month. A servant who came to his room to make the fire often brought a woman with him "who used to exhibit her breasts and otherwise behave very indecently" towards Smith. She expressed "a strong inclination to come to bed to him." Smith threatened to report her to the owners of the establishment and, in retaliation, she spread the rumour that Smith was a woman, that his confinement had been occasioned by pregnancy and that he had been delivered of a child.⁸ Next, Smith may have gone to Connecticut. He told one deponent that while in Norwalk he had been cured of "the foul disorder" by a Dr. Betts. In addition, at some point, Smith had sought advice from a clergyman named Reece who "advised him to go home to his friends."⁹ By early 1805, he had arrived in Saint John.

The Loyalist communities of Parr-town on the east side of the harbour and Carleton on the west side where chartered as the "city" of Saint John in 1785. Gabriel George Ludlow was appointed its first mayor, serving for 20 years. With the departure of Governor Thomas Carleton from the province in 1803 Ludlow, as senior councillor, became commander-in-chief and president of the Council of New Brunswick. In reality, he seems to have left the administration of the colony to his older brother, George Duncan Ludlow, the chief justice and a resident of the capital, Fredericton. The President resided at Carleton and preferred to remain there at his house situated in what had been the garden of the old French fort. Appropriately, Ludlow's home in Carleton was referred to as "overment House".¹⁰

⁷Depositions of John Ketchum, Caleb Wetmore and Samuel Jones: Hazen Collection, Chipman Papers, F4A, NBM. Two treatments of the social, religious and moral climate of life in the West Indies at this time are P. Wright, ed., *Lady Nugent's Journal of Her Residence in Jamaica from 1801 to 1805* (Kingston, Jamaica: Institute of Jamaica, 1966) and J. P. Greene, "Changing Identity in the British Caribbean: Barbados as a Case Study" in N. Canby and A. Pagden, eds., *Colonial Identity in the Atlantic World, 1500-1800* (Princeton, N.J.: Princeton University Press, 1987) 213. See especially 225-226.

⁸Examination of John M. Smith: Hazen Collection, Chipman Papers, F4A, NBM.

⁹Deposition of Caleb Wetmore: *supra*, note 6.

¹⁰C.M. Wallace, "Ludlow, Gabriel George" and "Ludlow, George Duncan" *Dictionary of Canadian Biography*, Vol. V (Toronto: University of Toronto Press, 1983) at 503-507.

President Ludlow, by far the most prosperous and prominent resident of Carleton, fared better than most residents of that community, which has been characterized as "an impoverished hamlet" by the beginning of the nineteenth century.¹¹ Schoolmaster John Rule wrote in 1798 that the inhabitants were mostly "illiterate, and never having had any occasion themselves for learning, think that their money laid out in this way is lost; and indeed they pay little regard to their present or future welfare."¹² This sour description has validity but omits much. The Anglican community of Carleton that can be reconstructed, within limits, from documents generated by the *Smith* case, consisted, in the main, of artisans and fishermen who, if not prosperous, earned enough to maintain themselves and their families in their own houses, to offer food and drink when guests stopped by on a Sunday, and to keep holidays in some style.¹³ The men were active in the militia.¹⁴ Many families were connected by marriage and by occupational links. They attended divine service at St. John's Chapel, Carleton, where a layreader officiated for £20 per annum, paid by subscribers of the chapel and Trinity Church, the parish church of Saint John.¹⁵

By March 1805 the lay reader at St. John's Chapel was John M. Smith. He did not live in Carleton, but on the east side of the harbour where he kept school in his house.¹⁶ Smith found favour with President Ludlow and his family –no small consideration in light of the President's power and influence –but problems remained. The Baltimore rumours (that he was a woman) had followed him to Saint John. In addition, one document refers mysteriously to "the death of Parker's son whom some persons supposed he [Smith] was in some measure the cause of his death." At that time, Caleb Wetmore, a prominent resident of Carleton, vestryman of Trinity and City alderman, had chided Smith about his role in the matter. Smith showed some temper but appeared to accept Wetmore's advice, which probably involved the paramountcy of protecting the Church and the

¹¹D.G. Bell, ed., *Newlight Baptist Journals of James Manning and James Innis* (Saint John: Acadia Divinity College and the Baptist Historical Committee of the United Baptist Convention of the Atlantic Provinces, 1984) at 290.

¹²John Rule to SPG, *ibid.* at 290. Trinity Church Records for 28 March 1805 describe Carleton as follows: "That there is no mercantile business carried on there: the place is supported principally by the fishery. The inhabitants are generally in low circumstances..." Trinity Church Records, Minute Book (1790-1825)(transcript): F43, NBM at 43.

¹³Evidence of lifestyles culled from depositions of John Ketchum, Caleb Wetmore and Margaret Mungar: Hazen Collection, Chipman Papers, F4A, NBM.

¹⁴Saint John County Militia Records: F50, NBM.

¹⁵Trinity Church Minute Book: *supra*, note 12 at 43 notes, "VOTED that an allowance at the rate of twenty pounds per annum be made to John Middleton Smith for the time he has been and may be employed by the Rector as Reader in the Chapel."

¹⁶Every deposition contains some reference either to Smith's school in his house or to his crossing the river from Carleton to his house: Hazen Collection, Chipman Papers, F4A, NBM.

good name of the President and his family.¹⁷ Then on 26 or 27 December 1805 John Ketchum, a resident of Carleton and a member of St. John's Chapel, called on President Ludlow to relate certain matters and to inform the President that he intended to swear out a complaint accusing Smith of buggery. Ketchum's complaint set off a chain of revelations disclosing the nature and remarkable extent of Smith's Saint John career.¹⁸

On Sundays, after reading divine service, the lay reader was invited often to dine with a family at Carleton. After dinner, depending on the weather, Smith would either stay overnight at Carleton, usually at Alderman Wetmore's, or be rowed across the harbour and accompanied to his own house.¹⁹ On Sunday, 15 December 1805, John Ketchum and his wife dined at the home of the Mungars (Mrs. Ketchum's parents) in company with Smith and Caleb Wetmore. On this occasion Wetmore apologized that he was unable to invite Smith to spend the night at his home or accompany him across the river because a child was ill. Throughout the evening, Smith was uncommonly attentive to Ketchum and at length asked Mrs. Ketchum if she would allow her husband to take him home. Out of respect for the lay reader, she consented. About nine in the evening Ketchum rowed Smith across the river and assisted him in lighting the fire. In return, Smith produced some twenty-year-old liquor that he offered only to "particular friends". At three in the morning they went to bed where Smith made advances, which Ketchum repulsed at first. Smith persisted, saying that:

he could give him as much satisfaction as any woman he ever had to do with, if he would *consent* and *adhere* to him, and said he was a *woman* – that he had his monthly courses – that he had been pregnant – and being asked in Gods name how this could be and how he had got rid of it – Answered I used medicines for that purpose and destroyed it – that he was a woman and had the necessary convenience of one – question suppose you had a child do you believe you could suckle – A: yes I am sure of it – Try me and I will give you all the satisfaction that any woman can.²⁰

¹⁷Deposition of Caleb Wetmore: *supra*, note 6. Strictly speaking, Wetmore says at this time, "I checked him – intimating to him the situation in which he then stood." However, when the storm broke around Smith, Wetmore on two occasions was moved to tears because of "how he had deceived me, how he had deceived and imposed upon the President and his worthy family, who had been fostering a viper instead of a Christian, how he had deceived and disappointed the people of Carleton, who were looking up to him as a lead, and how much the church must suffer from his practices." Saint John Gazette (18 January 1805) 3, mentions the death of Thomas Parker after a short illness, age 15.

¹⁸Biographical details on John Ketchum are scarce. *The Saint John Gazette* (8 April 1805) 2, reports the election in Guy's Ward of Caleb Wetmore (alderman), John Ketchum (assistant) and Nicholas Beam (junior constable).

¹⁹Deposition of Caleb Wetmore: *supra*, note 6.

²⁰Deposition of John Ketchum: *supra*, note 7.

Ketchum insisted that "at the time of copulation and after he verily believes a woman's convenience was what he had been making use of both from its feeling, and the great agitation [sic] it put Smith into at the time."²¹ Ketchum left early in the morning, although Smith attempted to delay his departure with offers of breakfast, as enjoyed by other men who stayed with him. As Ketchum was fond of reading novels, Smith offered him some of the many books he owned.

Ketchum remained uneasy all week. The next Sunday he agreed against to see Smith home in order (Ketchum said) that he might question Smith in greater detail about others who had stayed with him and obtained proof of his being a female. At Smith's house they talked about the West Indies. Smith insisted that he was not a hermaphrodite and that a doctor in Jamaica had examined him and concluded he was "a perfect woman". Ketchum berated Smith about deceiving the people of Carleton who had used him kindly. Did it not bother his conscience? Smith replied that a local youth had attempted to quote Scripture to convince him that what he was doing was wrong.²² However, in Smith's opinion, many things, such as David King's having his will with Uriah's wife and then putting Uriah in the front of the battle in which he was slain, "were not so wicked as people generally thought, or was preached to them." Smith said that nature had such an impression on him that when "I cannot get a man to satisfy me... I am under necessity of using a candle." He gave Ketchum little information about who had -habited with him in Saint John. After again making an effort to satisfy himself whether Smith was really a woman, Ketchum left in the early hours of the morning. On Christmas day 1805 Smith continued to pursue Ketchum who, on Smith's cheerful inquiry as to what was the matter, responded:

you have Ruined me I am much disturbed in mind -now you know it is in my power to ruin you -you have blasted yourself and me -Look at the President that good family -whom you so basely deceive -Look at that Church where you have this Day preached such a fine Sermon & c. -he then said shall I never see you again at my Home -No never dart in my Doors.²³

When President Ludlow heard Ketchum's story, he sent for Caleb Wetmore and together they went to Smith's house to confront him. The President told Smith that these scandals had to be laid to rest and immediately sent for two

²¹*Ibid.* Ketchum repeated substantially the same information to President Ludlow and Caleb Wetmore. See deposition of Caleb Wetmore: *supra*, note 6. According to precedents cited by Bliss, in law this consistency was a strong indication that Ketchum was telling the truth. See collection of authorities, page headed "evidence." P84, NBM.

²²The young man is identified only as Mr. and Mrs. Gardiner's son in John Ketchum's deposition.

²³Deposition of John Ketchum: *supra*, note 7. Smith's version eliminates all aspects of sexual intercourse with Ketchum and he denies that he said he was a woman. Examination of John Smith: *supra*, note 8.

physicians to examine him.²⁴ Drs. Adino Paddock and Thomas Emerson verified by examination and swore affidavits that Smith was “of the male sex and that the said John M. Smith hath the privy parts of a man.”²⁵ Smith maintained his innocence, saying Ketchum’s accusations were “malicious and groundless” falsehoods.²⁶

English courts viewed a false accusation of buggery seriously, recognizing that even acquittal did not remove the blot from a reputation.²⁷ William Blackstone, never sympathetic in his treatment of sodomy, thought that the penalty for a false accusation of sodomy should be only slightly less than the penalty for the crime itself. In 1810 six Middlesex men were convicted of blackmail for threatening to make allegations of sodomy if not paid. Two were sentenced to transportation for seven years and four received prison sentences of one year, at a time when the average sentence for an attempted sodomy conviction was only two years in gaol.²⁸ In Smith’s case accusers were not deterred and Ketchum’s allegations prompted others to step forward. James Stackhouse, another Carleton resident, charged Smith with the same offence. Samuel Jones, George Godsoe and two other men complained that Smith had attempted to seduce them as well.²⁹

Jones was a courier between Saint John and Fredericton for the General Post Office. In September 1805 he received a message that Smith, whom he had never met, had some business for him. Jones was invited into the house and some general conversation ensued. In Jones’ opinion the talk and Smith’s whole manner were overly familiar considering the shortness of their acquaintance. Through the evening Smith showed him an elaborate sewing kit and some fine needlework, and an array of rings and earrings. Jones thought he also saw a black silk dress and black silk petticoats. When it became apparent that Smith had no business for him, Jones left. Though annoyed, he promised to return some other evening. Smith badgered Jones, sending messengers to his house. Finally Jones went to see

²⁴Deposition of Caleb Wetmore: *supra*, note 6.

²⁵Deposition of Caleb Wetmore: *supra*, note 6; Affidavit of Dr. Adino Paddock: Hazen Collection, Chipman, Papers, F4A, NBM. On the word of the two doctors, presumably one potential scandal could be laid to rest, that is, that which might have ensued if the wardens and vestry of Trinity Church had hired a woman to preach.

²⁶Examination of John Smith: *supra*, note 8.

²⁷Blackmail thrived in these circumstances. See A. N. Gilbert, “Sodomy and the Law in Eighteenth- and Early Nineteenth-Century Britain” (1987) 7 *Societas* at 229-234.

²⁸*Ibid.* at 231-232.

²⁹For Stackhouse, see Indictment: The King v. John M. Smith (18 March 1806): Hazen Collection, Chipman Papers, F4A, NBM. There are no depositions and few details concerning the Stackhouse case. See also Minute Book of the Circuit Court (1786-1809): RS-36A, Book I, Provincial Archives of New Brunswick [PANS] at 300-304. See also depositions of Samuel Jones and George Godsoe: Hazen Collection, Chipman Papers, F4A, NBM.

him again, accompanied by his brother-in-law. Smith resented the other man's presence. To Jones's surprise, in a private moment, Smith informed him that if he were not already married, Smith would marry him. The appearance of yet another guest stopped this conversation, but eventually Smith beckoned Jones out into the yard. Smith said he was desirous that Jones should stay and sleep with him:

and the said Smith at the same time caught the said deponent in his arms and hugged and kissed the deponent and took hold of the deponent's genitals with his the said Smith's hand. That at that moment the deponent thought the said Smith was a female, and a base prostitute, and an imposter, and being shocked and disgusted at his or her the said Smith's conduct and attempts to seduce the deponent, he the deponent instantly pushed the said Smith with violence from him against the house and jumped over the fence and left him and never has been near him the said Smith since.

Jones learned later that his brother Stephen had had a similar experience with Smith. Stephen Jones, who lived at Bellisle Bay, had lodged with Smith once when visiting Saint John. He urged Samuel to keep well clear of Smith.³⁰

George Godsoe seems to have been the youngest of those to whom Smith made advances. He was the illiterate son of the bailiff and high constable of the City and County of Saint John, William Godsoe, and resided with his parents. One day, as George Godsoe worked at a house in the Lower Cove, he received a message that Smith wanted to see him, but Godsoe was too busy to respond. He likewise ignored a second message. The next morning before breakfast the messenger appeared again and Godsoe went to see Smith, who explained that he lived alone and wanted a companion for the winter. If Godsoe would fill this position, Smith would teach and instruct him at his school "gratis" and provide room and board. Godsoe was interested, "conceiving it would afford him a good opportunity of improving himself." He discussed the matter with his father, who was pleased to consent.

The first evening at Smith's, Godsoe was urged to drink some spirits and water, which he did. Smith then offered "some liquid of a whitish appearance" to make him sleep, which he refused. In bed, Smith followed his usual course, but the young man resisted and finally left. Smith begged Godsoe to say nothing of what had transpired, then asked Godsoe if he knew of any other young man who could stay with him.³¹ Godsoe went home and told his father he would never

³⁰Deposition of Samuel Jones: *supra*, note 7. According to (November 1898) 1 *The New Brunswick Magazine* 290, Samuel Jones carried the mail once a week between Saint John and Fredericton.

³¹Deposition of George Godsoe: *supra*, note 29.

return to Smith's house.³²

As a result of the investigation following Ketchum's complaint, Smith was charged on 18 March 1806 with buggery with John Ketchum and James Stackhouse and with making assault with intent to commit buggery on Paul Phillips, George Godsoe, Samuel Jones and Stephen Jones. The indictments drawn up by Attorney General Jonathan Bliss, whose compilation of legal authorities relevant to the case reflects a number of important considerations. In framing the indictments (two felonies and four misdemeanours) Bliss sought to avoid a practice that had developed in the English courts whereby, on acquittal for a felony, the charge would be dropped down to a misdemeanour and the prisoner retried on the same evidence. Bliss noted that in 1790 an English court had expressed "a strong disapprobation" of this practice concluding, "The Grand Jury cannot with propriety find two Indictments for the same offence at the same time & the continuance of the practice may produce many inconveniences."³³ Nevertheless, this practice still applied in 1793, when William Green and James Harrison were tried at the Old Bailey. Though acquitted of sodomy, it was judged that they had unlawfully laid hands on each other "with intent to commit the detestable crime of sodomy." They were tried, convicted and spent a year in Newgate Prison.³⁴ In the Smith case it would seem that as the trial proceeded and, despite Bliss's initial intentions, the possibility of conviction on the "included" offence did come into play.

The standard language of criminal indictments employed phrases rooted in Christian beliefs, so that the indictment for murder or assault, for example, stated that the perpetrator acted while "not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil."³⁵ An indictment for buggery indicated, likewise, the deep-seated repugnance for this particular offence. The act was "instigated by the Devil", and "against the order of nature". It declared that the prisoner "did commit and perpetrate that detestable and abominable crime of Buggery (not to be named among Christians) to the great displeasure of Almighty God, to the great scandal of all human kind, against the form of the Statute in such case made & provided, and against the peace of our said Lord the King his Crown and Dignity." In contemporary legal phraseology the naming of "buggery" is followed invariably by the bracketed phrase "not to be named among Christians". The antipathy apparent in the indictments also

³²Deposition of William Godsoe: Hazen Collection, Chipman Papers, F4A, NBM.

³³Collection of authorities: *supra*, note 2.

³⁴Gilbert, *supra*, note 27 at 235.

³⁵Links between theology and the traditional prohibitions against homosexuality are discussed in A. N. Gilbert, "Conceptions of Homosexuality and Sodomy in Western History" (1990-81) 6 *Journal of Homosexuality* at 57-68.

manifested itself in the reluctance of the courts to examine allegations of sodomy in detail. Blackstone discussed the offence briefly, concluding, "I will not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject the very mention of which is a disgrace to human nature."³⁶ In the summer of 1806, when twenty men were tried at the Lancaster assizes, the judge, according to the *Annual Register*, "very properly ordered that no notes should be taken on these trials, nor any young persons be allowed to be present at them". In 1805 it was recorded of a witness: "He then related a very disgusting story of himself —of Mr. Forrester's coming to him in bed, and related what is too disgusting to be repeated."³⁷

Perhaps because of the reticence attending the subject, there was no precise legal definition of buggery, although certain trends seem to have developed over time. In general terms, buggery in English law involved carnal knowledge by man with man, man with beast, or woman with beast, or any unnatural copulation by man and woman (e.g., anal sex, coitus interruptus, etc.). The overwhelming majority of prosecutions involved man with man.³⁸ Courts-martial records indicate that into the eighteenth century proof of penetration and (sometimes) emission were also required for a conviction. Attempted sodomy seems to have involved any act perceived to be of a sodomitical nature though not including anal penetration.³⁹ This welter of imprecision and uncertainty may in some part account for the apparent capriciousness of English jury verdicts in cases of attempted buggery, one jury convicting an accused on evidence that would seem to be very similar to that which a jury found insufficient for conviction in another case.⁴⁰ Other factors may have intervened. Contemporary trial records often contain the barest of information. The names of witnesses are recorded but their testimony is not. When depositions survive, it seems likely that courtroom testimony would have been the same or similar, but we cannot know to what extent this evidence was enhanced or mitigated under questioning. Eighteenth-century judges entered very freely into trial proceedings, routinely questioning witnesses and remarking on their testimony, exercising great discretion as to what evidence might be admitted and what instructions given to the jury.⁴¹

³⁶Quoted in Gilbert, *supra*, note 27 at 226.

³⁷Quoted in A.D. Harvey, "Communications: Prosecutions for Sodomy in England at the Beginning of the Nineteenth Century" (1978) 21 *The Historical Journal* 942.

³⁸Weeks, *supra*, note 1 at 82. Gilbert, *supra*, note 27 at 226-229. Harvey, *supra*, note 37 at 941.

³⁹Harvey, *supra*, note 37 at 939, 943. Gilbert, *supra*, note 27 at 233-234. Court-martial (not open to the public) records tend to be more explicit than civilian records.

⁴⁰Trumbach, *supra*, note 1 at 21.

⁴¹J.M. Beattie, *Crime and the Courts of England, 1660-1800* (Princeton, N.J.: Princeton University Press, 1986) at 340-352, 439-449.

The private nature of most sexual activities also presented legal difficulties. Usually, the only eyewitnesses were participants. A prisoner could be convicted on the evidence of an accomplice, unconfirmed by any other evidence. However, as Attorney General Bliss noted in his summary of authorities, the general opinion held that "unless some fair and unpolluted evidence corroborate and gives verisimilitude to the testimony of an accomplice, a person convicted under such circumstances ought to be recommended to mercy."⁴² "Fair and unpolluted evidence" aside, as little as a kiss or embrace between men might be construed as an act of a sodomitical nature and, therefore, attempted sodomy. In the overheated atmosphere that surrounded the "great scandal" of such accusations, the character of the accused and the 'quality' of his defenders played no small part.

John Smith's coterie of supporters in the wake of the buggery charges included men of substance and standing in the Saint John community, the most prominent being President G.G. Ludlow. Mayor William Campbell wrote Chief Justice G.D. Ludlow that "There are so many persons of property that he can give bail to any amount that would be required."⁴³ Dr. David Brown certified that a long confinement would prove fatal.⁴⁴ The chief justice also received a petition recommending Smith as "a fit object for being admitted to bail", signed by George Younghusband, James D. Seely, Edward Howard, John Garrison, Samuel Miles, Arthur Dingwall, William Donald, William Donaldson Sr., John Thomson and Thomas Bean.⁴⁵ Seven of the ten worshipped at Trinity Church and one at St. John's Chapel. Six were merchants and three were aldermen.⁴⁶ John Garrison and George Younghusband, who furnished bail of £100, were member of the House of Assembly and justices of the peace.⁴⁷

Support for Smith was not unanimous, but only hints remained of the social ferment created by the case. In December 1805, when allegations first surfaced, Alderman Wetmore commented that when this information became public, "I should not be surprised to hear of his being mobbed."⁴⁸ When Smith was indicted in March 1806 he and his supporters wished to proceed as quickly as

⁴²Collection of authorities: *supra*, note 2, page marked "evidence" at top left side.

⁴³Letter, William Campbell to Chief Justice Ludlow (7 April 1806): Hazen Collection, Chipman Papers, F4A, NBM.

⁴⁴Certificate of Dr. David Brown (7 April 1806): Hazen Collection, Chipman Papers, F4A, NBM.

⁴⁵Petition for bail (undated): Hazen Collection: Chipman Papers, F4A, NBM.

⁴⁶J. R. Armstrong, "The Exchange Coffee House and St. John's First Club" (1907) *7 Collections of the New Brunswick Historical Society* 60

⁴⁷They are listed as justices of the peace in various documents in Hazen Collection, Chipman Papers, F4A, NBM.

⁴⁸Deposition of Caleb Wetmore: *supra*, note 6.

possible, but Ward Chipman cautioned the chief justice that "the public mind" was "considerably agitated". He advised postponement of the trial until after the May term when emotions might have cooled down.⁴⁹ A brief newspaper account of the Smith trials confirms that the matter was a "cause of great expectation" and continued, "The Public has for some time past been much divided in opinion respecting the charges preferred against this Man."⁵⁰

A curious incident that occurred immediately prior to trial furnishes another sort of indication of the upheaval in the community and, perhaps, of machinations behind the scenes. It will be recalled that William Godsoe, a young man who made allegations of attempted sodomy against Smith, was the son of George Godsoe, the bailiff of Saint John. On 5 June 1806 the grand jury returned a finding of "no true bill" in the misdemeanours involving George Godsoe and Paul Phillips, effectively dismissing the charges.⁵¹ Two days later a Saint John merchant swore an affidavit before Solicitor General Chipman to the effect that in the spring George Godsoe told a group discussing the Smith matter in front of David Merritt's house that he (Godsoe) "knew [on] what side his bread was buttered."⁵² As a result of this information Chipman moved to challenge the "array" of the jury empanelled to try Smith. He charged that four men had been placed on the jury "at the denomination and instance of William Godsoe the Bailiff of the said City and County of Saint John in favour of the said John M. Smith." The circumstances were that Godsoe had reported to the sheriff that ten other potential candidates for jury duty could not be located when, in fact, they were within the city. He had kept another, Stephen Kent, off the jury alleging that "the said Stephen Kent was a party man, whereas in truth and in fact the said Stephen Kent was residing in his dwelling house in the City and was as is believed an impartial and disinterested person."⁵³ Chipman's challenge was rejected without recorded explanation, however, and the jury affirmed.⁵⁴

Smith was tried between 3 and 11 June 1806 at the Court of Oyer and Terminer and General Gaol Delivery for St. John County. Chief Justice George Duncan Ludlow, the President's brother, presided. At the prisoner's request, John

⁴⁹Letter, Ward Chipman to Chief Justice George D. Ludlow (31 March 1806): Hazen Collection, Chipman Papers, F4A, NBM.

⁵⁰*The Saint John Gazette* (11 June 1806) 3.

⁵¹Minute Book: *supra*, note 39 at 302. Similarly, the buggery charges against John Ketchum and James Stackhouse were dismissed.

⁵²Affidavit of William Balster: Hazen Collection, Chipman Papers, F4A, NBM.

⁵³Challenge to the array of the panel: Hazen Collection, Chipman Papers, F4A, NBM.

⁵⁴Minute Book, *supra*, note 29 at 304.

Murray Bliss and William Botsford were assigned to him as counsel.⁵⁵ Smith pleaded not guilty to two misdemeanour charges of making an assault with intent to commit buggery on Samuel and Stephen Jones. With the prisoner's consent, the same jury heard the evidence in both buggery trials.⁵⁶ In the first trial there were twenty-nine witnesses for the Crown and twenty-four for the prisoner.⁵⁷ There were fewer witnesses in the second buggery trial. Proceedings lasted seventeen hours. The jury then withdrew and quickly brought in a verdict of not guilty.⁵⁸ Then followed the trials on the reduced charge of attempt. As in the felony buggery trials, one jury heard the evidence in all the misdemeanour cases. On 11 June Smith was found guilty of attempted buggery with Samuel Jones and

⁵⁵*Ibid.* at 300-306. The scope for defence counsel in New Brunswick criminal prosecutions of the time was narrow. In *Newlight Baptist Journals*, *supra*, note 11 at 341-342, D. G. Bell writes that in New Brunswick at this time, "A prisoner charged with a capital crime was not entitled to have legal counsel conduct his defence unless he were insane at the time of trial or stood mute by visitation of God." In *The Judges of New Brunswick and Their Times* D.G. Bell, ed., (Fredericton: Acadiensis, 1985) at 77-78, Joseph W. Lawrence notes that in a capital offence counsel could argue points of law (for example, the sufficiency of the indictment, qualifications of the jury, incompetence of witnesses) and instruct the prisoner what questions to ask. It was the judge's task to see that the proceedings against the prisoner were fair and the evidence clear. In *Seventy Years of New Brunswick Life: Autobiographical Sketches* (Saint John, N.B.: Press of G.E. Day, 1890) at 63, W.T. Baird wrote of a murder trial in 1822, "At that time and for upwards of ten years afterwards, prisoners on trial for criminal charges were not allowed to be defended by counsel except to argue legal points." He adds, "Neither of the prisoners addressed the jury, and their counsel had no right to do so." In England, by 1730, counsel were acting for defendants in some cases. See Beattie, *supra*, note 41 at 356-362.

⁵⁶See collection of authorities for propriety of same jury for both trials. A jury sitting at multiple trials was common practice. See Beattie, *supra*, note 41 at 378-380. The jurors at the two buggery trials were Bernard Manser, David Currier, Nathaniel Chandler, Peter Cable, Daniel Hatfield, Thomas Inglesby, William Holland, David Gable, Sr., William Harper, Oliver Fraser, Joseph Canby, William Burton. For the trials on two charges of attempted buggery, nine members of the above jury were carried over. John Stewart, Timothy Thompson and James M. Fairchild replaced David Gable, Sr., William Harper and Oliver Fraser. Minute Book, *supra*, note 29 at 305-306.

⁵⁷*Ibid.* at 305. Evidence for the Crown: John Ketchum, Caleb Wetmore Esq., Robert Stackhouse, James Brittain, Margaret Munger (sic), Andrew Nelson, Benjamin Moore (black man), James Richards (black man), Stephen Jones, Paul Philips, Samuel Jones, William Lee, William Hilt, Henry Hennigar, Ward Chipman Esq. The examination of the prisoner taken before the Mayor and Recorder, Thomas Wetmore Esq., Charles J. Peters Esq., Ruloff Ruloffson Esq., Daniel Micheau Esq., Walter Bates Esq., Lawrence Foster Esq., Isaac Perry, William Olive, Chapman Judson, Robert Connor, Caleb Merritt, Adino Paddock Esq., John Rosenell, John Cochrane. Evidence for the Prisoner: George Lane, Amos Adams, Silvanus Whitney Esq., Samuel Whitney, Elijah Tilton, Charles Ham, John Thompson Esq., George Younghusband Esq., John Garrison Esq., Tertullus Theel, John Craft, David Brown, Samuel Miles Jr., Patty Frazee, David Waterbury, James Grigor, Michel Eaton, Charles Johnson, William Burton, Michael Hennigar Sr., William Willbour, Isaiah Smith, The deposition of John Fleming, The deposition of John Ketchum taken before the mayor and recorder.

⁵⁸*Ibid.* at 306. On the second indictment (buggery with James Stackhouse) evidence for the Crown: Robert Stackhouse, James Stackhouse, William Olive, John Craft, Silvanus Whitney Esq., Jeremiah Bundage Esq., Caleb Wetmore Esq., Elijah Tilton, John Ketchum, David Waterbury; evidence for the Prisoner: John Garrison Esq., George Younghusband Esq. On the length of the trials, see *Saint John Gazette* (11 June 1806) 3.

with Stephen Jones. Asked if he had anything to say, the prisoner made no reply.⁵⁹

Apparently the jury that acquitted Smith of buggery regarded the Crown's evidence as strong but too circumstantial to justify conviction, their verdict reflecting "that tenderness for life which conscientious men must ever feel."⁶⁰ Nine jurors who heard evidence in the buggery trial served on the jury that convicted Smith of attempted buggery. A strong possibility exists that regardless of the strength or weakness of evidence of attempted buggery against Smith, three-fourth of the jury (the nine carryovers) might not have been reluctant to convict when the penalty exacted did not involve loss of life. In declining to convict Smith of buggery, the jury might also have considered that he had risked his life by standing trail when he might have fled. In the absence of organized police forces and sophisticated communications networks the urge to escape and make a fresh start elsewhere would have been tempting. In England, absconding while on bail in buggery cases was common practice. The best known instance involved Percy Jocelyn, the Bishop of Clogher, who in 1822 was arrested in a public house in London and charged with attempted buggery. He was allowed bail, fled, changed his identity and died in anonymity in Scotland many years later.⁶¹

It is reasonable to wonder why Smith did not run in the first place. Before charges had been laid, Caleb Wetmore advised Smith to "Pack up you alls! and be off—as quick as possible." He could take the packet for Annapolis that would sail within hours. Smith had protested that he could not be ready in time. Take the next one, Wetmore pressed. Smith countered that he had had problems with the captain of the vessel "concerning a child of his that was at school with me". Then the next one, the alderman persisted. Smith agreed to this; he would go to Annapolis, then to Halifax and on to England.⁶² In the event, he did not leave at this time or later when free on bail for months prior to the trials.

For each offence, Smith was sentenced to one-half hour in the pillory in the Market Square on each of two days, three months in gaol and a fine of £5.⁶³ Courts intended to reinforce the shame entailed in public disclosure and loss of reputation by requiring the subject to "stand at least once and sometimes twice in the pillory of the neighbourhood where he was best known or where he had been

⁵⁹*Ibid.* at 306.

⁶⁰*Royal Gazette* (11 June 1806) 3.

⁶¹Gilbert, *supra*, note 27 at 225-226, 233.

⁶²Deposition of Caleb Wetmore: *supra*, note 6.

⁶³Minute Book, *supra*, note 29 at 306. In England in 60 percent of all cases of attempted sodomy that Trumbach looked at, the punishment involved the pillory, ten months in jail and a fine of 10. Trumbach, *supra* note 1 at 21.

apprehended.”⁶⁴ In the words of William Eden, “The idea of shame should follow the finger of the law.”⁶⁵ In Saint John the pillory was located at the foot of King Street by the old county court house, which doubled as city hall. According to W.O. Raymond (the historian who preserved the Smith prosecution files), part of the basement served as a lockup and above the basement were located butcher stalls and the market. The market slip was considered filthy even by the standards of the day, with garbage at hand to pelt the helpless individual in the pillory.⁶⁶ The usual missiles involved mud, rotten eggs, dead cats and, for especially shameful crimes, cabbages, turnips and onions might be employed.⁶⁷ Smith’s experience has been described, perhaps aphorically, as “a field day to the School Boys, for the sight of a School Teacher holding a levee in that character was something novel; what added to their enjoyment was he ruled them by the rod and not by moral suasion.”⁶⁸

Having endured the pillory, Smith had only to serve out his prison terms and pay the fines in order to be released. However, on conviction Smith’s support seems to have melted away. The received wisdom of the time dictated that the sodomite be shunned, “excluded from all civil society and human conversation.”⁶⁹ Deprived of income and bereft of friends, Smith was unable to support himself while incarcerated, nor would he be able to pay the fines when confinement ended.⁷⁰ He might remain a drain on public revenues until the end of his life.

As a focus for on-going gossip, Smith represented an object of notoriety for the community as a whole and a source of embarrassment for Anglican adherents and for those who had supported him. The contemporary Church of England was under attack on a number of fronts. In England, the clergy of the Established Church were characterized as nepotistic, worldly and too fond of the creature-comforts. A German visitor to London wrote in 1782 that the English clergy were “notorious for their free and easy way of life.”⁷¹ In the local context, D.G. Bell

⁶⁴*Ibid.*

⁶⁵Quoted in L. Radzinowicz, *The Movement for Reform. Vol. of A History of English Criminal Law and its Administration from 1750* (London: Macmillan, 1948) at 313.

⁶⁶W.O. Raymond, “Notes” (1970) 7 *Acadiensis* 139.

⁶⁷C. Ward, “Punishments of Seventy Years Ago” (1899) 3 *New Brunswick Magazine* at 81-83.

⁶⁸J.W. Lawrence, “The Medical Men of St. John, in Its First Half Century” (1897) 1 *Collections of the New Brunswick Historical Society* 284.

⁶⁹Trumbach, *supra*, note 1 at 11.

⁷⁰Order of banishment: Hazen Collection, Chipman Papers, F4A, NBM.

⁷¹G. Newman, *The Rise of English Nationalism: a Cultural History 1740-1830* (New York: St. Martin’s Press, 1987) at 24-25. For a concise account of the Church of England in early New Brunswick, see A.G. Condon, *The Envy of the American States: The Loyalist Dream for New Brunswick* (Fredericton: New Ireland Press, 1984), especially at 184-188.

has described six instances in which Bishop Inglis investigated charges "of a scandalous nature" against New Brunswick clergymen.⁷² In 1792 when the Congregational minister at Maugerville was accused of "scandalous Indecencies ...not fit to be named among Christians", he denied everything and "through [sic] himself into the arms of the Church of England", which he labelled "the most indulgent and least censorious church in the world."⁷³ In Saint John a well-established knot of Presbyterians flourished, although many of them worshipped at Trinity Church. Throughout the province itinerant Baptist preachers were winning converts.⁷⁴ Caleb Wetmore immediately attributed the rumours that Smith was a woman to Mrs. Ring "a well-known enemy of the Church".⁷⁵ The Anglican community, and not just the elite, must have been acutely uncomfortable with Smith mouldering in a gaol cell, a constant reminder of scandal.⁷⁶

On 21 July 1806 President Ludlow commuted Smith's sentence. The remainder of the prison term and the fines were waived "upon the express condition that he the said John M. Smith do depart immediately from our said Province of New Brunswick and be not again found with the same".⁷⁷ No doubt Smith's unmasking and conviction had distressed the Ludlows. Neither the president nor his brother, proud and wealthy New York squires transplanted to New Brunswick and core members of the Loyalist elite, would have suffered stoically a misery which could be removed with the stroke of a pen. Nonetheless, it would be a crude oversimplification to dismiss the outcome of the Smith case as mere manipulation of the legal system to serve caste interest. The pardon process formed an integral part of the eighteenth-century justice system.⁷⁸

⁷²D.G. Bell, "Charles Inglis and the Anglican Clergy of Loyalist New Brunswick" (1987) 7 *Nova Scotia Historical Review* 25.

⁷³J. Hannay, "Documents of Old Congregationalist Church at Maugerville" (1984) 1 *Collections of the New Brunswick Historical Society* at 145-146. Seventy Years later and in a spirit of commendation, the rector of St. Luke's Church, Portland, referred to the Church of England as "the roomiest church on the face of the earth." L.G. Stevens, ed., *A Review of the First Half Century's History of St. Luke's Church, Portland, St. John, N.B.* (Saint John: J & A McMillan, 1889) at 103.

⁷⁴D.R. Jack, *History of St. Andrew's Church* (Saint John: Barnes & Co., 1913) at 6-16; W.S. MacNutt, *New Brunswick: A History, 1784-1867* (Toronto: Macmillan, 1984) at 167; Bell, *supra*, note 11 at 159.

⁷⁵Deposition of Caleb Wetmore: *supra*, note 6.

⁷⁶Dr. David Brown's statement that Smith would not survive a long confinement might have been more than a ploy to have Smith released on bail. On 5 March 1805, the grand jury reported the jail, particularly the criminal quarters, was so filthy and in such bad repair that it constituted "a most disgraceful nuisance" and "a very disgusting predicament." Saint John City and County Court of quarter Sessions Minutes (1801-1811): NBM at 120-131.

⁷⁷Order of banishment: *supra*, note 70.

⁷⁸Beattie, *supra*, note 41 at 430-439; Radzinowicz, *supra*, note 65, Vol.1, especially Chapter 4; D. Hay, "Property, Authority and the Criminal Law" in D. Hay et al., eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Pantheon Books, 1975) at 40, 43.

Attorney General Bliss had indicated the possibility of mercy if Smith was convicted largely on the evidence of a participant in the crime. Additionally, Smith had employed no force or violence and there was no loss of life or property involved in any of the crimes with which he was charged. He was not convicted of a capital offence, but of a misdemeanour, albeit a high one. A local precedent for pardon in a sensational case existed already in the instance of David Fanning, a member of the House of Assembly, who in 1800 was convicted of rape and sentenced to death by Chief Justice Ludlow. Fanning's victim was the only other person present when the crime occurred. She alleged at first that he had attempted to rape her, then changed the accusation to rape. Fanning insisted he had been convicted not on the evidence but because the jurors (his neighbours) hated him on account of his hot temper and much-publicized record as a brutal Loyalist raider in the Southern campaign during the American Revolution. Fanning, unlike Smith, had little political influence since he had managed to alienate both the administration and the opposition in New Brunswick. Nevertheless, in great part because of the shakiness of the evidence against him, Fanning's death sentence was commuted on condition of exile, which he chose to serve in Nova Scotia.⁷⁹ This condition was strictly enforced. Until his death in 1825, David Fanning unceasingly badgered and petitioned individuals and the New Brunswick legislature to allow him to return long enough to sell properties and collect debts owed him, all to no avail. He was not permitted even to pass through the province on a trip from Nova Scotia to Canada.⁸⁰

If Smith and Fanning had been ordinary farmers or labourers, would they have been granted pardons? Pending a comprehensive survey of the pardon process in New Brunswick, the question is moot. Douglas Hay contends that in England most requests for pardons were initiated by gentlemen on behalf of labourers since the prerogative of mercy was a manifestation of a society thoroughly grounded in patronage at the top and reciprocated by deference at the bottom. Decisions of mercy were the private perquisite of persons of property. However, as Hay also points out, their power, while pervasive, was not complete.⁸¹ While the events and conduct of the Smith case suggest parallels with the Hay thesis, the nature of the available documents and of Smith's crimes warrants extreme caution in analysis. The surviving documents were generated for the most part by the justice system or those employed in it. That system was dedicated, as was the society it served, to suppressing the behaviour that the historian asks the documents to reveal. Therefore, although the record is incomplete at best, study of these documents

⁷⁹C. W. Troxler, "To git out of a Troublesome neighbourhood": David Fanning in New Brunswick" (1979) 61 *North Carolina Historical Review* 343 at 343-365.

⁸⁰Jarvis Family Papers: NBM. See, for example, Box 6, F2-32, F3-4, F5-18; Box 7, F1-11, 14, 27, 32.

⁸¹Hay, *supra*, note 78 at 17-63. Hay's thesis has been challenged in J.H. Langebein, "Albion's Fatal Flaws" (1983) 98 *Past and Present* at 96.

suggests the following outline of the unfolding of the Smith affair.

Rumours about Smith's activities seem to have circulated about him almost from his arrival in Saint John. Given the scarcity of competent schoolmasters and of young agile clergy willing to service areas of difficult access, Smith experienced no serious problem as long as he behaved discreetly. From the time the storm of allegations broke around Smith there are strong indications that the overriding concern involved protecting the Church and the reputations of those who were perceived as Smith's patrons. From alderman Wetmore on, the agenda indicated Smith's removal from Saint John. Failing flight, the next best option was acquittal on all charges. Smith's high-profile supporters, most of whom can be connected to Trinity Church and the prospering merchant interest of the city, signed petitions and secured bail. Furthermore, persons unknown indicated to Bailiff William Godsoe on "what side his bread was buttered". Ward Chipman alleged that Godsoe stacked the jury in Smith's favour. If true, Godsoe succeeded in that Chipman's allegations were rejected and the jury affirmed, but failed in that Smith was convicted of the two lesser charges. Even if Smith had been acquitted of all charges, his "supporters" intended to be rid of him. From January 1806 the trustees of the newly-founded grammar school affiliated with Trinity Church were negotiating for a preceptor who would serve also as an assistant to the rector and whose chief duty would comprise conducting services at St. John's Chapel, Carleton.⁸² Without an income Smith could not have remained in the city.

A pardon conditional on departure from the province was the last weapon in the arsenal. Proprieties had been observed in that the example was made – Smith suffered the pillory and the population expressed its disapproval with rotten vegetables and other projectiles. He also served a fraction of his jail sentence. Presumably, Smith then left the province. All reference to him ceases until the late nineteenth century when New Brunswick historians Joseph W. Lawrence and W. O. Raymond began to use these documents, though never specifying the nature of the crime of which Smith was convicted.

It is axiomatic that history is rooted in time and facts. Attitudes change over time. Historians, especially in North America, have scarcely begun to study the intricacies of sexual behaviour and its taboos. At various times in Western societies, for example, it has been acceptable or unacceptable, legal or illegal to marry one's cousin or the sibling of one's deceased spouse. These restraints

⁸²This candidate, a teacher at King's College, Windsor, Nova Scotia, eventually informed the trustees that certain false, malicious and invented reports would prevent his entering into Holy Orders for the moment. The candidate strongly denied the allegations by the father of a young girl that he had seduced his daughter. The Trustees responded that if no charges were laid and if he could produce signed statements to verify his assertions, their offer of the position still held. The candidate did not respond. See Minutes of the Saint John Grammar School Corporation (17 March 1806-20 May 1806): A114, NBM. See also F66, NBM.

signified more than mere eccentricity on the part of our antecedents. Randolph Trumbach has suggested that sexual behaviour is, perhaps, "the most highly symbolic activity in any society's sexual behaviour is therefore to come closest to the heart of its uniqueness."⁸³ The law constitutes one important facet of an evolving, extensive, interactive network of church and state, public and private, formal and informal controls on sexuality. The record of resistance to these controls, as the Smith case illustrates, is equally instructive in coming to an appreciation of any given society.

⁸³Trumbach, *supra*, note 1 at 24. See also J. Weeks, *Sex, Politics and Society: The Regulation of Sexuality Since 1800* (London: Longman, 1981) c.1.