

**Gender, Crime and Discretion**  
**in the English Criminal Justice System,**  
**1780s to 1830s**

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A thesis submitted for the degree of Doctor of Philosophy

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## **Abstract**

### **Gender, Crime and Discretion in the English Criminal Justice System, 1780s to 1830s**

**Deirdre E. P. Palk**

Historians of English crime and criminal justice agree that females are more leniently treated by the criminal justice system. Fewer females are prosecuted for unlawful activities, and, when they are, they are more readily acquitted, or receive lighter sentences than males. However, reasons for this remain elusive. References to the paternalism of those involved in the system, together with notions about masculinity and femininity in a patriarchally ordered society, have been offered in the absence of other more focussed and systematic evidence.

This thesis follows a systematic enquiry about three crimes which attracted the death sentence – shoplifting, pickpocketing, and uttering forged Bank of England notes. The period of the study covers the 1780s to the 1830s, and is centred on London and Middlesex. It considers involvement in each crime by gender. The approach seeks to avoid the over-generalisation resulting from synthesis of statistics for a wide variety of offences, and to allow a clearer view of how men and women operated in committing offences. This systematic approach follows the offenders involved in the three crimes through the criminal justice system, so far as it is possible to do so, since the public trial and sentencing at the Old Bailey were not the end of the decision-making story. Previous studies have largely neglected to follow-through to the stage of commutation of sentences and pardons where influences on the decision-makers differed from those on decision-makers at earlier stages of the system.

In particular, this thesis focuses on the gendered context of the specific behaviour of male and female offenders in the selected offences, on the effects of a patriarchal system of justice, and on the needs of the State to make political decisions about the disposal of offenders.

Deirdre E P Palk  
September 2001

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The experience of researching and writing this thesis over six years, part-time, has been a particularly lonely one, since I have continued to earn my living in professional work entirely divorced from any historical or other academic life, and have lived at a distance from my supervisory team. My wish to communicate, in a down-to earth way, the fascination of the social history of 'ordinary' people has meant that those who have relieved the loneliness of working on this project have been many personal friends, and even some of the clients of my health and safety consultancy, who have wondered what I have been 'up to' in my spare time. Their wish to hear some of the stories I have been researching, and their real interest on hearing these stories and ideas for the first time have encouraged me.

It has been good to share my interest in this project with some of the archivists who have assisted me in my researches. My thanks go to the archivists and their staff at the Records Office of the Corporation of the City of London, and, especially, the archivists at the Bank of England.

Most of all, I thank Richard Palk, for all his support and encouragement, for reading through many drafts, for keeping my feet on the ground, for offering the most challenging criticisms, for his impatience with academic obtuseness, and his never-failing belief that I could complete this project and produce something worth-while.

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### **Abbreviations used in thesis**

OBSP	Old Bailey Sessions Papers
CLRO	Corporation of London Record Office
PRO	Public Record Office
HO	Home Office
BECLS	Bank of England Committee for Law Suits
PP	Parliamentary (Sessional) Papers

## Introduction

### **Overall aim of thesis:**

The central aim of this thesis is to analyse women's involvement in three of the main categories of capital property crimes in London and Middlesex at a critical time in the history of the development of the English criminal justice system, and to suggest reasons for the different ways in which they were treated by the judicial decision-makers, compared with their male counterparts. This analysis seeks to extend some of the recent boundaries reached by historians of gender and crime by focusing closely on specific crimes and the progress of offenders through the criminal justice system.

Only relatively recently has writing on the history of crime and the criminal justice system in England broached the difficult question of the relationship between gender and law-breaking, and gender and judicial decisions in the early modern and modern periods.<sup>1</sup> Despite the growth of the study of women's history and the increasing interest in social history over the last 30 years, there is not an embarrassment of riches of historical research and writing on any aspect of the criminality of women and their encounter with the English criminal justice system. Without doubt, the unexplored

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<sup>1</sup> J. Kermode & G. Walker, (eds.), *Women, Crime and the Courts in Early Modern England*, London 1994; P. King, 'Female Offenders, Work and Life-Cycle in Late Eighteenth-century London', *Continuity and Change*, 11, 1996, pp.61-90; *Crime, Justice and Discretion in England 1740-1820*, Oxford, 2000; M. Arnot & C. Osborne, (eds.), *Gender and Crime in Modern Europe*, London 1999; L.Zedner, 'Women, Crime and Penal Responses: a Historical Account', in M. Tonry, (ed.), *Crime and Justice: a Review of Research*, 14, 1991, pp.307-362; and *Women, Crime and Custody in Victorian England*, Oxford, 1991; C.Conley, *The Unwritten Law: Criminal Justice in Victorian Kent*, Oxford, 1991; C. Emsley, *Crime and Society 1750-1900*, Second Edition, London & New York, 1996. Other earlier work which considered women and the criminal justice system includes: J. Beattie, 'The Criminality of Women in 18<sup>th</sup>-century England', *Journal of Social History*, 8, 1975, pp.80-116; idem. *Crime and the Courts in England 1660-1800*, Oxford, 1986; C. Wiener, 'Sex Roles and Crime in Late Elizabethan Hertfordshire', *Journal of Social History*, 8, 1975, pp.38-64. For earlier times, J. Bennett, *Women in the Medieval Countryside: Gender and the Household in Brigstock Before the Plague*, Oxford, 1987; B. Hanawalt, 'The Female Felon in Fourteenth-century England', *Viator-Medieval and Renaissance Studies*, 5 1974, pp.253-268; *Crime and Conflict in English Communities 1300-1348*, Cambridge, MA, 1979.

terrain is difficult and the evidence opaque. We do not often hear the authentic voices of those on one side of the unremarkable, daily drama of the system of criminal justice - the men and women who were tried, judged and punished. Those on the other side - prosecutors, juries and judges - rarely gave reasons for their decisions which determined the fate of the poor and the obscure.

The immediate motivation for this thesis was the discovery of the extraordinarily gendered attitude of the Bank of England and its solicitors at the beginning of the nineteenth century towards the women and men it prosecuted for forged Bank note crimes, as they waited in gaol for transportation to New South Wales. The Bank's negative response to the male convicts' appeals, and the compassion and generosity shown to most of the women, was effected without explanation or policy guidance. Why should discretion have been exercised on a gendered basis? Consideration of Bank note forgery crimes also suggests that, if categories of crimes are considered discretely, the traditional picture of women as law-abiding and not worth consideration in crime and criminal justice history is far from the truth.<sup>2</sup> The pattern of 'lenient' sentencing treatment for women may be well established (at least for more serious, usually capital, crimes)<sup>3</sup> but the reason for it remains largely unexplored. Where such a search has been attempted, the answer seems elusive.<sup>4</sup> To leave such an important question unanswered, or so partially answered, is unsatisfactory. The study of crime and the criminal justice system requires that women who were involved in crime and who were

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<sup>2</sup> For instance, L. Pike, *A History of Crime in England*, London, 1876; C. Lombroso & W. Ferrero, *The Female Offender*, New York, 1895; O. Pollack, *The Criminality of Women*, New York, 1961; J.J. Tobias, *Crime and Industrial Society*, London, 1967, in which there is a section on 'Juveniles and Women' - juveniles get fifteen pages, women four. This view of female criminality goes back much further - see Zedner, 'Women, crime and penal responses'.

<sup>3</sup> Particularly, P. King, 'Gender, Crime and Justice in Late Eighteenth- and Early Nineteenth-century England', pp. 44-74 in Arnot & Osborne, (eds.), *Gender and Crime* and idem. *Crime, Justice and Discretion*, pp.259-296.

<sup>4</sup> King, *Crime, Justice and Discretion*; Walker 'Women, Theft'; Conley, *The Unwritten Law*; Zedner, *Women, Crime and Custody*.

tried and punished, are taken more seriously, and that the motivation of those who had judicial power over them is better understood. The exercise of juridical power within complex systems of power relations may contribute to understandings of crime and criminal justice, to women's history, and to the history of the constructions of masculinity and femininity.

The questions addressed in this thesis are crucial ones about men and women's involvement in the selected crimes. Those questions ask how life-style, status and occupation may have motivated unlawful activity; whether male and female methods of participation in these activities differed from each other; and, if there were indeed differences, whether they had any bearing on the judicial responses and decisions. In order to answer these questions, selected criminal activities have to be looked at discretely and carefully, so that patterns of behaviour can be revealed. This requires analysis of the quantitative data, but it is vital to go behind the statistics to look closely at who and what behaviours were on trial. If we find that males and females acted differently, we may conclude that this has implications for the judicial decisions which were made - when the decision-makers in the justice system were not comparing like with like when judging men and women accused of apparently the same crimes. Further, it is also important that all stages of the justice system are explored, since the statistics of trial outcomes and sentencing reflect incompletely and misleadingly what happened finally to the convicted men and women. We should ask whether the appeals and pardoning system were influenced by gendered considerations, and whether there was scope for gender to be a more powerful bargaining tool for convicts when the process was removed from full public gaze to more secret, discretionary areas.

## **Scope and method of the thesis:**

The thesis aims, within specific limits, to contribute to the answers to these questions. It analyses what can be known about the men and women from London and Middlesex who appeared before the Old Bailey Sessions, charged with the capital crimes of stealing privily from the person (sometimes called pickpocketing), stealing privily in a shop (sometimes called shoplifting), and the various crimes of selling, uttering, and disposing of forged Bank of England currency notes. These three sets of crimes have been selected for three reasons. First, they involved a significant proportion of women, allowing balanced consideration of the issues.<sup>5</sup> Second, they attracted the death sentence, which allows a view through the whole of the judicial process, and the opportunity to compare the fates of men and women at each stage. Third, their capital nature gave the offences added significance in the eyes of contemporaries. The analysis is generally restricted to London and Middlesex since this is the only region of the country where there are full trial reports to give qualitative evidence, so important in painting a picture of the accused and their behaviour. Sets of Criminal Registers are also available for the region from 1791, permitting fuller understanding of the disposal of convicts after sentencing.

Consideration of shoplifting and pickpocketing begins in 1780. The choice of this date is not precise, but sets the study at a time when the criminal justice system was changing in many ways. Debates about punishment were at their height and the judicial and penal system was under strain. These two crimes are studied until the point when

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<sup>5</sup> Women were involved in a wide range of property crimes, but their numbers can be very small. Horse-, cow- and sheep-stealing, burglary and housebreaking and highway robbery, for instance, had very low overall numbers of indicted females. See King, *Crime, Justice and Discretion*, Table 6.4 for Essex, p.196; and 'Gender Crime and Justice', Table 2.1. for Old Bailey and Home Circuit, p.45.

the death penalty was repealed – 1808 for pickpocketing and 1823 for shoplifting.<sup>6</sup>

Forged Bank of England note crimes are studied for a specific period - from 1802, when the Bank began to record its decisions on prosecutions, to 1832/3, when these records ceased and the death penalty for uttering forged notes was abolished.

The three crimes, and the men and women involved, are considered within a four-part framework, reflecting the stages of the justice system. This permits the possibility of asking whether gendered discretion operated differently at the various stages. The first stage deals with English law itself, asking to what extent it was gender-based. The second looks at the preliminary stages of the judicial system between apprehension of an alleged criminal and his or her appearance before the petty jury at the Old Bailey. The third stage deals with the Old Bailey trials, the verdicts and sentences of the Court; and the fourth stage deals with what occurred later, in the appeals procedures and the pardoning processes.

In interrogating and reflecting upon the evidence drawn from these four stages of the justice system, a 'middle way' has been sought between over-extensive use of statistics and over-reliance on individual micro-histories. Statistics are used to demonstrate the incidence of men's and women's involvement in the three crimes in order to set the scene; and in order to categorise and compare the nature of criminal activity as it was carried out by males and females – their identity, their methods, and where and in what context they fell foul of the law. The verdicts and sentences passed on men and women for these offences, the subsequent changes to sentence, and the approaches used in petitioning for pardon and mercy are all quantitatively treated. The selection of three property crimes for analysis, in one area of the country, places limitations on the general nature of any conclusions which can be reached. However,

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<sup>6</sup> A major change was made in 1821, raising the lower limit for which shoplifting was a capital offence from five shillings to fifteen pounds. (1Geo.4, c117).

understanding how the crucial organising category of gender may operate in criminal justice history requires use of a more critical lens at a narrower focus to allow us to see through the statistics. A quantitative basis is required since it still appears necessary to state clearly that women were significantly involved. The need then is to be more specific about the crimes for which they were tried and about how the system treated them. Beattie's early work on women and crime provided an essential description of the broad picture, but the breadth of criminal activities he covered, his extensive time period, the limited sense of context, and the lack of any related evidence on trial outcomes, did not permit a view of how gender affected the workings of the criminal justice system.<sup>7</sup> In later work, his focus was sharper, context was provided, and there was some analysis of verdict by gender of the accused, based on evidence for Surrey. However, since most of his analysis was based on 'ungendered' statistics, with categories of crime widely drawn, his conclusions on the operation of gender in verdict and sentencing remain impressionistic.<sup>8</sup>

The recent engagement of Peter King with statistics for property offences in the late eighteenth and early nineteenth centuries, in which he reached a contextualised view on gender and property crime, has provided the statistical starting point for this thesis. He moved from counting indictments to examining verdicts, using material from official sources which allowed comparisons of ages, marital status, life-style, and life-cycle occupation of the men and women involved. From extensive and detailed use of the available statistics, he showed a consistent national pattern of strongly gendered conviction and sentencing from Assize trials, noting greater lenience shown to women at all stages of the justice system. As a result, he was able to pose the crucial question:

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<sup>7</sup> Beattie, 'The Criminality of Women'. Mainly Surrey, with some Sussex, 1663 to 1802.

<sup>8</sup> Beattie, *Crime and the Courts*, pp.400-449.

‘why the difference?’ The question is not yet answered.<sup>9</sup> However, by treating fairly wide categories of property crime as if they were homogenous, for instance not considering that women stole in ways different from men, he did not explore the full extent of the way gender worked at the heart of crime. Closer examination of the categories of crime, as proposed in this thesis, following the same people through the whole of the judicial system, may provide some answers.

A qualitative approach, using micro-histories and textual analysis, is added to the basic quantitative material. This should not run counter to the systematic approach upon which this thesis is based, but it should assist in reading context, feelings, prejudices, and assumptions into otherwise uncommunicative statistics. The source texts used in this thesis – court reports, newspaper comment, petitions and appeal papers – are products of an adversarial system of justice, of prejudiced opinion, of desperate people saying what they believed would bring them relief. Perhaps because of that, they have a major part to play in extending our knowledge of the effect of gender in the criminal justice system. There are, of course, dangers in using this approach, as well as strengths. In one of the most striking uses of micro-history in recent years – in relation to execution in England at this period – Gatrell, commenting on the appeals texts he uses, says that ‘the most interesting revelations ... lie between the lines of single cases rather than within aggregations of many – in phrasings and images which flow around a story uncensored, revealing feelings, assumptions, and attitudes which are not always conscious’.<sup>10</sup> There is little doubt about that, and the single case can be

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<sup>9</sup> King, ‘Female Offenders’; ‘Gender, Crime and Justice’, passim; *Crime, Justice and Discretion*, pp.259-296.

<sup>10</sup> V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770-1868*, Oxford, 1994, p.614. On the other hand, systematic case-studies can be useful, anchoring detailed story in the wider legal and administrative setting; for instance, J. Styles, “‘Our Traitorous Money Makers’ - The Yorkshire Coiners and the Law, 1760-1783’, J. Brewer & J. Styles (eds.), *An Ungovernable People: the English and their Law in the Seventeenth and Eighteenth Centuries*, London, 1980, pp.172-249; R.A.E. Wells ‘Sheep-rustling in Yorkshire in the Age of the Industrial and Agrarian Revolutions’, *Northern History*, 20, 1984, pp.127-145.

illuminating. However, it should not stand alone. It should be related to others of a similar type, otherwise its energy cannot be used to answer wider questions. Gatrell does great service in reminding us of the horrors of the death sentence and all that went with it, something that systematic approaches and statistical analyses are apt to hide. There seems little point to historical enquiry that lacks emotional involvement, but a narrow focus on a small number of micro-histories can become an emotional end in itself, necessary for putting across a message, but to be used carefully and in relation to other evidence.

The prompt for the methodology used in this thesis is the excellent summary of the field by Innes and Styles (1986).<sup>11</sup> They saw the study of crime and the criminal law in this period as one of the most exciting and influential areas of research. They synthesised work on the study of crime and criminal justice, and suggested ‘fruitful directions’ for further research. Amongst these directions, they did not identify the role of gender as a means of unlocking meaning in any of the issues they raised. However, the requests they made fifteen years ago remain substantially unfulfilled. They suggested, first, that more attention be paid to the ways in which different forms of illegal appropriation were undertaken and organised; what was stolen, how it was stolen, and what was done with the stolen property. They emphasised the need for this investigation to be systematic. A systematic qualitative analysis, they believed, could offer some of the same advantages as counting crimes. Second, more work was needed on ‘solidarities, attitudes and material cultures’ of those prosecuted for criminal activities, such as study of age, and life history. Third, that such study should not be separated from the history of law enforcement and the problems of the possible lack of

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<sup>11</sup> J. Innes & J. Styles ‘The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-century England’, *Journal of British Studies*, 25, 1986, pp.380-435, and updated and reprinted in A. Wilson, (ed.), *Rethinking Social History: English Society 1570-1920 and its Interpretation*, Manchester, 1993, pp. 201-265.

representativeness of prosecuted offences.

It is along these routes that this thesis travels. Some quantitative work reveals the activities which require further systematic investigation, and the selected crimes have been investigated largely in the way suggested. It is imperative that such qualitative investigation takes gender as one of its categories of analysis; to ignore it would now seem bizarre.

### **The context: the historiography of criminal justice and gender:**

For a long time, the accepted view of the criminal justice system has been that the 'entire legal fabric, from prosecution to punishment, was shot through with discretion'.<sup>12</sup> However, the role of gender in this discretionary process in the late eighteenth and early nineteenth centuries went unremarked until recently. As late as 1996, it was possible to say that historians of crime in England in the eighteenth and early nineteenth centuries had given little attention to the role of gender, and had 'found it remarkably difficult to give their work a properly contextualised gender dimension'.<sup>13</sup> This might not be surprising, considering the lack of attention paid in pioneering work on the history of crime to the existence of women amongst criminal offenders. The history of criminology compounded the relative neglect of female offenders, being unable to engage with issues of gender until late in the twentieth century. This neglect was coupled with specific treatments of female criminality, characterised by psychological or biological reductionism. Studies focussed on women's social and moral situation, and their vulnerability to 'falling' into crime and deviance. At the end of

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<sup>12</sup> Brewer & Styles, (eds.), *An Ungovernable People*, p.18. The discretionary theme is explored in D. Hay, 'Property, Authority and the Criminal Law' and other essays in D. Hay, P. Linebaugh, E.P. Thompson, et al, *Albion's Fatal Tree*, London, 1975; P. King, 'Decision-makers and Decision-making in the English Criminal Law 1750-1800', *The Historical Journal*, 27,1984, pp.25-58; J. Langbein, 'Albion's Fatal Flaws' *Past and Present*, 98, 1983, pp.96-120.

<sup>13</sup> King, 'Female Offenders', p.61.

the nineteenth century, it could be suggested that women 'are kept in the paths of virtue by ... maternity, piety, weakness ... (but in reality) their evil tendencies are more numerous and varied than men's', and that, although all women were less evolved than men, and thus closer to primitive types, natural selection had bred out the criminal tendencies among women, since more 'masculine' women did not find sexual partners.<sup>14</sup>

For as long as systematic records of crime have been kept, the sex of offenders has been recorded. Over time, certain trends and patterns in female criminality, compared with males, have been observable. Amongst long-term patterns are the simple facts that women commit a minority of recorded crimes; and that their crimes are categorised as less serious and more rarely professional than men's.<sup>15</sup> It is usually said that, in the eighteenth century, women accounted for a relatively small proportion of (property) offenders, and were less likely than men to be accused of capital crimes or of property crimes involving violence. Petty larceny, receiving and shoplifting were the main types of indictable property crime that involved above average proportions of females. There is a problem with this generalisation, as it is largely based on research which counts and compares indictments. This limits what can be known about context, and other issues such as occupation, age and status of defendants and their relationship with the victim of crime.<sup>16</sup> When criminal records can be consulted in more detail and over the whole range of the criminal justice system, the 'universal truth' that women commit much less crime than men do, looks as if it needs some qualification.

We are certainly seduced into a picture of continuity if we look at the overall criminal statistics over a long period. The ratio of men to women indicted for felony/serious offences appears to remain relatively constant from the middle ages

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<sup>14</sup> F. Heidensohn, *Women and Crime*, Basingstoke, 1985, p.114 (quoting Lombroso & Ferrero, *The Female Offender*); 'Gender and crime', ch. 21 in M. Maguire, R. Morgan & R. Reiner (eds.), *The Oxford Handbook of Criminology*, Oxford, 1994.

<sup>15</sup> Heidensohn, 'Gender and Crime', *ibid.* p.998.

<sup>16</sup> King 'Female Offenders', pp.61-2.

onwards,<sup>17</sup> with an increase in the women's share occurring only in the later twentieth century.<sup>18</sup> Few historians seriously challenge this long-term view, although Feeley and Little have initiated some discussion with their attempt to show a declining proportion of women coming before the courts between 1700 and 1880.<sup>19</sup> There may be little to be learned from generalisation, and the argument on trends needs to be a good deal more subtle. Closer examination sometimes shows robust differences between men and women in the nature and method of their activities, and certainly in the way they are treated by the justice system. The differences and the changes which occur in an apparent pattern of continuity yield clues about the role of gender in criminal justice.

Discretion in the exercise of the criminal law was a crucial issue for the historians who contributed in 1975 to the influential *Albion's Fatal Tree*, in which they set themselves the task of 'unlocking the meanings of eighteenth-century social history'.<sup>20</sup> Seeking to explain the discrepancy between the massive extension of the capital sanction during the eighteenth century and the relatively small and declining proportion of those sentenced who were actually hanged, Hay presented the criminal

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<sup>17</sup> For instance, J. Bennett, *Women in the Medieval Countryside*; K. Garay, 'Women and Crime in Late Medieval England: an Examination of the Courts of Gaol Delivery 1388-1409', *Florilegium*, 1-2, 1979/80, pp.87-103; J. Given, *Society and Homicide in Thirteenth-century England*, Stanford, 1979; B. Hanawalt-Westman, 'The Female Felon', pp.253-268; 'The Peasant Family and Crime; *Crime and Conflict*; A.L. Klinck, 'Anglo-Saxon Women and the Law', *Journal of Medieval History*, 8, 1982, pp.107-121; S. Mercer, 'Crime in Late Seventeenth-century Yorkshire – An Exception to a National Pattern?', *Northern History*, 27, 1991, pp.106-119; C. Wiener, 'Sex Roles and Crime'; J. Beattie, 'The Criminality of Women'. (Figures and comment in A. Laurence, *Women in England 1500-1760: a Social History*, London, 1994, pp.254-271, give a different picture based on unusual definitions of crime).

<sup>18</sup> A. Morris, *Women, Crime and Criminal Justice*, Oxford, 1987, pp.19-20; F.Heidensohn, 'Women and Crime', p.5; 'Gender and Crime', p.1001.

<sup>19</sup> M. Feeley & D. Little, 'The Vanishing Female: the Decline of Women in the Criminal Process 1687-1912', *Law and Society Review*, 25, 1991, pp.719-757; M. Feeley, 'The Decline of Women in the Criminal Process: A Comparative History', *Criminal Justice History*, 15, 1994, pp.235-74. See also Zedner, *Women, Crime and Custody*; E.A. Johnson, 'Women as Victims and Criminals: Female Homicide and Criminality in Imperial Germany 1873-1914', *Criminal Justice History*, 6, 1985, pp. 151-175; but at variance S. Frank, 'Women and Crime in Imperial Russia, 1834-1913: Representing Realities', in Arnot & Osborne (eds.), *Gender and Crime*, pp. 93-117. But see King, 'Gender and Recorded Crime: the Long Term Impact of Female Offenders on Prosecution Rates Across England and Wales 1750-1850' (forthcoming) for a persuasive argument against Feeley and Little's work.

<sup>20</sup> Hay, Linebaugh & Thompson, (eds.), *Albion's Fatal Tree*, p.13.

law as the primary ideological institution in the eighteenth-century English state. The majesty, justice, terror and mercy of the law, in particular the system of dispensing mercy and pardon from the very highest level in the land, he saw as an instrument of power which served class interests. The importance of Hay's arguments to this thesis lies in his exploration of discretion and the reasons for it. His work provoked many debates, but no-one denies the pervasive operation of discretion and flexibility in the criminal justice system.<sup>21</sup> However, to read Hay's chapter now, is to be struck by its lack of perception of the role of gender or sex within the complicated picture of discretion and flexibility in the criminal justice system and in society as a whole. We see only males in powerful positions, only males amongst the common people, and only men among those subjected to the law's terror and the mercy of the powerful. It is interesting that Beattie published work on the criminality of women in the year of the publication of *Albion's Fatal Tree*.<sup>22</sup> Other work in the 1970s and early 1980s dealt with specific crimes, such as infanticide, and those related to prostitution, which were of interest to historians of women.<sup>23</sup>

Through the 1980s and into the 1990s, many text books on crime in the eighteenth and early nineteenth centuries contained no index reference to women or gender, other than to women as victims of crime, or with reference to infanticide or

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<sup>21</sup> J. Langbein, 'Albion's Fatal Flaws', *Past and Present*, 1983, 98, pp.96-120; King, 'Decision-makers' passim.

<sup>22</sup> Beattie, 'The Criminality of Women'. In 'The Pattern of Crime in England 1660-1800', *Past and Present*, 62, 1974, pp. 47-95, he did not see gender as part of the pattern.

<sup>23</sup> The historiography is extensive. Examples of the decade in question: R.W. Malcolmson, 'Infanticide in the Eighteenth Century', pp.187-209, in J.S. Cockburn, (ed.), *Crime in England 1550-1800*, London, 1977; K. Wrightson, 'Infanticide in European History', *Criminal Justice History*, 3, 1982, pp. 1-20; R.D. Storch, 'Police Control of Street Prostitution in Victorian London: a Study in the Contexts of Police Action', pp. 49-71, in D. H. Bayley, (ed.), *Police and Society*, Beverley Hills, 1977.

prostitution.<sup>24</sup> Some historians of crime are now including considerations of women and of gender in their work.

It is not simply that historians and criminologists have begun to explore the role of women in criminal activity ... and the experience of women enmeshed in the various elements of the criminal justice system, but, more importantly, there is a recognition that gender is central to economic, political and social relations, and as such it contributes to the ways in which communities, institutions and states formulate their regulations and their laws as well as to the ways in which these regulations and laws are interpreted and enforced.<sup>25</sup>

Beattie's contribution to revealing the role of gender in the criminal justice system is significant. He built up a quantitative review of a variety of crimes in Surrey and Sussex over a long period (1660-1800), laying solid foundations. However, reflection on the effect of gender was not his purpose. His scope was too broad for the systematic qualitative work that might have shown how gender operated in the prosecution and punishment of crime. In recent writing, he has not pursued the question of gender.<sup>26</sup>

Some historians of the early modern period have shown what can be achieved if qualitative approaches are pursued.<sup>27</sup> In particular, Walker, considering women's involvement in property offences, showed that men and women had different patterns of

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<sup>24</sup> J.A. Sharpe, *Crime in Early Modern England 1550-1750*, Harlow, 1984 and *Judicial Punishment in England*, London, 1990; G. Rudé, *Criminal and Victim: Crime and Society in Early Nineteenth-century England*, Oxford, 1985; C. Emsley, *Crime and Society in England 1750-1900*, First edition; J. Briggs, C. Harrison, A. McInnes & D. Vincent (eds.), *Crime and Punishment in England: An Introductory History*, London, 1996 (very few references); A. Barrett & C. Harrison, *Crime and Punishment in England: A Sourcebook*, London, 1999.

<sup>25</sup> C. Emsley in Arnot & Osborne (eds.), *Gender and Crime*, pp. vii/viii. Emsley added 'Mid-point Assessment I: Crime and Gender' to the Second Edition of *Crime and Society* (1996); his focus was on women's crime, not gender. See idem, 'Albion's Felonious Attractions: Reflections Upon the History of Crime in England', in C. Emsley and L.A. Knafla, (eds.), *Crime History and Histories of Crime – Studies in the Historiography of Crime and Criminal Justice in Modern History*, London and Connecticut, 1996, pp. 67-85.

<sup>26</sup> Beattie, *Crime and the Courts*; idem, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries', *Law and History Review*, 9, 1991, pp 221-267; idem, 'London Crime and the Making of the 'Bloody Code' 1689-1718', pp.49-75, in Davison, Hitchcock, Keirn & Shoemaker (eds.), *Stilling the Grumbling Hive: the Response to Social and Economic Problems in England 1689-1750*; idem, 'Crime and Inequality' (in which there is some consideration of gender).

<sup>27</sup> The collection of essays in Kermode & Walker (eds.), *Women, Crime*; also U. Rublack, *The Crimes of Women in Early Modern Germany*, Oxford, 1999.

thieving activity - in the type of goods they stole, and in their choice of partners in crime.<sup>28</sup> Such a methodology can unmask the role and presence of women previously hidden by heavy use of statistical methods. Difference in male and female behaviour and then in how the criminal justice system responded, reveals the dynamics of gender relations as a key to unlocking the operation of the system. Systematic interrogation of the details of the stories of encounters with the criminal justice system reveals striking gendered differences in behaviour. This emerges as a particularly strong theme throughout this thesis – in private stealing, it extends to the type and value of appropriated property, the method of committing the crime, and the life-style and situation of the offender. Such a wide-ranging scale of difference between male and female suggests a strong reason for differences in judicial decisions. On the other hand, where behaviours were less divergent, such as in crimes involving forged Bank notes, judicial responses show less difference along gendered lines. The dynamics of female criminality, and women's different behaviour, offer a far more complex and instructive view of gendered experience than historians of crime have hitherto acknowledged.

Peter King now meets directly the gender issues in the criminal justice system. In earlier work, he showed the difficulties in securing evidence about the behaviour and attitudes of those who were prosecuted, but was able to draw conclusions from careful analysis, both quantitative and qualitative, in the pardoning archives. He considered the effect of age, background and factors mentioned in their appeals. It is possible, using this methodology, as I have partially done in this thesis, to ask similar questions about gender.<sup>29</sup> More recently, King has contributed significantly on gender issues. His work on female offenders, their work and life-cycle change, provided a contextualised account

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<sup>28</sup> Walker 'Women, Theft'.

<sup>29</sup> King, 'Decision-makers'. He was able to use both appeals and judges' responses to draw conclusions; since I am working on London-based material, and the responses were not available, my analysis lacks this important dimension.

of those offenders in a brief period (1791-3), linked the discussion about women's crime with the debate on women's work, and highlighted the complex relationship between female offenders, work and life-cycle change as central to any attempt to explain patterns of female crime. This study provided fresh impetus to using court records in a qualitative way.<sup>30</sup> Particularly challenging is his 1999 study of gender, crime and justice in late eighteenth- and early nineteenth-century England, using both quantitative and qualitative approaches. His use of statistics for serious property crime (in selected years between the 1780s and 1820s, for London, Middlesex, the Home Circuit, Lancashire and Northern Assizes Circuit) together with statistics for judicial outcomes - a crucial juxtaposition - showed the gendered nature of trial outcomes. In judicial outcomes for property crime, King found a pattern of lenience towards women. Although he questions whether this pattern relates only to property crime, and to the major courts - the Assizes and the Old Bailey - his quantitative findings are crucial.<sup>31</sup> However, there are a number of ways in which the research methodology used in this thesis is different from King's. This may allow modification and refocusing of his findings. The main differences are: first, a more focussed use of the crime categories to show differences between men and women on trial for ostensibly the same offences; second, the use of a wider range of sources through the whole of the judicial process; and third, a continuation of the search for the operation of gendered decisions within and after the pardoning process.

Apart from the work of Beattie, Walker and King, qualitative historical research on crime and the criminal justice system, and the place of gender as an explanatory force in the late eighteenth and early nineteenth centuries, is thin, often tangential and

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<sup>30</sup> King, 'Female Offenders'.

<sup>31</sup> King, 'Gender, Crime and Justice'.

unfocussed.<sup>32</sup> We should note the work being done by Australian historians on the backgrounds of those transported to New South Wales at the end of the eighteenth and during the first half of the nineteenth century.<sup>33</sup> Other qualitative work relates to the death penalty, and to the lives of those who hanged in London;<sup>34</sup> to the place of gender in the summary and quarter sessions courts, and in vagrancy, prostitution, and violence.<sup>35</sup> For a later period, work by Zedner and by Conley contributed to the crime and gender discussion, although neither engaged sufficiently with the crucial questions of this thesis about the extent to which gender affected trial outcomes, and why.<sup>36</sup>

The work of modern criminologists contributes to consideration of how and why

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<sup>32</sup> L.Mackay, 'Why They Stole: Women in the Old Bailey 1779-1789', *Journal of Social History*, 32, 1999, pp.623-637, although confirmatory of this thesis, lacks focus and cohesion, since too wide a category of thefts is analysed, not permitting satisfactory comparisons. R.M. Short, 'Female Criminality', M. Litt. Thesis, University of Oxford, 1989 is over-generalised.

<sup>33</sup> M. Gillen, 'The Botany Bay Decision', *English Historical Review*, 97, 1982, pp. 740-766; S.Nicholas (ed.), *Convict Workers – Reinterpreting Australia's Past*, Cambridge 1988; D.Meredith & D.Oxley, 'Designing Colonial Labour: Were Useful Convicts Selected for Transportation to Australia?', Sydney, University of New South Wales, work in progress, 1996; D. Oxley, *Convict Maids: the Forced Migration of Women to Australia*, Cambridge, 1999. These and other works are achieving a more balanced view of the convicts sent to New South Wales than the previously stereotyped male and female pictures of the mid-1960s.

<sup>34</sup> P.Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century*, London, 1991 (although there is a methodological problem with sole use of the Ordinary of Newgate's accounts of the lives of those about to hang to make links with the lives and occupations of their co-Londoners); Gatrell, *The Hanging Tree*; C. Naish, *Death Comes to the Maiden: Sex and Execution 1431-1933*; London and New York, 1991.

<sup>35</sup> A recent selection includes N. Rogers, 'Policing the Poor in Eighteenth-century London: the Vagrancy Laws and their Administration', *Histoire Sociale*, 24, 1991, pp.127-147 (which shows that the majority of vagrants were female); M. Doggett, *Marriage Wife-beating and the Law in Victorian England*, London, 1992; A. Clark, *Women's Silence, Men's Violence: Sexual Assault in England 1770-1845*, London, 1987; T. Henderson, *Disorderly Women in Eighteenth-century London: Prostitution and Control in the Metropolis, 1730-1830*, London, 1999; G. Smith, 'The State and the Culture of Violence in London 1760-1840', PhD. thesis, University of Toronto, 1999; R. Shoemaker, *Prosecution and Punishment of Petty Crime and the Law in London and Rural Middlesex, c 1660-1725*, Cambridge, 1991.

<sup>36</sup> Zedner, 'Women, Crime and Penal Responses'. She poses but fails to engage with the question of how far attitudes to women affected judgements at their trials. Idem, *Women, Crime and Custody*, where the focus is on women's treatment in prison, a product of the later period being presented. Conley, *The Unwritten Law*, focuses on typically 'female' activities, in summary courts.

gender operates in the criminal justice system.<sup>37</sup> Here there is no dearth of theory, reflection and analysis. It is hard not to envy those able to question and reflect on living human beings! One of the most useful modern studies considers males and females coming before the courts in Connecticut, and the 'mismeasure' of justice between them, based on gender. Men and women said different things about themselves, and about what they did. There was no gender difference in how they sought to justify themselves, but significant gender difference in how the courts made judgements about their character, and therefore in the sentencing which was thought appropriate.<sup>38</sup> A 1997 Home Office research study, starting from the proposition that a 'superficial examination of the criminal statistics suggests that, for virtually every type of offence, women are treated more leniently than men', provides a review of sentencing patterns for shoplifting, violence and drug offences in 1991, as well as a review of interviews with magistrates (1995) about what they thought were the main influences on their decision-making. The lenience which emerged was more in the nature of different rather than lighter sentences, and the influence of gendered attitudes in decision-making, both conscious and sub-conscious, was clear.<sup>39</sup>

### **Broader debates on gender history:**

A thesis on gender and the criminal justice system must locate itself in the context of debates on gender history, women's history, the construction of masculinity,

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<sup>37</sup> Since the literature is vast, I mention only recent works, not cited elsewhere in this chapter, which I have found useful: L. Gelsthorpe, *Sexism and the Female Offender*, Aldershot, 1989; L. Gelsthorpe & A. Morris, *Feminist Perspectives in Criminology*, Milton Keynes, 1990; S. Edwards, *Sex and Gender in the Legal Process*, London, 1996. C. Smart, *Women, Crime and Criminology: a Feminist Critique*, London, 1976, seen as the starting point of feminist criminological studies in Britain is still useful, although it shows its age; the 'silence' of which it speaks in relation to women's crime is no longer entirely relevant.

<sup>38</sup> K. Daly, *Gender, Crime and Punishment*, Yale, New Haven, 1994.

<sup>39</sup> C. Hedderman & L. Gelsthorpe, (eds.), *Understanding the Sentencing of Women*, Home Office Research Study 170, London, 1997.

femininity and sexuality, and discourse on issues such as 'public and private', 'separate spheres', 'golden ages' and 'continuity and change.' Since the experiences and materiality of the lives of women involved in crime and tried by the justice system have been hidden for so long, unmasking and recovering that experience (as far as a historian can do so) requires much effort. There is a prime need for 'retaining a focus on the collective and individual experiences of flesh-and-blood women'.<sup>40</sup> At the same time, there is need to understand how gender works to construct the changing meanings associated with terms such as 'male', 'female', 'masculine', 'feminine', 'womanly', 'manly' and so on, which appear in the judicial sources, in order to articulate the inter-relationship between 'experience' and 'meaning'.<sup>41</sup>

There is now a plethora of work from historians who see the eighteenth and early nineteenth centuries as times of significant change in attitudes to gender and sexuality. Each defines the period they write about as 'revolutionary' or 'seminal', but bow to a 'continuity' argument, leaving many unanswered questions:<sup>42</sup> for instance, whether the eighteenth century witnessed a sexual revolution which transformed attitudes, creating a phallogentric, increasingly heterosexual, culture;<sup>43</sup> or whether it was a time of increasing male participation in 'polite society' or a time of increase in male

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<sup>40</sup> L. M. Newman, 'Critical Theory and the History of Women: What's at Stake in Deconstructing Women's History', *Journal of Women's History*, Winter, 1991, pp.58-68.

<sup>41</sup> An excellent synthesis and summary of the development of feminist, Marxist and psycho-analytical approaches to gender history is found in K. Honeyman, *Women, Gender and Industrialisation in England 1700-1870*, Basingstoke and London 2000. A less detached view is expressed in most of the essays of J. W. Scott, *Gender and the Politics of History*, Revised edition, New York, 1999; also L. Davidoff, *Worlds Between: Historical Perspectives on Gender and Class* Cambridge, 1995, especially 'Regarding Some "Old Husbands' Tales": Public and Private in Feminist History', pp. 227-276; M. Maynard, 'Beyond the 'Big Three': the Development of Feminist Theory into the 1990s', *Women's History Review*, 4 (3) 1995, pp. 259-281, in particular her comments on 'The importance of a historical dimension' p. 267.

<sup>42</sup> It is therefore useful to have a synopsis over a longer historical period, as in S. Kingsley-Kent, *Gender and Power in Britain 1640-1990*, London, 1999.

<sup>43</sup> T. Hitchcock, *English Sexualities 1700-1800*, Basingstoke 1997; T. Hitchcock & M. Cohen (eds.), *English Masculinities 1600-1800*, London 1999, pp. 1-21.

aggression.<sup>44</sup> Did definitions of ‘public’ and ‘private’ change, with women increasingly confined to the private and domestic;<sup>45</sup> or were the critical changes not so much a confinement of women to a private sphere, as the growth of the public sphere to which men had nearly exclusive access?<sup>46</sup> Were women enjoying the benefits of an increased or decreased share in the nation’s work and wealth – something that touches on the tendency to break the law?<sup>47</sup>

Any study of men and women of the ‘labouring class’, ‘the poor’, needs to register gender structures which changed little or which may have resisted changes going on elsewhere. We should also note that notions of sexual polarisation, said to represent changed attitudes, were mainly presented in medical, and prescriptive and didactic writings and were not a description of actual social relations. Such polarised notions may have taken hold, or strengthened, amongst the aristocracy and the ‘middling sort’, especially as the latter sought to ‘better’ themselves. However, much that was

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<sup>44</sup> R. Shoemaker, ‘Reforming Male Manners: Public Insult and the Decline of Violence in London 1660-1740’, ch.7 in Hitchcock and Cohen, *English Masculinities*; E. Foyster, ‘Boys Will Be Boys’, ch. 8 in *ibid*; J. Tosh, ‘The Old Adam and the New Man: Emerging Themes in the History of English Masculinities 1750-1850’, ch. 11 in *ibid*. G.J. Barker-Benfield, *The Culture of Sensibility: Sex, and Society in Eighteenth-century Britain*, Chicago, 1992; H. Barker & E. Chalus (eds.), *Gender in Eighteenth-Century England: Roles, Representations and Responsibilities*, Harlow, 1997; P. Carter, *Men and the Emergence of Polite Society, Britain 1660-1800*, Harlow, 2001.

<sup>45</sup> For instance, K. Von den Steinen, ‘The Discovery of Women in Eighteenth-century English Political Life’, pp.231-258, in B. Kanner, (ed.), *The Women of England from Anglo-Saxon Times to the Present*, London, 1980; L. Davidoff & C. Hall, *Family Fortunes: Men and Women of the English Middle Class 1780-1850*, London, 1987; V. Jones, (ed.), *Women in the Eighteenth Century: Constructions of Femininity*, London, 1990; L. Klein, ‘Gender, Conversation and the Public Sphere in Early Eighteenth-century England’, pp.100-115, in J. Still & M. Worton, (eds.), *Textuality and Sexuality: Reading Theories and Practices*, Manchester, 1993; and ‘Gender and the Public/private Distinction in the Eighteenth-century: Some Questions About Evidence and Analytic Procedure’, *Eighteenth-Century Studies*, 29, 1995, pp.97-109; J. Brewer, ‘This, That and the Other: Public, Social and Private in the Seventeenth and Eighteenth Centuries’, pp.1-21 in D. Castiglione & L. Sharpe, (eds.), *Shifting the Boundaries: Transformations of the Language of Public and Private in the Eighteenth Century*, Exeter 1995; A. Fletcher, *Gender Sex and Subordination in England 1500-1800*, London, 1995; R. Shoemaker, *Gender in English Society 1650 –1850: the Emergence of Separate Spheres?* Harlow, 1998; J. Rendall, ‘Women and the Public Sphere’, *Gender and History*, 11, 1999, pp.475-488; E. Chalus, ‘Elite Women, Social Politics and the Political World of the Late Eighteenth-century England’, *The Historical Journal*, 43, 2000.

<sup>46</sup> S. Walby, ‘Women’s’ Employment and the Historical Periodisation of Patriarchy’, pp. 141-161, in H. Corr & L. Jamieson, *Politics of Everyday Life: Continuities and Change in Work and the Family*, London, 1990.

<sup>47</sup> B. Hill, *Women, Work and Sexual Politics in Eighteenth-century England*, Oxford, 1990; P. Sharpe (ed.), *Women’s Work; the English Experience 1650-1914*, London, 1998.

said and written could have been ‘a shrill response to an expansion in the opportunities and ambitions of Georgian and Victorian women – a cry from an embattled status quo, rather than the leading edge of change’.<sup>48</sup> Amongst the poor, however, persistence of unchanged social relationships between men and women is likely to have been more significant than change.<sup>49</sup> Few historians have penetrated the lives of the truly poor; even less in urban situations than in the countryside. We know too little about how they were affected by middle class perceptions of domesticity, and the ‘appropriate’ spheres of activity for men and women.<sup>50</sup> The language of ‘domesticity’ may have sounded more loudly during the eighteenth century, and a notional division between public and private may have had considerable hold on eighteenth-century imaginations, but, as Vickery points out, ‘even the most cursory sweep of Georgian usages reveals that the public/private dichotomy had multiple applications, which only sometimes mirrored a male/female distinction, and then not always perfectly’.<sup>51</sup>

The lives of the men and women who came before the London and Middlesex courts demonstrate continuity in life-style, occupation, status and attitude more than change at this period. However, shifting notions of appropriate male and female behaviour would have significantly affected the views of the decision-makers - men of authority, élite and middling, who operated the criminal justice system – officials, magistrates, juries, judges, parliamentarians and government servants, thus impacting on the lives of some of the poorer folk. Life in London is always different from life

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<sup>48</sup> A. Vickery, *The Gentleman's Daughter: Women's Lives in Georgian England*, London, 1998, p.7.

<sup>49</sup> Vickery's much quoted article, ‘Golden Age to Separate Spheres? A Review of the Categories and Chronology of English Women's History’, *The Historical Journal*, 36, 1993, pp. 383-414, provides a useful overview. Although she is preoccupied with women of the middling and genteel sort, her Introduction to *The Gentleman's Daughter*, takes sides effectively in the debate.

<sup>50</sup> T.Hitchcock, P. King, P. Sharpe, (eds.), *Chronicling Poverty: the Voices and Strategies of the English Poor, 1640-1840*, London, 1997; A. Clark, *The Struggle for the Breeches: Gender and the Making of the British Working Class*, Berkeley, 1995 (in looking at ‘the working class’ she engages with a people of a culture different from the poor, often out-of-work, people who were the majority of those who found themselves in court in London between 1780 and 1830); Hill, *Women, Work*; (focuses on women in rural situations).

<sup>51</sup> Vickery, *The Gentleman's Daughter*, pp. 288-293.

elsewhere in the nation. The capital was not affected in the same way as other areas of the country by industrialisation, and the work of men and women, particularly of women, was marked by a solid continuity. Women remained locked into the marginal, seasonal, part-time, poorly remunerated areas of service, commerce, and small manufacturing enterprise.<sup>52</sup> On the other hand, whilst the material circumstances of the poor may have changed little, changes in London from the late seventeenth century significantly affected their lives. The rapidly growing commercial city was home to polite culture and the increasingly comfortable material lives of propertied individuals, with their various networks of authority over the materially less well-off. London provided extensive employment opportunities for domestic servants, a degree of anonymity for those with something to hide, and care for many with illegitimate children. There were endless temptations, and opportunities for crime - in crowded streets, in shops full to overflowing to meet the rapidly increasing consumer desires of men and women of property, and at leisure activities and entertainment where wealth was on display.<sup>53</sup> Women in the metropolis formed a higher proportion of those accused of criminal activities than their rural counterparts, perhaps because of their often wretched and irregular work opportunities, as well as their greater personal freedom.<sup>54</sup>

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<sup>52</sup> P. Earle, *A City Full of People: Men and Women in London 1650-1750*, London, 1994; idem, 'The Female Labour Market in London in the Late Seventeenth and Early Eighteenth Centuries', *Economic History Review*, 2<sup>nd</sup> series, 42, 1989, pp.328-52. Compare with S. Alexander, 'Women's Work in Nineteenth-Century London: a Study of the Years 1820-1850' in J. Mitchell & A. Oakley, (eds.), *The Rights and Wrongs of Women*, London, 1976; this provides a view of continuity in women's work and lives. M. Ginsberg, 'The Tailoring and Dressmaking Trades, 1700-1850', *Costume*, VI (1972), pp.64-71; M. Prior, 'Women in the Urban Economy: Oxford 1500-1800', pp.93-117, in idem, (ed.), *Women in English Society 1500-1800*, London, 1985.

<sup>53</sup> L. Weatherill, 'Consumer Behaviour and Social Status in England 1660-1750', *Continuity and Change*, 1(2), 1986, pp.191-216; P. Langford, *A Polite and Commercial People, England 1727-1783*, Oxford, 1989; D. Kent, 'Ubiquitous but Invisible: Female Domestic Servants in Mid-eighteenth-century London', *History Workshop Journal*, 28, 1989, pp.111-127; P. Earle, *A City Full of People*; C. Walsh, 'Shop Design and the Display of Goods in Eighteenth-century London', *Journal of Design History*, 8, 1995, pp. 157-176.

<sup>54</sup> King, *Crime, Justice and Discretion*, pp.198-9. In the early 1790s, women were about a quarter of offenders tried at the Old Bailey, compared with an average of 11.3% in the five Home Circuit counties, a differential too large to be accounted for by women forming a higher proportion of the London population.

Women without strong support networks would frequently opt for earning their livings illegally, as part of London's extensive receiving networks, or in the prostitution trade.<sup>55</sup>

Behind the various debates with gender at their centre, we have to be aware of core patriarchal assumptions as they may have operated in the criminal justice system<sup>56</sup>. Such assumptions were (and are) changing, shifting, but pervasive.<sup>57</sup> Since the law, constructed, interpreted and administered by men for a society ruled by men, embodied such assumptions, could women be envisaged as equal members of society, or even capable of breaking laws which had not been made to control them? Since activities were defined as criminal in relation to a male view of acceptable behaviour, how far was the law capable of dealing equitably with women? However the male-centred system operated over the long term, it placed issues of gender at the centre of decision-making. Therefore, at each stage of the justice system, questions have to be asked about how decisions were made about guilt or punishment for individual women and men. We also have to ask how far decisions were surprising and contradictory, working in favour, rather than against many women.

### **The social and legal environment:**

It is beyond the scope of this thesis to deal in any detail with the changes and continuities of the period which had a significant impact on the commission of crime, and on attitudes to crime and to offenders. The effects of war and subsequent periods

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<sup>55</sup> Beattie, 'The Criminality of Women'; idem, *Crime and the Courts*, pp.239-40; idem, 'Crime and Inequality'; King, 'Female Offenders', p.67; Henderson, *Disorderly Women*.

<sup>56</sup> Chapter 1 explains how those assumptions were defined and may have operated. I am aware of the contested nature of the use of 'patriarchy' to analyse women's oppression and/or subordination, but believe its use is justified in an examination of the criminal justice system. My definitions of patriarchy and paternalism are as set out in G. Lerner, *The Creation of Patriarchy*, New York and Oxford, 1986, pp.238-240.

<sup>57</sup> Walby, 'Women's Employment'; J. Bennett, 'History That Stands Still' pp.269-283; idem, 'Women's History: a Study in Continuity and Change', *Women's History Review*, 2, 1993, pp.173-184. Contrast B. Hill, 'Women's History: a Study in Change, Continuity or Standing Still?' *ibid.* pp.5-22.

of peace between 1780 and 1830, together with fluctuations in the prices of basic foodstuffs, and the availability of employment – in particular for men returning from military service, with London as a focal point – made their mark in increasing property crime figures. It is reasonable to suppose that an increasing proportion of poor people turned to theft when times were hard. However, the proportion of victims prepared to prosecute exerted more influence on indictment levels as anxieties increased amongst those with property and goods to protect. Periods of war, in general, led to a reduction in indictments, whilst the establishment of peace increased them. Post-war increases in crime were often anticipated before they happened, in the form of a ‘moral panic’, provoked by newspapers. The relationship between poverty and crime cannot be ignored when considering the effect of gender on legal decisions.<sup>58</sup> War was the peculiar reason for the prominence of crime connected with forged Bank of England low-denomination currency notes.<sup>59</sup>

The system of administration of justice was, at the same time, the subject of fervent debate, change and upheaval – all of which could be expected to influence and inform the decisions of prosecutors, juries, judges and government servants as they dealt with the men and women accused and convicted of crime. The ‘Bloody Code’ was under review both as part of a humane reforming agenda and, on a more bureaucratic level, as an attempt to retain the effectiveness of the punishment at a time when it was

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<sup>58</sup> D. Hay, ‘War, Dearth and Theft in the Eighteenth Century: the Record of the English Courts’, *Past and Present*, 95, 1982, pp.117-160; King, *Crime, Justice and Discretion*, pp.145-168.

<sup>59</sup> The effect of war on the state’s finances caused the decision in 1797 – renewed until 1821 - to restrict cash (gold) payments, resulting in publishing poor quality, low value, Bank notes. W. Marston Acres, *The Bank of England from within 1694-1900*, London, 1931; J. Slinn, *A History of Freshfields*, London 1984; R. McGowen, ‘The Bank of England and the Policing of Forgery 1797-1821’ (forthcoming).

being less and less carried into effect.<sup>60</sup> The range of secondary sentences was under scrutiny – again for both reformist and pragmatic reasons. The judiciary, in 1780, had recourse to a wide range of punishments for serious offences, from hanging, to transportation, incarceration, whipping, branding, forced hard labour, despatch to the armed services, and fines – with or without some other punishment. Juries often returned partial verdicts which avoided the death penalty. Judges were able to select certain capital convicts and certain types of offence for more lenient treatment, and, for Old Bailey convicts, the Home Secretary, through the King in Council, had discretion over the outcome and some choice over the substitute penalty. By the end of the period, repeal of the capital statutes was under way; transportation was approaching its demise; women convicted of murder or coining were no longer burned at the stake; they were no longer flogged, and men were less likely to be flogged or sent to the armed services. Penal pluralism was coming to an end. Imprisonment became the state's main weapon. The wide range of sentencing options available from 1780 to the 1830s provides scope to question the effect of gender in the criminal justice system, since

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<sup>60</sup> Sir Samuel Romilly, 'Observations on the Criminal Law of England as it Relates to Capital Punishments and on the Mode in which it is Administered', London, 1810; Gatrell, *The Hanging Tree*; B. Hilton, 'The Gallows and Mr Peel', pp. 88-112, in T.C.W. Blanning & D. Cannadine (eds.), *History and Biography – Essays in Honour of David Beales*, Cambridge, 1996; P. Jenkins, 'From Gallows to Prison? The Execution Rate in Early Modern England', *Criminal Justice History*, VII, 1986, pp.51-71; idem, 'Into the Upperworld? Law, Crime and Punishment in English Society', *Social History*, 12, 1987, pp.93-102; R. McGowen, 'The Image of Justice and Reform of the Criminal Law in Early Nineteenth-century England', *Buffalo Law Review*, 32, 1983, pp.89-125; idem, 'A Powerful Sympathy: Terror, the Prison and Humanitarian Reform in Early Nineteenth-century Britain', *Journal of British Studies*, 25, 1986, pp.312-334; idem, 'The Body and Punishment in Eighteenth-century England', *Journal of Modern History*, 59, 1987, p.651-679; idem, 'The Changing Face of God's Justice', *Criminal Justice History*, 9, 1988, pp.63-98; idem, 'Punishing Violence, Sentencing Crime' in N. Armstrong & L. Tennenhouse (eds.), *The Violence of Representation: Literature and the History of Violence*, London, 1989, pp.140-156; H. Potter, *Hanging in Judgement: Religion and the Death Penalty in England from the Bloody Code to Abolition*, London, 1993.

punishment was often adjusted to the nature of the offender.<sup>61</sup> To all these changes can be added the developments in the Home Office as it responded to the overloading of the administration of criminal justice. This in turn changed the nature of the pardoning and appeals system by the 1820s.<sup>62</sup> The process of policing was changing from a reactive to a more preventative mode,<sup>63</sup> and court procedure was accommodating and responding to increased use of defence counsel.<sup>64</sup>

### **The variety of decision makers:**

I have described the decision-makers in the different stages of the criminal justice system as ‘doorkeepers’, who allowed some offenders the chance of escape, or lighter punishment. It is useful to define who these many people might have been, exerting

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<sup>61</sup> Emsley, *Crime and Society*; idem, ‘Repression, ‘Terror’ and the Rule of Law in England During the Decade of the French Revolution’, *English Historical Review*, Oct. 1985, pp. 801-825; V.Gatrell, B. Lenman, G. Parker (eds.), *Crime and the Law: the Social History of Crime in Western Europe since 1500*, London, 1980; Gatrell, ‘Crime, Authority and the Policeman State’, pp. 243-310, in F. Thompson (ed.), *The Cambridge Social History of Britain 1750-1950 – Vol. 3 Social Agencies and Institutions*, Cambridge, 1990; Sir L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, Vol. 2. ‘The Clash between Private Initiative and Public Interest in the Enforcement of the Law’, London, 1956; G. Rudé, *Criminal and Victim: Crime and Society in Early Nineteenth-Century England*, Oxford, 1985; King, *Crime, Justice and Discretion*; R.Campbell, ‘Sentence of Death by Burning for Women’, *Journal of Legal History*, 5, 1984, pp.44-59; A. D. Harvey, ‘Burning Women at the Stake in Eighteenth-century England’, *Criminal Justice History*, 11, 1990, pp. 193-195; S. Devereaux, ‘In Place of Death: Transportation, Penal Practices and the English State 1770-1830’, pp.52-76 in C. Strange, (ed.), *Qualities of Mercy: Justice, Punishment and Discretion*, Vancouver, 1996; idem. ‘The Making of the Penitentiary Act 1775-1779’, *Historical Journal*, 42,1999, pp.405-433; S. Nicholas, (ed.), *Convict Workers*; W. Oldham, *Britain’s Convicts to the Colonies*, Sydney, 1990; G. Rudé, *Protest and Punishment: the Story of the Social and Political Protesters Transported to Australia 1788-1868*, Oxford, 1978; M. Ignatieff, *A Just Measure of Pain: the Penitentiary in the Industrial Revolution 1750- 1850*, London 1978; idem. ‘State, Civil Society and Total Institution: a Critique of Recent Social Histories of Punishment’, pp.183-209, in D. Sugarman, (ed.), *Legality, Ideology and the State*, London, 1983.

<sup>62</sup> S. Devereaux, ‘The Criminal Branch of the Home Office 1782-1830’, pp.270-308, in G. Smith, A. May, S. Devereaux, (eds.), *Criminal Justice in the Old World and the New: Essays in Honour of J.M. Beattie*, Toronto, 1998.

<sup>63</sup> J. Styles, ‘The Emergence of the Police: Explaining Police Reform in Eighteenth- and Nineteenth-century England’, *British Journal of Criminology*, 27, 1987, pp.15-22; Hay & Snyder, (eds.), *Policing and Prosecution in Britain*.

<sup>64</sup> Beattie, ‘Scales of Justice’; idem, ‘Garrow for the Defence’, *History Today*, Feb. 1991, pp.49-53; D. Bentley, *English Criminal Justice in the Nineteenth Century*, London, 1998; D. Hay ‘The Criminal Prosecution in England and its Historians’, *The Modern Law Review*, 47, 1984, pp.1-29; J. Langbein, ‘Shaping the Eighteenth-century Criminal Trial: a View from the Ryder Sources’, *University of Chicago Law Review*, 50, 1983, pp.1-136; S. Landsman, ‘The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth-century England’, *Cornell Law Review*, 75, 1990, pp.497-609.

choice and influence at critical points as the offenders journeyed through the system.<sup>65</sup> It is usual to describe the criminal justice system at this time as essentially 'private', since the initial accusation and complaint to magistrates was made by the private individual who was the victim of the offence. The victim was the prosecutor in the higher court of law. However, that individual had many official supporters.<sup>66</sup> In property cases, support came from constables and justices of the peace, and, in the City of London, from peace officers and men of the watch. Each had a part to play in deciding how far the alleged offender would journey through the system. The major escape of offenders from the system was permitted by the failure of victims to press charges. There were many reasons for this. A victim may have thought a theft was trivial, may have felt compassion for the offender, or may have wished to avoid the time, trouble and expense involved in going to court. It was not unknown for rough justice to be meted out on the spot and the matter to be concluded there. Many a shopkeeper preferred to avoid prosecuting as this might be seen as bad for trade. Many a victim of a pickpocket would rather have kept quiet about the circumstances of a theft. If an indictment could lead to a capital sentence, a victim might have been reluctant to set off down this path. Police and peace officers at different times had different motives for seeking to apprehend offenders and to bring them before the magistrates. Magistrates, with their own sentiments about crime in the metropolis, had to make a further sift, and decide whether there was *prima facie* evidence of an indictable offence which could properly be passed to the higher court. Where the offence involved forged Bank notes, the victim was the Bank of England. The recipient of the forged note, who might

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<sup>65</sup> Beattie, *Crime and the Courts*, passim, but esp. pp. 267-449.

<sup>66</sup> J. H. Langbein, 'Shaping the Eighteenth-Century Criminal Trial: a View from the Ryder Sources', pp. 1-136, *University of Chicago Law Review*, 50, 1, 1983.

appear to be the true victim, since he or she was never reimbursed on handing in the forgery, was not the initiator of indictment proceedings. Nonetheless, the magistrates considered the evidence brought by police officers or Bank investigators, and referred cases to the Bank for a decision to take the matter further. Those decisions could vary according to the Bank's prevailing political and pragmatic needs, and were assisted by another group of decision-makers – the Committee for Law Suits, made up of bankers and lawyers. Decisions at this point were not only about whether to prosecute on indictment, but whether the charge should be capital, and whether to offer a plea-bargaining alternative.

If offenders passed through all these doors and reached the Old Bailey, there were many further decision points. The grand jury had to establish whether there was a case to answer and decide whether to send the case forward to trial or to adjudge that there was 'no true bill' and release the prisoner. At the next stage, many escape doors were opened when the victim, who had had further time to think about the situation, frequently failed to turn up in court to prosecute, despite the possibility of losing money put up as a recognisance to see the case through. In these circumstances, the trial could not proceed and the prisoner would be acquitted of the offence. Where all the required actors were in place, the trial (petty) jury had to listen to the evidence, and make the crucial decision of guilt or innocence, or decide to find the prisoner only partially guilty of the charge and subject to a lesser category of punishment. The judge frequently guided the jury and on occasions interjected to assist the prisoner make his or her case. Some prisoners were aided by lawyers, who could also change the course of events. After the judge had pronounced sentence on the prisoner, the victim and the jury could ask for mercy to be shown, and, at the end of the Sessions, the judge could remit or change the sentences of as many convicts as he saw fit.

Beyond this public stage of the process, the decision-making for London and Middlesex convicts technically rested with the King in Council, where the royal prerogative of mercy could be exercised. The Home Secretary and his Home Office servants took the lead in this stage of the decision-making, handling the papers of all capital convicts, and all appeals from convicts sentenced to other punishments. They could consult the Old Bailey Judges and the City of London Recorder and follow up some of the appeal factors.<sup>67</sup> They were also responsible for a growing number of bureaucratic decisions about the release of prisoners from overcrowded incarceration facilities. Even beyond this point, we will see that decisions which could make life more bearable for some offenders after sentence was an extensive exercise for one 'victim', the Bank of England.

#### **Main sources:**

The main sources for this thesis have been the records of the English criminal justice system. For the earlier stages of the legal process, limited random sampling of the records of summary and quarter sessions courts in London and Middlesex was carried out since courts at this level did not have jurisdiction over the felonies studied in this thesis. Records from these lower courts, in particular from the Middlesex and Westminster Quarter Sessions, exist in copious amounts, but they have, so far, received little systematic attention.<sup>68</sup> The sampling was carried out to determine the gendered nature of their operations and the different types of male and female behaviour which might be viewed there. So far as the crimes against the Bank of England were concerned, the Minute Books of the Bank's Committee for Law Suits, together with the

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<sup>67</sup> S. Devereaux, 'The Criminal Branch of the Home Office'; *idem*. 'The City and the Sessions Paper: "Public Justice" in London, 1770-1800', *Journal of British Studies*, 35, 1996, pp. 466-503.

<sup>68</sup> Records held in the London Metropolitan Archives and in the archives of the CLRO. See Chapter 2 for discussion of evidence from this sample.

papers of the Bank's Solicitors, Freshfields, have provided a unique insight into decisions about prosecutions for crimes against the currency during the period of the Restriction. Limited evidence from the London newspapers about cases in the lower courts has been added to these more substantial records.

For the next stage of the judicial process - the Old Bailey trial, the verdicts and initial sentences - the so-called Old Bailey Sessions Papers, which record in more or less detail all the hearings in this court - have been used. Research on the development of the Old Bailey Sessions Papers, from pamphlets sold on the street or in clubs, to their possible use as factual background in appeal cases, suggests that, by the period considered here, some weight can be placed on their accuracy in reporting what occurred in court.<sup>69</sup> Since the late seventeenth century, every trial which took place was reported in pamphlets, collected and bound in annual volumes – 'The Whole Proceedings on the King's Commission of the Peace, Oyer et Terminer and Gaol Delivery for the City of London and also Gaol Delivery for the County of Middlesex held at the Justice Hall in the Old Bailey' - known as the Old Bailey Sessions Papers. These narrative accounts, taken down in shorthand by an officially appointed publisher who paid a licence fee to the Lord Mayor of London, were an early species of periodical journalism, 'true-life' stories of crime and criminals. They went on sale on the streets within days of the end of the Sessions, providing interest and amusement for a lay readership. Since contemporary newspapers contained little in the way of trial reporting, and other legal records cannot provide systematic evidence and certainly no narrative stories, these records are of enormous value. The emphasis on the factual detail of the stories told by witnesses for the prosecution and by the defendants make this source extremely important for a survey such as this which needs to explore

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<sup>69</sup> S. Devereaux, 'The City and the Sessions Papers'.

qualitative detail and narrative. The Sessions Papers would be of little use to lawyers, since they omitted much of the interaction of judge and jury. On the other hand, their accounts are reliable to the extent that if they record that something was said, it was; it was never fictionalised. Since they were for the interest of the public, reports of cases which were thought to be sensational - murder, gang crime, unusual thefts and most cases with sexual overtones - were accorded many more words than less interesting hearings. The quasi-official status of the Sessions Papers from an early stage required from their publishers a duty of 'completeness'. This completeness was important, especially from the last decades of the eighteenth century, when the Sessions Papers were used to assist decisions made by the King in Council on convicts' appeals for clemency in capital cases.<sup>70</sup> Naturally, in an adversarial system of justice, the stories told by the various participants cannot be taken at face value, as 'true' accounts, as each had their own interests to defend. However, it is the undisputed detail about lifestyle, method of working, and attitudes expressed in court which provide such uniquely valuable material about the activities of offenders and the gendered nature of crime.

For the stage of the process where appeals were considered and sentences changed or confirmed, use was made of a variety of official sources: the Home Office records which list prisoners committed and held for trial at the Old Bailey, the outcome of their cases, their sentences and their initial disposal on removal from Newgate; records of executions; records of removal to transport ships, or to hard labour on the 'hulks'.<sup>71</sup> None of these records can be relied on for accuracy or completeness, particularly after about 1815. Official records of the appeals system have then been

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<sup>70</sup> Devereaux, 'The City and the Sessions Papers' passim; Langbein, 'Shaping', pp. 17-20.

<sup>71</sup> PRO: Criminal Registers for London and Middlesex, HO 26 series, 1791-1833; Newgate Calendar, HO77 series, London and Middlesex 1782-1833; Criminal Entry Books, HO13 series, 1813-1816; Convict Transportation Registers, HO11 series, London and Middlesex prisoners 1787-1834.

used. London and Middlesex appeals were handled differently from those from the rest of the country, for which there are rich resources in the reports from trial judges to the Home Secretary, giving their reasons for their sentencing. The odd London case appears amongst these, but this is unusual. London and Middlesex cases were dealt with in a more ‘on the spot manner’, at meetings of the King in Council. Reasons were not generally recorded for decisions made, although an interim decision was sometimes noted on the letters of appeal. The same records provide an important glimpse into the increasingly bureaucratic and systematic nature of an administrative system under stress, as more mechanisms were put into effect for automatic pardoning of offenders.<sup>72</sup>

The records of the Bank of England provide additional insights on what happened to convicted prisoners after they had left the public eye of the court. Of particular interest is the large collection of correspondence in the Bank solicitors’ archive between the Bank and ‘its’ convicted prisoners, which permits an unusually intimate view of gendered discretion.<sup>73</sup>

### **Structure of thesis:**

This follows the chronological journey of men and women through the criminal justice system: the law itself; the summary stages of the law; the public trial on indictment, the verdict and sentencing at the Old Bailey; the alterations made to sentences beyond the court arena, the use of the death sentence; the pardoning and remission system. The core question at all stages is: what part did gender play – in the crime itself, and in the decisions which were made about justice?

In Chapter 1, I consider whether English criminal law was gendered in

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<sup>72</sup> PRO: Home Office Petitions HO17 series, 1819-1836; Register of Petitions, HO19 from 1819; Correspondence Book for Pardons HO 13, 1812-1815; Judges Reports, HO47 series, 1820-1823.

<sup>73</sup> Bank of England archives: Committee for Law Suits (BECLS) Minutes, and Freshfields Solicitors’ papers.

nature, and if so, how. Did men and women start out as equals in the eyes of the law, expecting equality of judicial treatment? Although the civil law notion of *feme covert* was largely irrelevant legally, how far did it, and the legal excuse of marital coercion, affect judgement in cases under criminal statute law? Since the law describes rather than prescribes the rules of a society, it is necessary to consider the effect of the power structures in that society, and how power was exercised by men who made decisions on criminal justice.

In Chapter 2, consideration is given to the pre-trial processes of offences in London and Middlesex. A limited sample from the lower courts of London provides evidence that offences with which women were charged differed significantly from men's offences. The Bank of England records allow a more systematic view of decision-making about currency offences at this stage of the journey. These records are interrogated to discover the nature of men's and women's activities, and to consider the extent to which the Bank made gendered decisions to indict or discharge a prisoner. The exceptional issue of plea-bargaining is examined - a device used effectively by the Bank to allow capital sentencing to be avoided.

Chapters 3, 4 and 5 address each of the three capital crimes in turn - shoplifting, pickpocketing, and Bank note offences - as offenders reached trial on indictment at the Old Bailey Sessions. The stories told in court are considered to see what can be learned of the identity, occupation and life-style of the offenders. The nature of the verdicts and sentences are examined. I question whether differences emerged between men and women committing ostensibly the same crime. Were there gendered differences in method, time and place of operation such that verdicts and decisions could not fail to be different between male and female?

Chapter 6 looks beyond the public trial, verdict and initial sentence, to consider whether the process, in its later stages, became more or less gendered. As far as possible, the men and women tried for the three selected crimes are followed to find out what happened in the end, whether lenience was exercised in a gendered way, and, if so, reasons for it. Executions for these crimes were relatively few, especially for women, so the executions of all women in London in this period are considered (as far as they can be discovered). Why did the state shrink from executing women? If it was so averse to female execution, why did it execute the few that it did?

In Chapter 7, examination is extended to focus on how the men and women sentenced for serious crime used the appeals and pardoning procedure. How did a system, which was becoming more bureaucratic and less discretionary, respond to their appeals? By way of contrast with the State appeals system, the letters written to the Governors of the Bank of England by the men and women in Newgate and other prisons, awaiting transportation, requesting a variety of mitigation, money, practical assistance, and alterations in their conditions have also been studied. The remarkable response of the Bank of England raises questions about why this institution should have adopted different attitudes to 'its' prisoners on grounds of their gender.

Chapter 8 provides a summary of the findings of the research. As should be expected, the reasons for decisions affecting men and women involved in the three crimes reviewed were a complex mix. The research method used reveals and emphasises this complexity. Scrutiny of the three selected groups of illegal activity enables us to see how decisions could be affected by the differences and distinctions between male and female behaviour (especially in shoplifting and pickpocketing), how they may be influenced by similarity of behaviour and the public's changing views of the seriousness of a particular crime (currency forgery crimes). The systematic approach

which has followed men and women convicted of these crimes, where possible, to the final outcome of their journey through the justice system, allows us to see that discretion was exercised variably at different points in the system. In addition to the effect of gendered behaviour on judicial decisions, these decisions are seen in wider focus, against the background of the power structure in the justice system and the needs of State. Broader reasons for judicial decisions emerge. In summary, the crimes and the offenders studied, are seen through the three important filters: of different gendered behaviours, of the patriarchal construction of the system of criminal justice, and of the entirely pragmatic needs of the State to adjust sentencing and punishment. Each filter provides a view of a highly gendered process. The strongest explanatory feature for this emerges as one of 'difference and distinction' – difference of behaviour expected of men and women, and difference in judicial and administrative attitudes towards men and women when the expected gendered behaviour was perceived.

## Chapter 1

### The Female Sex - the Great Favourite of the Laws of England

#### **Introduction:**

The three property crimes which are the subject of this thesis – privily stealing in a shop, privily stealing from the person, and offences connected with the circulation of forged Bank of England notes - are not, on the face of it, gendered felonies. They are unlike the various crimes and misdemeanours which were specifically gendered – infanticide, rape, witchcraft, prostitution, for instance. At the other end of the scale, felonies like murder, burglary, robbery, horse- and cattle-stealing involved few women. The crimes for this study were selected because they should not create an obvious gender bias. With a level playing field at the start of the journey through the judicial process, these three crimes might reflect some kind of gender equality.

The first step to understanding the operation of gender in crime and the justice system is an examination of the law itself. ‘Law makes claims to neutrality, to objectivity, and to universality. Law speaks for us all...’ but ‘what if discretion, prejudice, opinion and sentiment are an inevitable part?’<sup>1</sup> This chapter questions whether gender was a significant weighting factor in the law, whether there was gender fairness and equality, and whether the law was ‘gender-blind’ in its neutrality, objectivity and universality.

#### **Wives with no legal existence, and women who were coerced:**

From at least the 12<sup>th</sup> century to the early 20<sup>th</sup> century, English lawyers sought to explain and justify, through legal device, doctrine and treatise, the disabilities and

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<sup>1</sup> S. Edwards, *Sex and Gender in the Legal Process*, London, 1996, pp.1-2.

subordination of women, particularly married women, which were visible around them.

The law is an institution of state which enshrines the status quo. The eighteenth-century legal commentator, William Blackstone, discussing the theory of 'marital unity', wrote:

we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.<sup>2</sup>

Edward Christian, who edited and annotated Blackstone's Commentaries between 1800 and 1830, disagreed. In 1830, he inserted a printed exclamation mark in the margin at this point, noting:

Nothing, I apprehend, would more conciliate the good will of the student in favour of the laws of England, than the persuasion that they had shown a partiality to the female sex. But I am not so much in love with my subject as to be inclined to leave it in possession of a glory which it may not justly deserve... and I shall leave it to the reader to determine on which side is the balance, and how far this compliment is supported by truth.<sup>3</sup>

Christian set out several of a married woman's disabilities,<sup>4</sup> concluding:

From this impartial statement of the account, I fear there is little reason to pay a compliment to our laws for their respect and favour to the female sex.<sup>5</sup>

The much-quoted passage from Blackstone, 'forever ringing like a bell to summon women to a wailing wall or to gird themselves for battle',<sup>6</sup> has been used uncritically:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything; and is therefore called in our law-french a *feme-covert*, *faemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her

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<sup>2</sup> W. Blackstone, *Commentaries on the Laws of England*, 5<sup>th</sup> edition, Book 1 *The Rights of Persons*, London, 1773, p.445.

<sup>3</sup> E. Christian, (ed.), *William Blackstone's Commentaries on the Laws of England in Four Books*, Seventeenth Edition, London, 1830, p.444 note 23.

<sup>4</sup> For instance he states, in relation to common and criminal law, that if she is killed by her husband it may be held as if she was a stranger; her punishment for treason is more severe than for a man; she is denied benefit of clergy (not so in practice); and in civil law she is subjected to multiple property, testamentary, inheritance and personal disabilities.

<sup>5</sup> Christian (ed.), *Blackstone's Commentaries*, Seventeenth Edition, p. 445.

<sup>6</sup> M. Doggett, *Marriage, Wife-beating and the Law in Victorian England*, London, 1992, p.66.

*baron*, or lord; and her condition during her marriage is called her *coverture*.<sup>7</sup>

The common law practice of *coverture*, or the concept of marital unity, which Blackstone describes, does not directly explain gender discrimination in cases under the criminal law. The legal description, with its powerful thinking about women and their rights and duties, legitimated and justified a system of male dominated economic and social control, deeply embedded in the English way of life, a system which can properly be described as patriarchal.<sup>8</sup> The system, in practice, shifts and changes in structure and function, and adapts to various pressures and demands. However, it is essentially hierarchical, depending on the subordination of subject to monarch, servant to master, religious inferiors to their superiors, son to father, women to men, and, in particular, wives to husbands. It defines both public and private relationships. Further, such a hierarchy within the familial sphere was invested with ontological meaning, mirroring early Christian ideas about God, kingship and patriarchy. However, understanding of the way in which English law created, justified or described the position of women in society was by no means unanimous. For instance, the concept of marital unity did not receive universal support, and was not universally applied in legal and judicial settings.

Whether the concept was myth, fiction, or mere description, its dogma could be applied through the common law in civil, property matters. It was modified in equity law. It was not directly applicable in common law or statute criminal matters. In the

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<sup>7</sup> Blackstone, *Commentaries*, 5<sup>th</sup> Edition, p. 442.

<sup>8</sup> I use the wider definition of 'patriarchy' in this thesis. See Lerner, *The Creation of Patriarchy*, p. 239: 'The manifestation and institutionalisation of male dominance over women and children in the family and the extension of male dominance over women in society in general. It implies that men hold power in all the important institutions of society and that women are deprived of access to such power'. The long-term debates about, for instance, whether it is correct to call a system of male domination 'patriarchal' (in view of e.g. race and class oppression) have been taken into consideration. This thesis cannot enter those debates, but my view is that, in a consideration of the institutionalising of the dominant system through the law, the concept of 'patriarchy' is the appropriate term to use. See arguments in Scott, *Gender and Politics*; Kingsley-Kent, *Gender and Power*, esp. pp.5-54; Mies, *Patriarchy*, esp. pp.36-38.

criminal law arena, a different legal device – that of ‘marital coercion’ – might, in specific circumstances, be available to married women, because of their civil subjection to their husbands. Marital coercion was a category of the legal excuse of ‘civil subjection or compulsion by another to perform a criminal act’. It is the appropriate feature to consider in criminal cases. The excuse of marital coercion, as a defence presumption, could be used only in limited situations. These are revealed only through detailed examination of individual court cases. In the types of cases studied here, the excuse was not often used in court, and gave married or cohabiting women little protection.

#### **The ‘feme covert’ and the power of the myth of marital unity:**

It is hardly likely that powerful men - lawyers, judges, juries, government servants, members of parliament, or any man with some property and a wife – would, consciously, separate the discriminatory legal devices relevant to common, civil law, from those relevant to the criminal law. The theoretical powerlessness of married women, sanctioned by law, was taken for granted as the model for all women, single, married, widowed, young or old, rich or poor.<sup>9</sup> ‘Coverture’, the collective label for women’s legal disabilities brought about through wifeness, was a system which could affect all women, married or not. Systems of economic and social organisation, of course, change with time and the needs of society. The English system throughout most of the middle ages was based on a military covenant, putting women at a disadvantage. Although the system was modified in practice by the eighteenth and nineteenth centuries, it has to be considered if the position of women and the law is to be understood. Land had been gifted, and protection and other rights bestowed, by a land-

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<sup>9</sup> Doggett, *Marriage*, particularly chapters 2 and 3.

holding feudal superior, in return for provision of armed service on the part of a man. The effective working of such a covenant depended on physical strength, year round availability and freedom from other responsibilities. None of this could women unequivocally offer. If women were given undisputed rights to inherit land, the system would collapse, with power dispersed and uncertain. Such a system also required that men had control over familial reproduction to establish male primogeniture. This system, monarchic and patriarchal, prevailed, with legal extensions and modifications from time to time.<sup>10</sup> A means of giving legal justification to a husband's power was effected through the dogma of marital unity.

In England, the concept of marital unity can be traced at least to the twelfth century. It has featured in the writings of every major common-law commentator since.<sup>11</sup> It underwent changes over the years to fit the needs of the times,<sup>12</sup> but proved remarkably persistent. At the end of the nineteenth century, some legal historians dismissed the idea as a useless, meaningless abstraction, at odds with legal reality.<sup>13</sup> In the twentieth century, it was held to be a doubtful legal principle, sheltering or concealing the invalidity of certain strictures held to be rules of law.<sup>14</sup> Yet there has never been an official renunciation of the concept, although, in 1981, the Court of Appeal held that it should no longer be regarded as an effective part of the common law of England.<sup>15</sup>

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<sup>10</sup> See P. Strohm, 'Treason in the Household', pp.121-144, in *idem. Hochon's Arrow: The Social Imagination of Fourteenth-century Texts*, Princeton, 1992, for a revealing study of the meanings behind the 1352 Statute of Treason, which encapsulates the model of hierarchy providing protection for men against the 'treason' of their wives at a time of social unrest and change. See particularly p.125.

<sup>11</sup> For synopsis see Sir F. Pollock & F. Maitland, *History of English Law before the Time of Edward I*, Oxford, 1895, Vol. I, pp.465-468, Vol. II, pp.397-434.

<sup>12</sup> For instance, for Bracton's views of marital guardianship and his more relaxed attitude to wifely disabilities and criminal excuses, see *On the Laws and Customs of England*, Book 3, chapter 32, translation S. E. Thorne, 1968, Cambridge, Mass.

<sup>13</sup> Pollock & Maitland, *The History of English Law*, Vol. I, p. 465.

<sup>14</sup> M. Lush, *The Law of Husband and Wife Within the Jurisdiction of the Queen's Bench and Chancery Divisions*, Fourth edition, London, 1933.

<sup>15</sup> *Midland Bank Trust Company Ltd. v. Green* (No.3) (1981) 3 All E.R. 744.

## Gender discrimination in legal treatise, maxim and precept:

William Noy's legal textbook, much used in the eighteenth and nineteenth centuries, demonstrated how lawyers constructed advice on legal principles.<sup>16</sup> Forty-eight maxims of the English Law were set out. Among them: 'the law favours some persons'; 'the law favours a thing which is of necessity'; 'the husband and wife are one person'; 'all that a woman has appertains to her husband'; and 'the will of a wife is subject to the will of her husband'. Those whom the law 'favoured', or treated as non-culpable or excused full responsibility for illegal action, were: 'men out of the realm or in prison, women married, infants, mad-men, men without intelligence, strangers', and one who does things 'in the right of another person'. The 'things which are of necessity' included obedience. As late as 1845, the view was little challenged that 'where baron and feme commit a felony, the feme can neither be principal nor accessory (sic) because the law intends her to have no will, on account of the subjection and obedience she owes to her husband'. Examples given for the other Maxims mentioned related entirely to estate, property, land covenants, purchases during marriage, indentures, and the whole panoply of civil and contract law issues, with no reference to the criminal law.<sup>17</sup> This uncritical understanding informed legal opinion, although it rarely prevailed in practice.

To what extent, then, did understandings of the idea of marital unity, a common law concept, have an effect on the administration of criminal justice? Some decisions in the property crime cases studied in this thesis suggest that the concept was influential, but that its effects did not operate consistently. Sometimes women benefited from decisions which saw womankind as weak, subordinate, and lacking agency. Sometimes

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<sup>16</sup> W. Noy, *The Principal Grounds and Maxims with an Analysis of the Laws of England*, H. Henning, (ed.), Third American edition from the London Edition, 1845, Burlington, VT.

<sup>17</sup> *ibid.* pp.29-37.

they were harmed. The discourse reflected different shades of opinion. Blackstone had expressed a Pauline, sacramental, rather than legal, understanding of marriage, with use of one flesh and one-person language.<sup>18</sup> Bracton on the other hand had held that woman (not only a wife) was inherently inferior.<sup>19</sup> In treatises written in the early part of the nineteenth century, the presumed suspension of the legal existence of a woman during marriage or at least its incorporation or consolidation into that of the husband, was seen as being for the protection of both parties; that the man should be made safe from her injuring him by disposing of his land, and that the woman should be saved from his exerting influence over her should she have land to dispose of. It was felt that great inconvenience would be experienced through departure from this code of behaviour.<sup>20</sup> Breaches of the peace would occur without adherence to such a code. Legal power had to be vested in the husband because he was the stronger:

Give but the legal authority to the wife, and every moment would produce a revolt on the part of the husband, only to be quelled by assistance from without... They who from some ill-defined notion of justice or generosity would extend to women an absolute equality, hold out to them a dangerous snare.<sup>21</sup>

Even this writer admitted that there had to be limits to this code, otherwise women would be reduced to a state of 'passive slavery', when they stood in need of legal protection because of their 'weakness and softness.'<sup>22</sup> On the other hand, this dogma intended a man to have total power and control over his wife. There remained questions about whether the unequal power relationship had been deliberately created by the law itself, as if the law had an independent existence apart from the men who made it, or

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<sup>18</sup> Shared by the author of *The Laws Respecting Women*, London, 1777, p. 23.

<sup>19</sup> Bracton, *On the Laws and Customs*, Vol. 2, p. 31: 'et differunt feminae a masculis in multis, quia earum deterior est condicio quam masculorum'.

<sup>20</sup> For instance, R.S. Donnison Roper, *A Treatise on the Laws of Property Arising from the Relation Between Husband and Wife*, London, 1820; J. Clancy, *A Treatise on the Rights, Duties and Liabilities of Husband and Wife at Law and Equity*, London 1827.

<sup>21</sup> P. Bingham, *The Law of Infancy and Coverture*, London, 1816, p.162.

<sup>22</sup> *ibid.* p. 164.

whether inequality was an inevitable consequence of women's weak nature which the law was forced to recognise.<sup>23</sup> There is no evidence, before the twentieth century, of any understanding that the law did not create but only justified, explained and consecrated an existing system of power in which men held land and property, including their wives and children, which they would be unwilling to sacrifice.

The seemingly watertight structure of the principle of *feme covert* was breached in legal practice in a variety of situations. For instance, in relation to 'contracts, debts and injuries', Blackstone admitted that man and wife could be seen as two distinct persons (albeit the women remaining inferior), and that in the ecclesiastical courts a woman might sue and be sued without her husband:

Yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary.<sup>24</sup>

Having painted a bleak portrait of women's legal situation, the legal pundits qualified what they had written.<sup>25</sup> Blackstone described so many small deviations to the dogma, that we may wonder how the system depending on the concept of marital unity did not fall apart. However, that is to suppose it was a coherent system and not a descriptive fiction or myth. Additionally, a woman, as a separate person, could do a civil wrong, although her perceived position under the law and her property disabilities might mean that she was not in a position to be penalised.<sup>26</sup>

As more work is done by historians on the various means by which married women evaded the strictures of coverture, we can see that its effect was not monolithic.

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<sup>23</sup> For instance, Doggett, *Marriage* p. 42.

<sup>24</sup> Blackstone, *Commentaries*, Fifth edition, p. 444.

<sup>25</sup> M. Finn, 'Women, Consumption and Coverture in England, c. 1760-1860', *The Historical Journal*, 39, 3, (1996), p.703-722 suggests that the law of necessaries was one of the most significant of the qualifications of coverture within the law itself.

<sup>26</sup> Doggett, *Marriage*, pp 44-45, and note 52, p. 156.

Despite the ideology behind the legal literature, women (mainly, but not only, elite women), found ways of using their husbands' credit, carved out for themselves a major role as consumers, manipulated marriage settlements, created independence in marriage, used the consistory courts, the small claims courts, instruments of equity, and judicial separations to their advantage.<sup>27</sup> This indicates that the legal disabilities of married women were less sweeping and more partial and contested than legal treatise would suggest. Nonetheless, the learned legal minds of the late eighteenth and early nineteenth centuries would have been guided by legal treatises, and there can be no denying the strength of the dominant view of the subordinate position of married women. This view in turn affected how all women were seen.

#### **The excuse of 'marital coercion' and the criminal law:**

In Christian's 1830 edition of Blackstone's Legal Commentaries, we can read that: 'in criminal prosecutions, it is true, the wife may be indicted and punished separately, for the union is only a civil union'.<sup>28</sup> Chitty's popular criminal law textbook of 1816 instructed that anyone and everyone was liable to arrest to answer an alleged or suspected crime, adding that: 'The exemptions which exist in civil cases here cease to operate. Thus a married woman, when she has committed an offence...is liable to be apprehended...'.<sup>29</sup> Even so, many lawyers felt that there was a lack of clarity about the situation of married women in relation to criminal law charges.<sup>30</sup> However, the men and women who were prosecuted through the criminal justice system were, for the most

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<sup>27</sup> Among contributions to the debate: Vickery, 'Golden Age to Separate Spheres?'; L. Bonfield, *Marriage Settlements, 1601-1740: the Adoption of the Strict Settlement*, Cambridge, 1983; S. Staves, *Married Women's Separate Property in England 1660-1833*, Cambridge, MA, 1990; A. L. Erickson, *Women and Property in Early Modern England*, London, 1993; Finn 'Women, Consumption'.

<sup>28</sup> Christian, *Blackstone's Commentaries* 17<sup>th</sup> edition, p. 443.

<sup>29</sup> J. Chitty, *A Practical Treatise on the Criminal Law* in 4 volumes, London 1816, produced in selection in 5 volumes by D.S. Berkowitz & S. E Thorne, London, 1978; p.12.

<sup>30</sup> For instance, Sir J. Fitzjames Stephen, *A History of the Criminal Law of England*, Volume 2, London, 1883, p. 105 on the law on co-ercion.

part, people for whom the property-orientated principle of coverture had little practical meaning. As a judge put it in the middle of the nineteenth century: ‘The law supposes that everything is in the property of the husband and that the wife is under his control. But in point of fact, in the lower positions of life that possibly may not be the case at all.’<sup>31</sup> The cases considered in this thesis are evidence of that view. However, the question remains as to how far the assumptions behind the law could be ignored, even if lawyers and judges were unsure of them.

‘Marital coercion’ was one of a group of ‘incapacities or defects’, under the heading of ‘civil subjection’, categorised in most criminal law textbooks. Such defences or excuses had the uncertain nature of legal presumptions, and a different philosophical justification from the principles of coverture and marital union. They could be used only in limited and particular circumstances. There were three main categories of incapacities or defects which might exempt people from legal penalties - natural, accidental and civil incapacities.<sup>32</sup> One – infancy – was a natural defect. Three were accidental defects - dementia, casualty or chance, and ignorance. There were four civil defects - civil subjection, compulsion, necessity and fear. In cases of crime or misdemeanour, where proceedings should lead to punishment, the law ‘in some cases and under certain temperaments takes notice of these defects, and in respect of them relaxeth or abateth the severity of their punishments’.<sup>33</sup> Civil subjection meant the subjection of wife to husband, although lawyers appeared uncertain as to its scope.<sup>34</sup>

The uncertainty was summarised, and parodied, in the latter part of the nineteenth century:

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<sup>31</sup> Blackburn J. Quoted in C. Conley, *The Unwritten Law*, p.69.

<sup>32</sup> Hale, *Historia Placitorum Coronae*, ed. Dogherty, chapter II.

<sup>33</sup> Ibid. Ch. II.

<sup>34</sup> Ibid. Ch. II. ‘Tho’ in many cases the command, or authority of the husband, either express or implied, doth not privilege the wife from capital punishment for capital offenses; yet in some cases the indulgence of the law doth privilege her from capital punishment for such offences, as are in themselves of a capital nature.’

As regards marital compulsion, the law is at once vague and bad as far as it goes. It is as follows: 'If a married woman commits a theft or receives stolen goods, knowing them to be stolen, in the presence of her husband, she is presumed to have acted under his coercion, and such coercion excuses her act; but this presumption may be rebutted if the circumstances of the case show that in point of fact she was not coerced. It is uncertain how far this principle applies to felonies in general. ... It does not apply to high treason and murder.... It probably does not apply to robbery... It applies to uttering counterfeit coin... It seems to apply to misdemeanours generally... It is hardly necessary to point out or indeed to observe upon the defects of this rule. It admits indeed of no defence, but I think it is capable of a historical explanation....'<sup>35</sup>

Lawyers believed that the excuse of marital coercion, seen as an example of 'modern' judicial practice, grew up because judges wished to give to married women in criminal cases some sort of rough equivalent for the benefit of clergy enjoyed by their husbands. Others, like Blackstone, explained the practice as a natural consequence of the theory of marital unity. Because of his lack of interest in criminal law, he has done historians a dis-service by inaccurately summarising the situation: 'In some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment, even for capital offences. And therefore, if a woman [commits such an offence] by the coercion of her husband or even in his company, which the law construes a coercion, she is not guilty of any crime'.<sup>36</sup>

This inaccurate view was repeated by other lawyers. East suggested that the general rule in cases of felony presupposes the wife to act under her husband's coercion.<sup>37</sup> However, from case law and case reports, it can be shown that the excuse of marital coercion was possible only in very limited circumstances, too few to provide an explanation for the different treatment of women in criminal cases. In cases

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<sup>35</sup> Stephen, *History of the Criminal Law*, Volume 2, Chapter XVIII, p.105. See also the confusion in *Laws Respecting Women*, p.71.

<sup>36</sup> Christian, *Blackstone Commentaries* 17<sup>th</sup> edition, p. 27. It was admitted (p.28) that this rule had its exception for crimes '*mala in se*' and 'prohibited by the law of nature, as murder and the like'.

<sup>37</sup> East, *Pleas of the Crown*. Similarly, *The Laws Respecting Women* turns the presumption of coercion into a supposition, p. 70.

considered in this thesis for instance, the Bank of England as prosecutor knew the limits.<sup>38</sup> The scope of the coercion defence was unclear, and legal commentators disagreed about it. Most agreed that it extended to most ordinary felonies - burglary, larceny, housebreaking, receiving stolen goods, arson and forgery, and perhaps robbery. There was doubt about manslaughter, but all agreed that it could never apply in cases of murder or treason. Some of the difficulty is demonstrated in the following argument:

If the husband and wife together commit larceny [sic] or burglary... both are guilty; and so it hath been practised by some judges... and possible in strictness of law, unless the actual co-ercion of the husband appear, she may be guilty in such a case; for it may many times fall out, that the husband doth commit larceny by the instigation, tho' he cannot in law do it by the coercion of his wife; but the latter practice hath obtain'd, that if the husband and wife commit burglary and larceny together, the wife shall be acquitted, and the husband only convicted... And accordingly in the modern practice, where the husband and wife, by the name of his wife, have been indicted for a larceny, or burglary jointly, and have pleaded to the indictment, and the wife convicted, and the husband acquitted; merciful judges have used to relieve the wife before judgement, because they have thought, or at least doubted, that the indictment was void against the wife, she appearing by the indictment to be a wife, and yet charged with felony jointly with her husband. But this is not agreeable to law, for the indictment stands good against the wife...<sup>39</sup>

### **In his sight – in his power: a limited defence opportunity:**

For the excuse of marital coercion to be available to a woman, she had to commit the crime in her husband's presence. She could not be presumed to have been coerced if she had only been instructed, bullied or threatened with abuse for disobedience. If she could additionally prove her husband's presence, coercion might be presumed. A leading case involved John and Sarah Morris. Sarah was charged with forging, uttering and publishing as true a forged certificate for prize money, due to be

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<sup>38</sup> See Chapter 2.

<sup>39</sup> Hale, *Historia Placitorum Coronae*. There was similar lack of clarity in respect of cases of misdemeanour. Some lawyers believed it applied to some misdemeanours, some that it never applied to non-indictable offences, and some that it may have applied to all. See Doggett, *Marriage*, pp. 52-53. *The Laws Respecting Women* excludes use of the defence in relation to treason, murder or robbery, p.71.

paid to her father, a naval petty officer, by the Seamen's Hospital in Greenwich. Her husband was charged that 'he did invite, move, counsel, aid, abet, charge and procure' Sarah to commit the forgery and the uttering. Sarah applied at the Hospital for the prize money of £30 with her forgery, purporting to be signed by the true winner. She had to return a few days later as the money had not reached the Hospital office. Meantime, her paper had been found false. Sarah and John were apprehended. Their landlord said he had heard John order Sarah that 'she must go for the money', and he believed 'she went to receive it in obedience to her husband's orders'. In order to make use of the excuse of marital coercion, John had signed a paper stating that Sarah had acted entirely under his orders and directions. Counsel for the couple argued that, as Sarah had acted under the control and direction of her husband, she could not be found guilty. Then John could not be found guilty as accessory, if she was innocent as a principal. The jury found them both guilty of capital felony. The view of the twelve judges was sought and the convictions were held sound. Sarah was seen to be fully implicated, and that whatever her husband had suggested or ordered she did, she was not under his control when she went to utter the forgery.<sup>40</sup>

The Bank of England's cases at the Old Bailey against Jane and John Graham in 1782 provide another view of the limitations of the excuse of marital coercion. The Grahams were indicted on eight capital charges of bank note forgery, the main one involving defacing a £15 note to make it appear a £50 note. Early in the hearing, their counsel raised the matter of Jane as a married woman. The newspaper report on the case read like an inaccurate legal textbook. 'The jury could not convict the prisoners, even if they believed the evidence proved, because in all cases short of treason

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<sup>40</sup> W. Oldnall Russell & E. Ryan, *Crown Cases Reserved for Consideration, and Decided by the Twelve Judges of England from 1799 to 1824*, London, 1825, R. v. Sarah Morris and John Morris, Kent 1814, pp.270-274.

and murder, where it appeared that a criminal action had been performed by a man and his wife, the woman was acquitted, from a presumption that what she had done was by the influence and direction of the husband'. Without informing his readers of the facts, the reporter moved quickly on:

The judge summed up the evidence with great precision and clarity and in regard to the point of law, he told the jury, that in all such cases where the husband and wife acted in coercion [*sic – presumably co-operation*] then indeed the law was so tender in behalf of the woman as to presume that she acted under an influence and compulsive force from the husband. But then she had no such advantage in the present case; what she had done appeared to have been a voluntary act; her husband was not present, even though he might have commanded her to utter the note in question, yet as soon as she was out of his sight, she was out of his power, and might have claimed the power of the magistrate to defend herself.

The jury asked if there were such a rule or presumption affecting married women. The answer was that 'a presumption is raised from the humanity of the law' if it might be presumed that she committed the offence 'under the dominion and authority of her husband'. The judge said that if the woman had been 'the active person', her degree of guilt was the same; moreover, if she was not in her husband's presence then she had no 'privilege'. The facts of the case showed a long marriage, nine children, the husband freshly out of prison, and the forgeries long planned between John and Jane. John had probably altered the notes, but had not 'put them off'. 'The whole of that is left to the conduct and management of the woman'. Jane had uttered the notes in Westminster and was apprehended in Southampton with more forged notes and experimental prints. There was no evidence of uttering against John, although he may have been near Jane when she did so. Both were capitally sentenced.<sup>41</sup>

On the other hand, there were many cases where the circumstances of the crime, or the judge's attitude, or both, resulted in a simpler legal decision. James and Mary Barrett, man and wife, were indicted in 1821 at the Old Bailey for stealing 'a great

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<sup>41</sup> OBSP 11 Sept 1782, pp.510-521; *The London Chronicle*, Sept 14/17 1782.

quantity of articles and wearing apparel' from the house of the master for whom Mary worked as dairy maid. The stolen property was found in the Barrett's house. James had been at Mary's master's house frequently in the time leading up to discovery of the theft. In his defence, he said he knew nothing about the property. Mary affirmed his story. The judge told the jury that there was an important question, 'which was, as both could not be convicted (being man and wife) which one was the thief?' The jury decided it was James and acquitted Mary. Neither the recorded court decision nor the newspaper report explains the legal basis for the verdict. The facts of the case as reported showed that Mary was fully involved in the stealing and the receiving of the goods. It was typical of verdicts in which juries showed leniency towards women, where they were able to convict a man of the offence.<sup>42</sup> 'Ordinary' people were aware of the excuse of marital coercion and tried to use it where they thought they could, whether they were entitled to or not.<sup>43</sup>

The effect of coverture and of the excuse of marital coercion continued to be scrutinised throughout the nineteenth century. It was decided that that the 'bare command' of the husband was insufficient to excuse the married woman.<sup>44</sup> Only at the end of the nineteenth century was it admitted that 'no presumption shall be made that a married woman committing an offence does so under compulsion only because she commits it in the presence of her husband'.<sup>45</sup> The presumption of marital coercion was not removed from legal precept until 1925.<sup>46</sup>

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<sup>42</sup> *The Times*, Oct 27, 1821.

<sup>43</sup> V. Edwards, 'The Case of the Unmarried Spinster: an Alternative Explanation', *American Journal of Legal History*, 21, 1977, p.260-265.

<sup>44</sup> Bingham, *The Law of Infancy*. 'If the feme covert commit theft of her own voluntary act or by the bare command of her husband, or be guilty of treason, murder or robbery in company with, or by coercion of her husband, she is punishable as much as if she were sole.'

<sup>45</sup> *Brown v. Attorney General of New Zealand* (J.C, 1898 AC).

<sup>46</sup> 'Any presumption of law that an offence committed by a wife in the presence of her husband is hereby abolished, but on a charge against a wife for offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of the husband.' Criminal Justice Act 1925.

## **Gendered judicial and penal practices:**

Notwithstanding the deeply gendered philosophy of the law, the judicial system of the eighteenth and nineteenth centuries retained a small number of specifically gendered practices. As far as women were concerned, these derived directly from their position under the common law of England. They included precedents which made it difficult for a wife to prosecute her husband. Spouses could not give evidence against each other. This worked for both men and women, although the majority of the case law dealt with wives' testimony, and was concerned with the chaos that could be caused in the patriarchal household if a wife gave evidence against her husband.<sup>47</sup> In practice, however, there were many examples of wives giving evidence against their husbands. When the Bank of England prosecuted forged note cases, a husband or a wife was frequently used as a witness for the prosecution of their spouse. The 'ordinary' criminal nature of these cases and the plebeian class of the people involved might explain why such a procedure was not seen as remarkable or threatening to social order.<sup>48</sup>

There were other activities, which, had the marriage not existed, might have been regarded as criminal. For instance, a wife and husband could not be found guilty of conspiring with one another. Further, it was held not to be larceny for a wife to take her husband's possessions without his consent, as she was not in a position to know what was his. Conversely, he could not steal from her, because she had nothing after marriage which could be stolen. A wife could protect her criminal husband without being an accessory after the fact; but a husband in a similar situation in relation to his wife was not permitted to protect her, and this again was because she was seen to be

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<sup>47</sup> Christian doubted the notion of marital union/one flesh used by Blackstone (and others) to justify the inability of a wife to give evidence against her husband. He did not believe in the propriety of the law ever ruling out crucial evidence in any kind of hearing: Note 20 to page 443 of the 17<sup>th</sup> edition of Blackstone, *Commentaries*.

<sup>48</sup> See Chapters 2 and 5.

*sub potestate viri*.<sup>49</sup> Perhaps a more honest view of the situation was that it was ‘a technical distinction for which there seems no just reason’.<sup>50</sup>

A further gendered practice relating to the offence of ‘petit’ treason was not abolished until 1828.<sup>51</sup> This offence was committed when a servant killed his or her master or mistress, when an ecclesiastic killed his or her religious superior, or when a wife killed her husband. All these relationships were held to embody obligations of duty, subordination and allegiance, similar to the feudal obligation of a man to his sovereign.<sup>52</sup> Not only was husband-killing considered a more serious crime than any other class of murder, but, until the end of the eighteenth century, women guilty of petit treason were punished differently from murderers in general, and from males guilty of petit treason. They were sentenced to be burned alive, whilst males were to hang. In practice, many of the women were more mercifully killed before the flames burned them, but this was not always the case.<sup>53</sup> The offence of coining counterfeit specie of money came within the category of petit treason (coin bore the image of the sovereign), and the executions of a number of women at the end of the eighteenth century drew adverse comment.<sup>54</sup> For men, the punishment for petit treason was ‘very solemn and terrible’ - drawing, hanging, disembowelling, decapitation and quartering - unless the monarch discharged the punishment to hanging only, but:

the punishment is milder for male offenders... in treasons of every kind the punishment of women is the same, and different from that of men. For, as the natural modesty of the sex forbids the exposing and publicly mangling of their bodies, their sentence (which is to the full as terrible to sense as the other) is to be drawn to the gallows and there to be burned alive.<sup>55</sup>

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<sup>49</sup> Hale, *Historia Placitorum Coronae*. 2:46.

<sup>50</sup> East, *Pleas of the Crown*, p. 559.

<sup>51</sup> Offences Against the Person Act 1828.

<sup>52</sup> Strohm, ‘Treason in the Household’.

<sup>53</sup> R. Campbell, ‘Sentence of Death by Burning’.

<sup>54</sup> For instance, the burnings/executions in London of Phoebe Harris (1786), Margaret Sullivan (1788), Christian Bowman (1789).

<sup>55</sup> Blackstone, *Commentaries*, 5<sup>th</sup> edition, p.93.

However, in theory at least, from the early nineteenth century, there was no other differential approach specified in law for men and women, save one. A man who killed his wife, having witnessed her in the act of adultery, could be held to be guilty of manslaughter, not murder, whereas a wife acting under similar provocation would have no such defence. An explanation for this difference was given in the early twentieth century - the husband's right to control his wife, whereas she had no such right over him.<sup>56</sup>

Where a woman had been sentenced to death by a criminal court, and could show, to the satisfaction to a Jury of Matrons, that she was 'quick with child of a quick child',<sup>57</sup> she could 'plead the belly' and have her execution stayed until after the birth of the child. This had been the practice in English law since at least the twelfth century. In the late eighteenth century, the decision of this jury could be particularly important, since such a stay of execution could be the prelude to a conditional pardon, with substitution of a secondary punishment; however, this might not always be so.<sup>58</sup> This relatively formal practice was significantly in decline by the last two decades of the eighteenth century. From 1780 to 1800, of 180 women sentenced to death at the Old Bailey, only four pleaded their bellies, at a time of increasing likelihood of a death sentence being carried out. Of the four, the jury of matrons found only one pregnant. By 1800, the appearance of the jury of matrons had become a rarity. Even so, since 1720, the number of women who made this plea, and verification of it, was extremely small. Oldham finds that the jury of matrons was called once each in 1825 and 1830.<sup>59</sup>

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<sup>56</sup> *R. v. Greening*, (1913) 3 KB 846; Bray J.

<sup>57</sup> J. Oldham, 'On Pleading the Belly: A History of the Jury of Matrons', *Criminal Justice History*, 6, 1985, pp.1-64 refers to the ' quaint language of the jury charge', (p. 1) which is taken from *The Office of the Clerk of Assize*, Rev. ed. (1660; London, 1681).

<sup>58</sup> King, *Crime, Justice and Discretion*, p.282; Beattie, *Crime and the Courts*, p.431; Oldham, 'On Pleading the Belly'.

<sup>59</sup> Oldham, 'On Pleading the Belly', Appendix 1, pp.34-37.

Gaining time in this way was of great value, but a successful pregnancy plea was not tantamount to a pardon, certainly not if the London records are anything to go by.<sup>60</sup>

A further difference in the penal treatment of men and women concerned whipping. Males and females could be sentenced to be whipped for non-capital offences, as their sole punishment, or in combination with other punishments, notably imprisonment. The use of whipping was also declining, although not steadily, from the last decades of the eighteenth century into the nineteenth century, for reasons associated with availability of other punishments and developing penal policy.<sup>61</sup> King has explored the reasons for the incidence of the use of flogging in Essex at the turn of the century, including the sensitivities which changed attitudes to public flogging. The public flogging of women had been largely abandoned by the 1750s. In 1817, the law specified an end to it. In 1820, private flogging of women was also proscribed, although it continued for men - publicly into the early nineteenth century, and privately well into the second half of the nineteenth century.<sup>62</sup> The highly gendered sentiments of the 'feeling classes' were expressed by the poet, Coleridge, in 1811:

We were in hopes, that with the progressive refinement and increased tenderness of private and domestic feelings ... this unmanly practice of scourging females had gradually become obsolete and placed among the Inusitata of the law dictionary. It is not only the female herself, who must needs ... be grievously injured in the first sources and primary impulses of female worth, - for who will deny, that the infamy which would attend a young woman from having been stripped naked under the lash of a townswoman (*sic*), would be incomparably greater, and have burned deeper in, than what would accrue from her having been detected in stealing half a dozen loaves? We are not shocked for the female only, but for the inflictor, at the unmanliness of the punishment itself. Good God! How is it possible that man, *born of a woman*, could go through the office ... the woman is still woman, and however she may have debased herself, yet that we should still shew some respect, still feel some reverence, if not for her sake, yet in

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<sup>60</sup> Ibid. pp.19, 21, 28.

<sup>61</sup> King, *Crime, Justice and Discretion*, pp. 262-6, 272-3.

<sup>62</sup> Gatrell, *The Hanging Tree*, 336-8; King, *Crime, Justice and Discretion*, p.286.

awe of that Being, who saw good to stamp her in his own image, and forbade it ever, in this life at least to be utterly erased.<sup>63</sup>

### **Conclusion: The male world of the criminal law:**

Any suggestion that the statute law itself was gendered would have been met with incredulity. 'The empire of law is masculinist, the application of legal rules have been recognised as masculinist, but the argument that the method of law itself is masculinist is not so readily conceded.'<sup>64</sup> Women feature less in written legal theory than they do in practice in the courts. 'Man' means 'woman' simply by saying so, as the lawyers often tell us, although the experiences of women are seen as otherwise irrelevant to the law, or rarely given the blessing of the law. Where women's activities are authenticated by the law, they appear to remain specifically feminine and without universal applicability. 'How, for example, can the partial defence of provocation founded on what reasonable men do in the face of adversity truly absorb reasonable women and their reaction to adversity?'<sup>65</sup> The subjective view of the reasonable man is constituted as universal, although it rests on subjectively selective facts and views.

When many categories of serious crime are considered, it is apparent that the lawmakers had in mind activities that were carried out by men. The crime of stealing privily from the person is a good example. The audacious thieving of gangs of men in public places in the sixteenth century caused sufficient concern for this to be made a capital offence. Yet it was used to prosecute more women than men, women who did not act in a way which resembled the behaviour originally feared.<sup>66</sup> The Bank of

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<sup>63</sup> S. T. Coleridge, letter to *The Courier* 13 May, 1811, 'Punishments - the Scourging of Women', printed in *Essays on his Own Times forming a second series of The Friend*, Vol. 3, ed. by his daughter, London, 1850, pp.762-6. Note reference to the lash being administered by a 'townswoman' when he questions how 'man, born of a woman' could do this – one of the many examples of confusion caused by the use of gender exclusive language – i.e. 'man' for 'human' or 'man and woman'.

<sup>64</sup> Edwards, *Sex and Gender*, p.6.

<sup>65</sup> *Ibid.* p.3.

<sup>66</sup> Chapter 4.

England, setting up its prosecution strategy to prevent and punish the forgery of low value Bank notes, found that the statute trapped large numbers of women utterers who faced the death penalty, when male forging gangs had been the target. The Bank was impelled to seek the passing of new statute law to provide an offence of possession which did not attract a capital sentence.

From the beginning of a journey through the judicial system, women and men did not share level ground. The understanding of the place of women in English society, justified in legal treatise, precept, instruction and practice, was discriminatory. This understanding necessarily affected the operation of the criminal code. Here women could be provided with excuses and compensation for their behaviour, which reinforced their subordinate position and their perceived weak natures. It was possible for the law and the judicial system to excuse and ignore female criminal behaviour, and for the system to work to women's advantage up to a point. However, beyond that point there was no shelter. Women who threatened the hierarchical economic and social structures were unlikely to receive any advantage. Women embarked on a journey where the rules were written to control unwanted male activity. Criminal women were something of an aberration. Sometimes they could be dealt with leniently, because of their weakness and their need to be protected. Sometimes they could be mercilessly disposed of, since they undermined the reasoning behind male chivalry, paternalism and patriarchy.

However, this gendered system did not operate consistently. The men and women in trouble with the criminal law were not the sort for whom the nice distinctions, and the need to defend and conform, created by property ownership, inheritance, marriage or marriage settlements, had much meaning. The decision-makers in the justice system knew that too. Their reactions would often be coloured by the understanding that the people they were dealing with were people of little or no

property, who would not subscribe to the same codes of practice. At the same time, the system of justice in England was built on discretion – in prosecution, in bringing in verdicts, in sentencing, and, to an even greater extent, in pardoning, and setting aside sentences. Everywhere the judicial system allowed discretion. The penalty structure was largely devoid of any appearance of system or principle. This was the subject of debate in the early nineteenth century, between those who sought to maintain judicial discretion and those seeking to develop a system in which the punishment fitted the crime.<sup>67</sup> The rooms of the criminal justice system were furnished with ‘variations, depending on the peculiar notions of policy entertained by different individuals, or their firmness or resolution of mind’.<sup>68</sup> Men and women faced a ‘system of eking out imperfect justice by irregular mercy’.<sup>69</sup>

Having established an unequally applied system of law, which it is appropriate to describe as patriarchal, the gentlest interpretation of the practice of gendered discretion may be one in which men were concerned to protect women – a practice of judicial paternalism. Sometimes paternalism may be interpreted as ‘chivalry’, which suggests a degree of respect for women. However, paternalism is contingent upon women displaying behaviour appropriate to the requirements of the decision-makers, and is about power relationships; it reflects women's social and legal inferiority to men and emphasises their putative need to be supported, guided and protected. Paternalism is little more than a particular mode or subset of patriarchal relations.<sup>70</sup> Judicial decisions, variations, peculiar notions, and ‘irregular mercy’ were as much influenced by an offender’s gender as by any other consideration. The journey through the judicial

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<sup>67</sup> D.A.Thomas, *The Penal Equation: Derivations of the Penalty Structure of English Criminal Law*, Cambridge, 1978; idem. *Constraints on Judgement: the Search for Structured Discretion in Sentencing 1860-1910*, Cambridge 1979.

<sup>68</sup> Thomas, *The Penal Equation*, p.20.

<sup>69</sup> Lord Penzance, *Hansard* 20 April 1870, c1150, quoted in Thomas, *Constraints on Judgement*, p. 38.

<sup>70</sup> K. Daly, ‘Rethinking Judicial Paternalism: Gender, Work-Family relations, and Sentencing’, *Gender and Society*, 3, 1989, pp. 9-36; Lerner, *The Creation of Patriarchy*, p.239.

system did not start on level ground for women and men. The uneven-ness of the starting point did not always advantage women. The inherent gendered nature of the law was therefore not the only, or perhaps even the predominant factor which predicted the course of the journey. However, its influence was always present.

## Chapter 2

### From Apprehension To The Old Bailey

#### **Introduction:**

The crimes of shoplifting, pickpocketing and forged bank note uttering, defined as felonies, were tried on indictment in the higher courts of the country – at the Assizes, or, for London and Middlesex, at the Old Bailey Sessions, held eight times a year. The passage of men and women suspected of these felonies through the rooms of the criminal justice system, towards trial on indictment at the Old Bailey, was uncertain and uneven. Their journeys depended on their chances of being detected, arrested and detained; then upon the willingness and ability of victims to press charges, the availability of witnesses, the agreement of magistrates to pass the prisoners from the summary court to the higher court, and, finally, the grand jury finding a ‘true bill’ against them. Magistrates and justices had a responsibility to act as investigating judges, examining cases and committing or bailing a suspected felon for trial.

Pre-trial procedures from the initial contact between victim and accused right up to the grand jury hearing in one of the major courts consisted of layer upon layer of negotiation opportunities and discretionary choices. Magistrates’ hearings need to be seen as part of that broader process: more formal and more subject, in theory at least, to legal regulation and control, but still an interconnected stage in the deeply discretionary and negotiative process that resolved the vast majority of disputes about property appropriation, leaving only a small residue to be dealt with by the judges and jurors of the major courts.<sup>1</sup>

It is beyond the scope of this thesis to explore these layers in detail.<sup>2</sup> The records of the lower courts of London and Middlesex can provide a mass of quantitative data about these early stages of the justice system. However, the task of systematic

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<sup>1</sup> King, *Crime, Justice and Discretion*, p. 125.

<sup>2</sup> The best explorations of general patterns and experiences of the early judicial stages for property crimes are Beattie, *Crime and the Courts*, pp.35-73, 267-313, and King, *Crime, Justice and Discretion*, pp.17-125.

review is not particularly helpful to this thesis, since technically none of the three crimes selected, being capital offences, fell within the jurisdiction of the Quarter Sessions courts.<sup>3</sup> Nonetheless, a brief view of this stage of the process may provide a useful view of the wider picture of criminality in London and Middlesex. Therefore, limited sampling was carried out in the records of summary court hearings in London, and in the records of the Quarter Sessions for Westminster and Middlesex. In this chapter, this evidence is discussed, with particular reference to the influence of gender and gendered behaviour on court appearances and judgements.

By way of contrast with this restricted sample, the second part of this chapter focuses on the records of the Bank of England. These provide evidence about decisions, taken between 1802 and 1834, on prosecutions for forged Bank note crimes at this early stage of the judicial process. The complete and systematic nature of the records provides an unusual insight into the decision-making process of an institutional prosecutor. They suggest reasons for decisions to prosecute or to discharge prisoners, and there is the possibility of showing whether the decisions were affected by considerations of gender or gendered behaviour.

It is also possible to obtain a further view of what happened in London's summary courts from contemporary newspaper reports. The London papers often carried brief references to cases heard at these courts. They provide a less than satisfactory, sporadic, record. However, the third part of this chapter considers the

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<sup>3</sup> London Metropolitan Archives: a) Middlesex and Westminster magistrates' and police court records, almost all from 1840s, with earlier records about licensing matters; b) Sessions of the Peace, Quarter Sessions, and gaol delivery records for Middlesex and Westminster, including: 1. Sessions rolls -1549 - 1889 (MJ/SR) being draft indictments and recognisances; 2. Sessions books 1639 -1839 (MJ/SBB) being calendars, names of jurors; 3. Sessions papers 1716 - 1889 (MJ/SP and WJ/SP) being lists of prisoners for trials and appeals, the odd information and examination. 4. Examinations (i.e. informations and complaints, marked 'depositions') (MJ/SPE and WJ/SPE) from some police/magistrates' courts; 5. Other documents (orders to prison keepers, calendars and lists of cases to be tried, calendars of indictments, copies of Old Bailey sessions books, recognisance and estreat books.) CLRO: Minute Books of the City of London Justices' Rooms, on which current doctoral research is being undertaken by D.D.Gray, University College Northampton.

evidence they give about attitudes to men and women who came before the magistrates.

### **Gender and the 'lower courts':**

Shoplifters and pickpockets who came before the magistrates of London and Middlesex to be committed or bailed for trial at the Old Bailey are, disappointingly, to be traced only with extreme difficulty. They appear relatively rarely among the multitudes of the idle, disorderly, drunk and riotous, or amongst the hundreds of assaults, sexual offences, and petty larcenies. Systematic enquiry (the ground of this thesis) has been impracticable.<sup>4</sup> Nevertheless, a sample of some of the lower court records produces useful suggestions on differences and distinctions between men and women who offended against norms of acceptable behaviour, and of decisions determined by those differences and distinctions of behaviour.

Difference and distinction show clearly in a sample of cases dealt with in the justice rooms of the City of London, during seven months, randomly selected, in 1792, 1801 and 1802. They are analysed in **Table 2.1**.<sup>5</sup> During these months, there were entries in the Minute Books of the Justices' Clerk for 670 separate hearings, 518 (77%) against men, 152 (23%) against women. This gender distribution was similar during all seven months. It was possible to identify the charges in 436 of the men's cases, and in 102 of the female cases. Table 2.1. shows that men's and women's activities dealt with

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<sup>4</sup> The records of the lower courts of London need systematic exploration, as for instance in current doctoral research by D.D. Gray, UCN, on the peace sessions of City of London. See also King, *Crime, Justice and Discretion*, pp.82-125; Beattie, *Crime and the Courts*, pp.268-281, 283-8. The difficulties with these records are well-known, and referred to for the early modern period by S. Hindle, 'The Keeping of the Public Peace', pp.212-248 in *The Experience of Authority in Early Modern England*, P. Griffiths, A. Fox, S. Hindle, (eds.), Basingstoke, 1996; R.B. Shoemaker *Prosecution and Punishment: Petty Crime and the Law in London and Rural Middlesex, c.1660-1725*, Cambridge, 1991; R. Paley, (ed.), *Justice in Eighteenth-Century Hackney: the Justicing Notebooks of Henry Norris and the Hackney Petty Sessions Book*, London Record Society, 1991. A positive view of the records is taken by D. Oberwittler, 'Crime and Authority in Eighteenth-Century England', *Historical Social Research*, 15, 1990, pp.3-34.

<sup>5</sup> Guildhall Justices' Room, Feb.13 to 28, 1792 – GJR/M49 (CLRO); Mansion House Justices' Room, Nov.16, 1801 to Apr.16 1802, Nov.10 to 20, 1802 - MJR/M67/69 (CLRO).

in these courts were strikingly different. Men faced charges for a wider range of illegal or anti-social behaviour, suggesting that the law and local rules, and the ways in which they were interpreted, were directed at male behaviour which was more threatening to social order, and that men had more freedom to commit a wider number of breaches of the law. It may have been that female offensive behaviour was more frequently ignored as less threatening or too minor in nature to take up official resources.

**Table 2.1. Cases dealt with at Mansion House (MH) and Guildhall (GH) Justices' Room, City of London during seven months in 1792,1801,1802**

Type of activity	Male				Female			
	MH	GH	Total	% of males	MH	GH	Total	% of females
Robbery	15	3	18	4%	4	0	4	3%
Petty theft	141	21	162	37%	19	0	19	14%
Major theft <sup>6</sup>	24	7	31	7%	3	3	6	5%
Uttering currency	12	0	12	3%	5	0	5	4%
Fraud	12	6	18	4%	0	2	2	1.5%
Embezzlement	2	0	2	0.5%	0	0	0	0
Receiving	2	0	2	0.5%	0	0	0	0
Refusal to pay <sup>7</sup>	6	1	7	1.5%	0	0	0	0
Assault	80	26	106	24%	14	7	21	16%
Insult	0	2	2	0.5%	0	2	2	1.5%
Disorderly, drunk, etc	35	12	47	11%	45	19	64	48%
Beg, wander, etc	2	3	5	1%	7	0	7	5%
Bigamy, desert family	2	2	4	1%	1	0	1	0.5%
Loiter at PO, lottery office	3	0	3	0.5%	2	0	2	1.5%
Indecency	0	2	2	0.5%	0	0	0	0
Aiding murder	0	2	2	0.5%	0	0	0	0
Deserting master	0	4	4	1%	0	0	0	0
Obstructing highway	0	2	2	0.5%	0	0	0	0
Dangerous driving	1	1	2	0.5%	0	0	0	0
Sell during Divine Service	0	1	1	0.25%	0	0	0	0
Deserting army	0	1	1	0.25%	0	0	0	0
Fail to wear identification	0	1	1	0.25%	0	0	0	0
Watchman failed to attend	0	1	1	0.25%	0	0	0	0
Fishing undersize fish	0	1	1	0.25%	0	0	0	0
<b>Total</b>	<b>344</b>	<b>92</b>	<b>436</b>	<b>100%</b>	<b>102</b>	<b>31</b>	<b>133</b>	<b>100%</b>

Sources: Minute Books of Guildhall and Mansion House Justices' Rooms (GJR and MJR): CLRO

<sup>6</sup> Unable to determine details of this group – it included stealing animals, theft from lodgings and from the person.

<sup>7</sup> Fines, compensation determined by the court for earlier damages, cab fares, licence fees.

Charges against men were mainly in the categories of petty theft (37% of men) and assault (24% of men.) There was a much smaller, though significant, number of women charged in these categories, (14% and 16% respectively). However, a huge proportion of the women (48%) was in court for behaviour described as disorderly, for being drunk, and for using abusive or indecent language. Only 11% of the men were charged in this category. We hear of women charged as ‘women of the town and great Nuisances to the Neighbourhood accosting (him) with indecent language’, ‘noisy and disorderly women’, ‘abandoned women’, prostitutes who wandered abroad, drunk, riotous and abusive. When men were charged with disorderly behaviour, the descriptions were different. They banged on shutters at midnight, passed water in inappropriate places and refused to leave public houses when requested.

It does not require a great leap of deduction to understand why women would be more leniently treated in the summary courts. Their offending behaviour was so different from the men’s. They had not done the same things. They had not offended to the same degree the norms set for male behaviour. Their acts offended norms set for female behaviour, and were seen as less serious. Even this small sample raises speculation as to whether the law is relevant to female behaviour in the same way as it is relevant to male behaviour. It raises questions about whether female behaviour was redefined as a form of deviance which did not threaten order in society. If so, it could then be treated accordingly.<sup>8</sup>

It is not straightforward to follow these cases in the records through to the punishment decisions, since the Minute Books are a record of justice ‘as it happened’. Some offenders were held over to later sessions whilst their stories were verified, witnesses found, and other enquiries made. However, where it was possible to follow

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<sup>8</sup> For a useful ‘modern’ discussion on this issue, see R. Pearson, ‘Women Defendants in Magistrates’ Courts’, *British Journal of Law and Society*, Winter 1976, pp.265-273.

through the cases during three of the seven months, the results were as presented in **Table 2.2**. In these months, there were cases against 91 males (78%) and 26 females (22%). The immediate outcomes were reasonably clear only in the cases of 64 males (74%) and 23 females (26%). The numbers here are rather too small to give a useful

**Table 2.2. Immediate outcomes of cases heard at Mansion House and Guildhall Justices' Rooms (three months during 1792, 1801 and 1802)**

	<b>Male total</b>	<b>% of males</b>	<b>Female total</b>	<b>% of females</b>
<b>Simple discharge</b>	15	23%	7	30%
<b>Reprimand/ discharge</b>	10	16%	9	39%
<b>Remand</b>	22	34%	1	4%
<b>Commit for further trial</b>	5	8%	2	9%
<b>Local prison</b>	2	3%	4	17%
<b>Fine</b>	8	13%	0	
<b>Repay what is owed</b>	2	3%	0	
<b>Total in sample</b>	<b>64</b>	<b>100%</b>	<b>23</b>	<b>99%</b>

*Source: Minute Books of Guildhall and Mansion House Justices' Rooms: CLRO*

overview. However, they reinforce views about lenience shown to women at this stage of the judicial process. This lenience appears, from Table 2.2, to be obvious. If the distinctive behaviours seen in Table 2.1. are taken into consideration, little else might be expected. Both men and women were much more likely in these years to be discharged by the magistrates than punished or handed on to higher courts. A large proportion of men and women appear in the two categories of 'discharge', but the disappearance of 69% of the women (compared with 39% of the men) from the judicial journey at this stage is surely conclusive of decisions based on difference and distinctiveness of behaviour. (Many would reappear when they offended on another occasion.) It is interesting to note that discharged females were more likely than the men to be reprimanded by the magistrate – which suggests a patronising attitude, rather than a seriously concerned response, to female deviant and unacceptable behaviour. The

proportion of men held on remand was high (34%), although many of these would later go free when further information was collected. Equally small proportions of men and women were immediately referred for trial to a higher court. It is also noticeable that women were not fined or ordered to make recompense. This may have been because of their poverty but also because their offences were not in categories where this would have been appropriate.

Small samples from the records from the Westminster Sessions of the Peace, and the Quarter Sessions courts for Westminster and Middlesex provide corroborative data. For instance, **Table 2.3.** analyses cases to be dealt with at the January 1819 sessions for the City of Westminster. The percentages of men and women expected to appear at this session were 70% men and 30% women. Again, males were to appear for a wider

### **2.3. Cases to be handled at Westminster Sessions of Peace, January 1819**

Type of activity	Total	% of all cases	Males	% of males	Females	% of females
Idle, disorderly, threats, breach of peace	50	23%	13	8%	37	56%
Assault	144	66%	121	79%	23	35%
Keeping a bawdy house	9	4%	4	3%	5	8%
Riot	4	2%	4	3%	0	
Selling short measure	1	0.5%	0		1	1%
Buggery	2	1%	2	1%	0	
Beget bastard on parish woman	5	2.5%	5	3%	0	
Rape	1	0.5%	1	0.5%	0	
Nuisance	2	1%	2	1%	0	
Failure to abide by sureties	1	0.5%	1	0.5%	0	
<b>Total</b>	<b>219</b>	<b>101%</b>	<b>153</b>	<b>99%</b>	<b>66</b>	<b>100%</b>

*Source: Sessions Rolls MJ/SR3990; London Metropolitan Archives*

selection of illegal activities than the women. The majority of women were to be charged with idle, disorderly behaviour (56%). Both men and women were charged with high levels of assault, but males were significantly in the lead (79%) over the large group of women (35%). A similar count was made for five Quarter Sessions hearings

for Westminster and Middlesex (1827-1829). The proportion of men to be tried was 79%, women 21%. The majority of cases (59%) involved simple larceny – 57% of the charges against men, 65% of charges against women. The only other activities which emerged significantly for men were assault (16% of men) and fraud (8% of men). For women, the only other significant number of charges involved the uttering of counterfeit coin (13% of women's cases). More work needs to be done on the lower court records to establish whether the evidence of this sample is borne out over time. The patterns shown in the small sample here are coherent. We might expect differences and distinctions between male and female behaviour to be the dominating feature which would go a long way to explaining the differing ways in which they were treated.

### **The Bank of England and decisions to prosecute:**

The Bank of England archives provide a unique and contrasting view of this stage of the criminal justice system.<sup>9</sup> Crimes involving forged bank notes and other currency were legally complex. The Bank, as victim and prosecutor, differed from most prosecutors. Not only was it a powerful national institution, with immense financial and legal resources, but it was also an expert prosecutor of forgery, bringing a large number of cases, unlike the usual individual prosecutor, who would do so only once or twice in a lifetime.<sup>10</sup> This resulted in the development of policy and procedure for prosecution, a

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<sup>9</sup> The Archive contains Minute Books of the Committee for Law Suits (BECLS) from inception in 1802 to completion of major criminal business in 1834. In addition, there is a large collection of papers, mainly concerned with banking matters, but relevant to prosecutions for bank note forgery. These include the papers of the Bank's solicitors (Freshfields) dealing with specific cases, and correspondence between prisoners and the Bank, explored in Chapter 7.

<sup>10</sup> BECLS Minutes show costs for criminal business each half-year. These varied from approximately £114-£150 per person prosecuted at times of high activity (1811-1820), to £380 per person in times of low activity (e.g. 1822). In 1821, there was concern about cost. During 1820, 411 prosecutions cost an average of £149-15s-3d per person. At the Old Bailey, fees paid by the Bank to counsel were £44-1s per case; and for drawing a brief another £51. At County Assizes, four counsel might be appointed, in addition to one standing counsel, who took what the Committee regarded as 'exorbitant' fees (BECLS, M5/325, AB369/2, 21 Mar 1821). Rewards paid in addition to these costs could vary from around £200 each half-year, to £2800 (recorded 27 May 1818 after prosecution of 132 cases, BECLS, M5/320, AB368/1).

unique set of records, providing an unusual insight into discretionary criteria at this stage of the criminal justice system.<sup>11</sup> There is extensive information on all Bank note forgery cases in Great Britain and Ireland from 1802 to 1834, and on cases of counterfeit tokens and other coin for which the Bank had an issuing responsibility. All these activities are considered in this chapter, and on a national scale, since the accuracy and completeness of the records give numbers worth analysing, and compensate for the lack of similar evidence for the other crimes being studied.

The records, although they give only terse information to justify the decisions reached, allow an unusual sense of security in quantifying the numbers of men and women whose depositions were passed to the Bank from magistrates. Decisions by the Bank to prosecute on indictment were carefully recorded. Although reasons for decisions in each case are sparingly noted, it is possible to deduce the Bank's reasons for not prosecuting in many of the cases. However, an institutional prosecutor may ensure its records show decisions in a way that pass political and organisational scrutiny. The Bank records also show how its legal advisors ignored the doctrine of *feme covert* and the excuse of marital coercion.

### **Processing crimes against the national currency:**

The words "promise to pay", inscribed on paper notes issued by the Bank of England, came to be accepted during the eighteenth century as an honourable promise. It was seldom doubted that the bearer would be paid in full from the Bank's funds with gold coin of the British realm. However, the national debt increased steadily during the eighteenth century, and the French wars placed strain on the nation's finances. In 1797, the Bank acceded to the Government's demands to stop paying out gold in exchange for

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<sup>11</sup> R. McGowen, 'The Bank of England and the Policing of Forgery, 1797-1821', (forthcoming).

the Bank's notes. This was the start of the 'Restriction Period', which lasted until 1821. During this period, the Bank issued £1 and £2 notes for the first time to compensate for the shortage of coin. The low denomination notes proved tempting to forgers, and behind this simple fact lies a remarkable episode in the history of crime.<sup>12</sup>

The Bank of England prosecuted over two thousand people between 1797 and 1834 for the capital property crime of forgery.<sup>13</sup> The prosecutions included charges for making and possessing impression plates, tools and special paper; selling and dealing in forged notes; uttering them (getting them into circulation), and, after 1801, when it became a separate non-capital offence, possession of forged notes. From 1802 until 1834, the Bank used a Committee for Law Suits to handle its criminal business. The evidence discussed in this chapter comes from the Committee records, rather than from State records, which are less accurate. The Committee records provide evidence of the size and success of the Bank's prosecuting enterprise. It achieved a high rate<sup>14</sup> of apprehension of criminals and maintained an efficient and effective system of communication up and down the nation. A complex network of police and other public officers did the Bank's will - tempted by large rewards - together with informers and a well-informed constituency of traders and shopkeepers who knew what to do if 'bad'

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<sup>12</sup> Historians of crime have shown little interest in this story, with the exception of R. McGowen, 'Forgery Discovered or the Perils of Circulation in Eighteenth-century England' *Angelaki*, 1, 1994, pp.113-129; 'From Pillory to Gallows: The Punishment of Forgery in the Age of Financial Revolution', *Past and Present*, 159, 1999, pp.107-140; 'The Bank of England and the Policing of Forgery', (forthcoming).

<sup>13</sup> A count in the Minutes of BECLS (1804 to 1834) checked against figures in 'Draft of return of prosecution for forgery on banks for 10 years commencing with the year 1818', MISC.MSS.368.14 (CLRO) gives well over 2000 such prosecuted cases. Added to these would be a few prosecutions between 1797 and 1803. The national figures cited by Gatrell on p.268 of 'The Decline of Theft and Violence in Victorian and Edwardian England' in V.Gatrell, B. Lenman & G. Parker, (eds.), *Crime and the Law: The Social History of Crime in Western Europe since 1500*, London, 1980, (taken from *County Constabulary Commission 1839*) show a misunderstanding of the legal process in prosecuting forged Bank note crimes. He suggests that the ratio of convictions to offences was extraordinarily low, but appears not to have recognised the alternative indictment system of plea-bargaining, allowing the conviction to be for possession rather than forgery or uttering. Also he seems to expect one indictment/conviction for each forged note presented, when an indictment could cite a number of notes.

<sup>14</sup> See note 13 above in respect of Gatrell's figures.

notes were passed to them. The Bank's resources provided for a smooth bureaucracy, with effective record keeping, the finest legal advice, and a system of influence that was irresistible, inscrutable and self-righteous. This was a prosecuting enterprise unlike anything else existing at the time.

The Bank guarded jealously its right to make its own decisions about whom to prosecute and about the nature of the charge. It saw interference from juries, judges, petitioners, magistrates, and members of Parliament, as irritating obstacles to curbing and curing the evil of forgery. The Secretary of State at the Home Office, and the Lord Advocate of Scotland, rebuked the Bank for usurping the prerogative of the Courts, when it went so far as to promise defendants sentences of life transportation rather than death if they pleaded guilty to a capital charge. The rebukes were recorded with no comment.<sup>15</sup> The Bank's system of handling criminal prosecutions was discretionary. The discretion was directed to ensuring its success in the legal confrontation with the prisoner. The outcome of the case in court was all-important, and decisions to prosecute were made with that outcome in mind.

The Directors of the Bank were taken by surprise by the amount of criminal legal business forced upon them by the issue of low denomination notes after 1797. The Committee for Law Suits was set up to manage prosecutions, to give direction as to the retention of Counsel, preferring indictments 'as they may judge expedient'.<sup>16</sup> The Committee, for thirty-two and a half years, carried out these duties supremely well. Above all, it was 'expedient'. Use of this word may suggest lack of underlying policy, a reaction to events and situations, or a response to a short term need. However, the Bank had a policy to which it adhered during the whole of the Committee's existence.

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<sup>15</sup> BECLS M5/320, AB368/1 2 July 1818; M5/321, AB368/2 5 & 9 Feb. 1819; Freshfields solicitors' letters re: R v MacKay in AB71/1, F2/94.

<sup>16</sup> BECLS, M5/307, AB363/3, 7 July 1802.

That policy was driven by the need to detect and punish those believed to be putting the nation, and the Bank, in danger. Successful capital prosecutions of forgers, dealers and utterers were necessary as examples to others. Rather than fail in a capital prosecution, the Bank used an extensive policy of 'plea bargaining'. It preferred alternative indictments and, in theory, with the Courts' agreement, accepted a guilty plea to the lesser, non-capital charge of possession, for which the sentence was 14 years transportation. One way or another, the Bank was determined that it and the country should be rid of people engaged in the evil of forgery. Rather than lose a case, the Bank would not prosecute at all, and required magistrates to discharge suspects. Frequently, a discharged prisoner was carefully watched, and would appear later on a charge for which the Bank felt there was safer evidence. Discretion was largely, if not exclusively, exercised to the benefit of the Bank.

From July 1802 to December 1834, the Committee for Law Suits considered 3054 different cases of criminal activity against the Bank.<sup>17</sup> It read depositions made before magistrates, or letters and statements from police, informers and other witnesses from all parts of the nation. It discussed the evidence and decided whether to bring an indictment against the prisoner. Arrangements were made to send police or solicitors to expedite the next stages of the process. Of the 3054 cases (some involved the same person more than once), 2298 involved males (75%) and 756 females (25%). **Table 2.4.** shows the cases considered (on a national scale) from 1802 to 1834, in three-year groupings. Until about 1811, the numbers dealt with each year were small. Between 1811 and 1822, the number of cases increased hugely, and the involvement of women in these times of prolific forged note activity increased from around 16% to around 28%. Evidence against women rarely related to the activity of producing forged notes. Most

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<sup>17</sup> Cases involving coin, tokens and paper money.

**Table 2.4: Bank currency cases considered for prosecution on indictment by the Bank of England Committee for Law Suits, 1802 to 1834**

<u>Years</u>	<u>Total</u>	<u>Females</u>	<u>Females as % of total</u>	<u>Males</u>	<u>Males as % of total</u>
1802-1804	66	9	14%	57	86%
1805-1807	102	20	20%	82	80%
1808-1810	157	22	14%	135	86%
1811-1813	361	100	28%	261	72%
1814-1816	488	145	30%	343	70%
1817-1819	918	244	27%	674	73%
1820-1822	768	195	25%	573	75%
1823-1825	33	5	15%	28	85%
1826-1828	103	8	8%	95	92%
1829-1831	30	1	3%	29	97%
1832-1834	28	7	25%	21	75%
<b>Totals</b>	<b>3054</b>	<b>756</b>	<b>25%</b>	<b>2298</b>	<b>75%</b>

*Source: BECLS, Minute Books: Bank of England*

note forging was carried out by male artisans in and around Birmingham and Liverpool. Very few London men were forgers. The vast majority of men and women were involved in getting notes into circulation - uttering. Some did so in a major way, in gangs and groups of note sellers, using others to utter them in shops and public houses, and at markets and fairs. This was an activity in which women might be less obtrusive than men. They were just as likely to work for organised gangs as to be working casually. In London and Middlesex, most of the cases against men and women cited the uttering of only a few notes, but often this was likely to have been the tip of an iceberg. Large caches of notes were found in their lodgings when the police or Bank officers carried out a search. Numbers of prosecutions were related to the number of notes in official circulation.<sup>18</sup> The activities of London men and women in this crime did not

<sup>18</sup> The connection between the number of notes in circulation and the level of prosecution suggested by R. McGowen (Seminar paper at Nene College Northampton, 1997) and in his forthcoming 'The Bank of England and the Policing of Forgery'. Until about 1810 when the number of bank notes (£5 and below) in circulation was around 4 million, there were between 3,000 and 5,000 forged notes returned to the Bank. Circulating notes increased to 7 million in 1810, and the number of forged notes climbed to a peak of 30,000 in 1820.

differ greatly from one another.

### **Decisions not to prosecute:**

The great majority of the deliberations on prisoners' cases resulted in decisions to prosecute on indictment. The Committee recorded the type of prosecution. For note offences, this showed whether the charge was capital only, or a lesser charge only (for possession), or the plea-bargaining alternative (if the prisoner would plead guilty to the offence of possessing forged notes, with its sentence of fourteen years' transportation, the Bank would withdraw the capital charge). The results of cases at the end of the Assizes or the Old Bailey Sessions were recorded. In the earlier, more relaxed, years, greater detail was recorded, such as reasons for prosecution, rather than, as later, reasons against - a reflection of the pressure of time and business. In 1802, the decision to prosecute Matthew Power was simply explained: 'he appears to have been extremely engaged in this circulation'. The cases of Matthew and Anna Power from Kent show how gendered discretion was used at this earlier and gentler stage. Matthew had been involved with a major dealer for three years and had been apprehended for uttering a forged £5 note. His wife, Anna, was apprehended with him for uttering another £5, but 'although there is no doubt of her guilt she appeared to have been acting under the influence of her husband'. Five or six years later, the Committee did not have the time to give such detail about its decisions.<sup>19</sup>

In the 3054 cases in the Committee records, a decision not to prosecute was recorded in 505 cases (16.5% of the total). These non-prosecution decisions favoured 324 men (14% of all male prisoners) and 181 women (nearly 24% of all women prisoners). The number of decisions in the women's favour suggests significant gender-

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<sup>19</sup> BECLS, M5/307/1, AB363/3, 7 July 1802.

based discretion. It is, therefore, useful to look more closely at how this gender bias worked, and to consider whether there were other factors leading to such a significant proportion of women escaping prosecution on indictment (at least for the case under consideration). In 434 (86%) of the 505 cases in which there was a decision not to prosecute, the records suggest the reasoning behind the decision. **Table 2.5.** gives an analysis of reasons which can be adduced.

**Table 2.5: Reasons for not prosecuting on indictment in all criminal cases by the Bank of England, 1802-1834**

<u>Reasons for not prosecuting</u>	<u>Total</u>	<u>Women</u>	<u>% of women's non-prosecuted cases</u>	<u>Men</u>	<u>% of men's non prosecuted cases</u>
<b>1. Offence too slight, too trivial</b>	<b>266</b>	<b>106</b>	<b>59%</b>	<b>160</b>	<b>49%</b>
<b>2. Evidence insufficient or defective</b>	<b>79</b>	<b>27</b>	<b>15%</b>	<b>52</b>	<b>16%</b>
<b>3. Legal or procedural problem</b>	<b>19</b>	<b>5</b>	<b>3%</b>	<b>14</b>	<b>4%</b>
<b>4. Other charges pending take precedence</b>	<b>17</b>	<b>7</b>	<b>4%</b>	<b>10</b>	<b>3%</b>
<b>5. Prisoner co-erced/induced/ or instrument of others</b>	<b>18</b>	<b>11</b>	<b>6%</b>	<b>7</b>	<b>2%</b>
<b>6. Wish to use as a witness against others</b>	<b>17</b>	<b>4</b>	<b>2%</b>	<b>13</b>	<b>4%</b>
<b>7. Age – too old, too young</b>	<b>7</b>	<b>3</b>	<b>2%</b>	<b>4</b>	<b>1%</b>
<b>8. Good character</b>	<b>9</b>	<b>1</b>	<b>1%</b>	<b>8</b>	<b>2%</b>
<b>9. Unfit to plead (mental illness)</b>	<b>1</b>	<b>0</b>	<b>0%</b>	<b>1</b>	<b>0.5%</b>
<b>10. Arrest was malicious</b>	<b>1</b>	<b>0</b>	<b>0%</b>	<b>1</b>	<b>0.5%</b>
<b>11. No reason deduced</b>	<b>71</b>	<b>17</b>	<b>9%</b>	<b>54</b>	<b>17%</b>
<b>Totals</b>	<b>505</b>	<b>181</b>	<b>101%</b>	<b>324</b>	<b>99%</b>

*Source: BECLS, Minute Books: Bank of England.*

Two reasons predominate. Most significant is the category where the offence was regarded as too slight or too trivial to warrant prosecution. The other related to situations where evidence to prove the charge was regarded as insufficient or legally defective. Both reasons were connected with the Bank's prosecution strategy, and its over-riding need not to lose cases. Proceeding in trivial cases created a significant risk of losing the case. The Bank also feared its bills of indictment being 'not found' by a

grand jury (see later in this chapter). It wished to avoid negative responses from the petty jury if the evidence on which it placed a prisoner at risk of death, or even fourteen years transportation, appeared to involve the handling of only one or two low denomination notes. In most of the cases rejected for prosecution on grounds of 'triviality', the offence concerned was indeed trivial.<sup>20</sup> Prosecution was also thought inadvisable in cases where the evidence was legally insufficient to prove a case beyond doubt. Examples included uncertainty that the forged note or notes could be traced from hand to hand through the essential narrative of the crime; doubts about the technical specification of the note; the person uttering it being innocent of its nature - or the Bank being unable to prove it was proffered knowingly.

Table 2.5. shows a preponderance of women in the 'trivial' category. It has been almost impossible, from the brief minutes, to detect obvious differences between the activities of the men and women where this reason was noted by the Committee. Women uttered notes extensively as part of their apparently legitimate business - at fairs, in shops and public houses. This resulted, proportionately more often than in the men's activities (where often the passing of notes was in secret meetings and in bulk), in the prosecutor being able only to prove a one-off attempt to pass a note or maybe two. Although some women were involved in major selling networks, it was less common for a woman to utter more than one note in one place at one time. In the majority of cases, women did exactly what men did and were prosecuted in the same fashion. However, a significant proportion of women was involved in a relatively minor way. The degree, rather than the nature, of their involvement may have been an essential factor in the decisions made on prosecution. Such indirect gender-based

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<sup>20</sup> The degree of triviality was defined by the political atmosphere. Towards the end of the period of Restriction, trivial might encompass the uttering of a note of £5 or £10, whereas in earlier years, it related to one or two £1 or £2 notes.

discretion may have resulted in a larger proportion of women escaping trial on indictment. Although some of those who fell into the Bank's hands were members of well-organised networks, and sometimes financially well-off, most of the men and women apprehended for note offences were poor folk, who had found a way of meeting their material needs. Women may have formed a significant proportion of those involved in note circulation in order to make ends meet and it may not be surprising that discretion favoured a higher proportion of women.

Another category worth attention in Table 2.5. is the one dealing with 'coercion' in its various forms. Few people avoided prosecution because of this. This is significant, in view of legal theories about married women.<sup>21</sup> The excuse of coercion was more likely to be used in women's favour than men's. However, the infrequency with which it was used is particularly significant. The seven men in this category were said to have been coerced by, or to have been instruments of, other men. The eleven women were induced or coerced by, or were the instruments of, a more varied group of people. In four of the eleven cases, coercion was said to have been by a husband or by a man with whom they cohabited. In one other case, a woman was said to be coerced by a casual male acquaintance; in three more cases, by an agent of the Bank; in one case by a servant; and in the two remaining cases by the women's mothers.

Anna Power, excused from prosecution on the grounds of being her husband's instrument, has already been mentioned as an early instance of gender-based discretion. However, other cases demonstrate a different attitude to married women, or men and women working together. The objective was successful prosecution rather than leniency to women. Joseph Kaye, the Bank solicitor, attending Warwick Assizes in August 1805, had to make a speedy decision on a husband and wife, George and Ann

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<sup>21</sup> See Chapter 1.

Smith, taken into custody just before the hearings began. He preferred a joint indictment against them for possessing blank notes, a separate indictment against George for the same offence, with additional charges against him for procuring a printing plate, forging a £1 note and uttering it. Only this last offence was capital. George offered to plead guilty to the other three charges, if the fourth was dropped. Kaye agreed, since his witnesses to that charge were 'very exceptionable characters', and he feared losing the capital case. Since his aim was achieved, he requested Ann be discharged, 'appearing to have acted solely under the direction and influence of the other prisoner and their marriage being ascertained'.<sup>22</sup>

When Mary Radford, and George and Joseph Ennever were apprehended for uttering forged notes in Bath in January 1807, George Ennever escaped. Radford, who lived with the two men, although they all affected to be strangers when caught, agreed to give evidence against Joseph. She was not prosecuted, and the record states she was 'an instrument' of the men, having lived as George's wife for some months. It is more likely that Mary had her liberty in exchange for information leading to a successful capital case against her brother-in-law.<sup>23</sup> Scrutiny of the Committee's work over many years shows that 'discretion' was often the reward for an outcome beneficial to the Bank.

One of the very few cases of discretion on grounds of marital coercion involved Mary Canvin. The Bank decided to prosecute her in January 1812 for uttering counterfeit Bank tokens in Birmingham. Five months later, she was still in custody awaiting trial, having petitioned against prosecution, stating that she received the tokens from her husband, who, as soon as she was apprehended, deserted her and their four children and went 'to the country' with another woman. He and the woman had since

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<sup>22</sup> BECLS, M5/307, AB363/3, 20 Aug 1805.

<sup>23</sup> BECLS, M5/307, AB363/3, 22 Jan 1807.

been apprehended, and convicted for uttering other counterfeit Bank coins. The Bank without further discussion agreed to comply with Mary Canvin's request and ordered her removal from custody. Her story was checked and the Bank was satisfied that justice had been done.<sup>24</sup>

The Bank's practical attitude to prosecution was further demonstrated in the case of Mary Rowland, a travelling hawker, in custody in Bath in August 1812, for passing off false Bank tokens, covered in silver paper to look like buttons, which she sold from her tray. Rowland and two female companions were well-known to the magistrates as extensive traders in 'bad' tokens – 'notorious characters of this neighbourhood and well-known at our Sessions'. The magistrates' clerk wished 'to spare no pains in bringing the offenders to punishment for they are most notorious'. He sought the Bank solicitor's advice on how to proceed. He informed the Bank solicitor that Mary Rowland was married, and that he had sent to Bristol where she lived to find out her husband's name as he intended in the indictment to describe her as his wife. The Bank solicitor replied, 'As we should not suppose the Prisoner would be advised to plead in abatement, you may describe her in the Indictment as a Spinster although she is in fact a married woman and it is therefore unnecessary to trouble yourself about the description of her husband'.<sup>25</sup> In February 1816, the Bath magistrates' clerk wrote to the Bank about Catherine Trotman, 'one of a notorious gang of coiners at Bristol; several of whom came to the Bath Fair yesterday'. He was not happy about dealing with her marital status. She was the wife of William Trotman, wine drawer of Bristol, and he proposed to change the indictment to give this information. The Bank solicitor responded, 'The description of the Prisoner as a spinster is no objection, as if she pleads guilty to the indictment she cannot take any advantage on the ground of her being a

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<sup>24</sup> BECLS, M5/311, AB365/1, 29 Jan 1812; M5/312, AB365/2, 13 May 1812.

<sup>25</sup> Bank of England, Freshfields papers, AB215/15.

married woman; and there is no probability of her pleading in abatement, as in that case she may be immediately indicted again by her correct description. We seldom indict a woman as a married woman'.<sup>26</sup> A woman's civil status was of no interest to the Bank as prosecutor. Its legal advisers knew how limited were the circumstances permitting use of the excuse of marital coercion. At the very least, the husband would have had to be in the immediate presence of his wife, and she would have had to act under his instruction.

The Bank's legal advisers worked with reasonably water-tight cases. They were not prepared to lose cases on trivial or ill-founded evidence. It is interesting to see how successful they were in this as far as grand jury hearings were concerned.<sup>27</sup> The number of rejected bills in Bank cases was extremely small.<sup>28</sup> This could have been because the Bank cases were well prepared. On the other hand, the members of the grand jury may have been ill-equipped to challenge the technical complexity of the charges, or they may have thought that forging of the currency was so heinous an activity that the cases must go to the petty jury. It was only during the years of maximum activity in Bank note forgery cases, from April 1818 to September 1821, that any bills were 'not found' in Bank cases.

**Table 2.6.** shows the details, separated for London and Middlesex, and the rest of the country, for these years of high activity. The proportion of female defendants was

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<sup>26</sup> Bank of England, Freshfields papers, AB 217/7, F24/45.

<sup>27</sup> For grand juries at the end of the 18<sup>th</sup> and beginning of the 19<sup>th</sup> centuries, and changes taking place, see Beattie, *Crime and the Courts*, esp. pp.318-335, 400; also idem, 'London Juries of the 1690s', pp.214-253 in J.S. Cockburn & T.A. Green, (eds.), *Twelve Good Men and True: The Criminal Trial Jury in England 1200-1800*, Princeton, 1998.

<sup>28</sup> Beattie, *Crime and the Courts* pp.401-403, found that the grand jury threw out 'significant numbers' of bills at the Surrey Assizes (1660-1800). However, he attached 'little significance' to the fact that 92% of forgery accusations were found by the Surrey grand juries between 1600 and 1800. If it is insignificant that 8% of bills were rejected, it makes the Bank of England's success tally extraordinary. Beattie saw 15% of bills marked 'ignoramus' for property offences in Surrey (1660-1800), and 25% for minor personal offences. The grand jury was less likely to reject bills where a capital offence was alleged. King, *Crime, Justice and Discretion*, p.231, found a minimum of about one-seventh of bills brought before the grand jurors of Essex between 1740 and 1805 'not found'.

24%. Amongst the very small number of bills of indictment rejected by the grand jury, women feature proportionately more than men. No specific reason can be adduced for this. One of the more interesting features is the tendency of the grand jury at the Old

**Table 2.6. Bills of indictment ‘not found’ by Grand Juries in Bank of England forged bank note cases (April 1818 to September 1821)**

	<b><u>Total Bills heard by Grand Jury</u></b>	<b><u>Bills not found</u></b>	<b><u>% total bills not found</u></b>	<b><u>Bills against men</u></b>	<b><u>Bills against men not found</u></b>	<b><u>% of men’s bills not found</u></b>	<b><u>Bills against women</u></b>	<b><u>Bills against women not found</u></b>	<b><u>% Bills against women not found</u></b>
<b><u>Assize hearings (i.e. outside London)</u></b>	564	7	1.24%	425	5	1.17%	139	2	1.43%
<b><u>Old Bailey Sessions</u></b>	511	18	3.52%	393	10	2.54%	118	8	6.77%
<b><u>In all courts</u></b>	1075	25	2.32%	818	15	1.83%	257	10	3.89%

*Source: BECLS, Minute Books: Bank of England.*

Bailey to throw out more bills than their counterparts in other areas of the country – 3.52% of cases compared with 1.24% in other regions of the country. They also did so more in favour of women – in 6.77% of bills against London women (compared with 2.54% of London men, and 1.43% of women elsewhere in the country).<sup>29</sup> These figures raise interesting questions. It is possible that the Old Bailey rejection rate was higher because the grand jury here was more used to dealing with forged note cases than juries in the rest of the country, and could spot a defect in a case. Perhaps the high number of cases brought by the Bank for offences in London and Middlesex in these years meant that its bill drafting was less meticulous. The proximity to each other of Bank and Old Bailey might have emphasised animosity between Bank and the men of the grand jury,

<sup>29</sup> Beattie, *Crime and the Courts*, p.403-4. Grand juries in Surrey (1660-1800) were also more likely to send men rather than women to trial. See his Table 8.2, p.404. This was noticeable in cases involving murder, fraud and certain property offences, but not forgery.

although, since their ranks would have included many with business interests in London, they might have been expected to wish to see forged note utterers indicted. The difference between the proportion of women's cases where no true bill was found at the Assizes and at the Old Bailey is also puzzling. The decisions of the grand juries cannot be explained solely on grounds of gendered discretion. Other factors were at work. Grand juries were known to consider issues beyond the facts of specific cases – the needs of the prosecutor and the perceived broader needs of society would have influenced their judgements. The grand jury was not engaged in administering the law in the interests of a narrow and abstract ideal of justice, but to pursue a more general aim of preserving order and harmony in society.<sup>30</sup> The knowledge jurors had about defendants, their understanding – technically and politically - of the alleged crime, and the influence of character and circumstance, were part of the decision-making process, in which gender issues played a part.

### **Men and women operating together:**

Men and women often operated together in activities involving forged bank notes. This was unlike their behaviour in many other property crimes.<sup>31</sup> It is possible to compare how the Bank made its decisions to prosecute men and women operating and apprehended together. This provides the only chance to see men and women in sufficient proximity in order to make a direct comparison of what happened to them when they were dealt with as co-perpetrators of crime. This comparison covers married couples, cohabiting couples, men and women as members of gangs, and men and women joined in the legal process, through the combined reading of depositions against them, or facing joint indictments. **Table 2.7.** shows that 218 men and 203 women were grouped

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<sup>30</sup> Ibid. pp.403, 405-406.

<sup>31</sup> See Chapters 3 and 4.

or coupled in this way. In the first place, proportionately many more women appear in mixed sex groups than men do (if we recall that, overall, the proportion of women involved was 25%). This is an unusual feature, but particularly important in Bank note crime. The surprising finding is that men and women operating together usually

**Table 2.7. Prosecution decisions taken by the Bank of England on men and women operating together (1802-1834)**

<b>Decisions on men and women operating together</b>	<b>Women</b>	<b>Men</b>
Decision to treat the same	171 (84%)	192 (88%)
Discharge	22 (11%)	10 (5%)
Prefer lesser (non-capital) charge	7 (3%)	15 (7%)
Disappear from records	3 (1%)	1 -
<b>Total</b>	<b>203 (100%)</b>	<b>218 (100%)</b>

*Source: BECLS, Minute Books, Bank of England*

received similar consideration at this stage of proceedings. However, in the few cases in which a distinction between men and women was made, the decision went in the women's favour – twenty-two (11%) of the 203 women were discharged without a proposal for prosecution. Ten (5%) of the 218 men were similarly discharged. Where the Bank made distinctions that did not go as far as a discharge, it might seek satisfaction by preferring an indictment for the lesser, non-capital offence. It was more likely to proceed in this way against men than women. These small differences suggest slight leniency towards women, although the similarity of treatment is the much more pronounced feature.

Information can also be extracted which shows whether, within these mixed sex groups, marital status had an effect on decisions to prosecute. Among the 421 people in these mixed groups, there were 73 pairs (146 people) who shared a surname because of 'marriage' and not for any other reason. Sharing a surname is not taken to mean the

existence of a legal marriage.<sup>32</sup> In forty-five (62%) of the 73 relationships, the decision on prosecution was the same for both partners. In the other twenty-eight (38%) of the 73 relationships, one of the couple was more leniently<sup>33</sup> treated by the Bank - not always the female. In seventeen cases (23% of the total relationships), the decision went in favour of the women, and in eleven (15%) the men were favoured. The numbers are small, but show that discretion was not exercised in one direction only. The proportion of married women benefiting from more lenient decisions was greater than that of men, but to a surprisingly small extent. The suspicion must be that lenience was shown to the spouse or partner who could be of most help to the Bank in ensuring a watertight case against his or her partner. Most married/cohabiting couples were treated equally at this stage of the judicial process. Married women were rarely protected by the effect of marriage itself.

#### **‘Inappropriate’ womanly behaviour:**

The Bank rarely let slip its circumspect institutional cover. As demonstrated already, it is not easy to read meaning into the brief entries in its prosecution records. Occasionally, the Minutes of the Committee spoke of men or women being ‘notorious’ utterers or dealers, but it was left to local solicitors and magistrates’ clerks in correspondence with the Bank to be less opaque. An insight into attitudes to women involved in currency crimes was provided in the case of Hannah Skelton, who tendered a bad three shilling token to a shopkeeper in Clare, Suffolk, in September 1812. She was brought before General Elvies, justice of the peace, who ‘ordered that some women

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<sup>32</sup> In only 21 of the 73 relationships was information given in the records which showed that legal marriage was proved. In the other 52 relationships, marriage was assumed, and the couple was at least known to go about as husband and wife.

<sup>33</sup> ‘Leniently’ means that one of the couple was discharged (13 women, 7 men) while the other was charged; or one was charged with the lesser offence while the other was capitally charged or charged on alternative indictments (2 women, 4 men); or the name of one of them disappears from the whole process (1 woman).

should take her and strip her to ascertain if she had any more token or other bad money about her'. He committed her to gaol and wrote to the Bank: 'she is a woman of very indifferent character... a bad character in my opinion - a proper object to be made an example of, if an example is wanting, for a great deal of bad money has been put off about the Country'. The Bank reminded him that it would take the decision about prosecuting. The offence was a 'misdemeanour', to be heard at Quarter Sessions. The Bank brief gave Hannah Skelton little chance of being found not guilty. She had been in the practice of sending a girl of 10 or 11 years to shops to buy things for her with base tokens. 'We understand the prisoner is a woman of a very base and dissolute character and from the Examinations upon which she has been committed for Trial, we should suppose that she is a common utterer of base coin and counterfeit tokens. The offence for which she is indicted subjects her to one year's imprisonment which is certainly inadequate to deter persons of her description from engaging in so alarming and mischievous a traffic'. It concluded, 'Her conduct is extremely wicked in making a little girl of such tender years the instrument of her Fraud... she certainly deserves a severer punishment than can be inflicted for the present offence'.<sup>34</sup>

The Bank made no secret of the fact that it regarded another woman, Mrs Johnston Cooke, as 'a woman of the greatest possible address, completely hardened in every kind of vice'. The Johnstone Cookes, husband and wife, were involved in a significant Scottish case involving a young woman, Frances Mackay, which drew down the wrath of the Lord Advocate upon the Bank for the way it coerced Mackay to make a confession, to show she had been the Johnston Cookes' means of transferring forged notes to Scotland from Birmingham, where they were well known forgers and dealers. Without Mackay's evidence, the Bank could not prove its case against the couple. The

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<sup>34</sup> Bank of England, Freshfields papers AB216/2.

Bank offered a plea bargain to the Cookes, as it feared failing to prove a capital charge and was desperate to get them out of the country. 'We fear the case against Mrs. Cooke is slight, but it will be a great object to get her out of the country if practicable'. Early in 1819, the cases against the Cookes collapsed after Mackay refused to give evidence. The Bank retaliated by prosecuting Mackay for possession. The Lord Advocate procured a free pardon for her, informing the Bank that it had acted in a manner which was 'improper, oppressive and illegal'.<sup>35</sup>

At this stage of the justice process, the Bank used its discretionary powers to safeguard its own interests. Decisions not to prosecute related to the chances of a successful outcome, and not significantly to other possible choices. The Bank was defensive about the views of Government, the judiciary and the public on the role discretion played in its prosecuting system. Its papers contain several written justifications of its actions.<sup>36</sup> The Bank claimed that it chose the alternative indictments option only if it felt that 'the Public Justice of the Country may be satisfied' with transportation for 14 years. Its policy was directed to successful prosecution and the preferring of indictments which had a reasonable chance of victory in the Courts. It also sought to control the expense of the exercise, and to distinguish petty offenders from the major fabricators and dealers in bad currency.

#### **Plea-bargaining: men's and women's choices:**

Coupled with the decision to prosecute was the offer of a plea bargaining deal, where the prisoner could choose to plead guilty to possession of forged notes, with the almost certain sentence of 14 years transportation, or take a chance with a not guilty

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<sup>35</sup> BECLS Minutes, M5/321, AB 368/2, 10 Dec 1818, 1 Jan, 5 Feb, 9 Feb 1819; Bank of England Freshfields papers AB71/1, F2/94.

<sup>36</sup> For instance, Bank of England F2/84, AB56/10.

plea to the capital charge of uttering. This deal was made before the move into the courtroom. If the former choice were made, the Bank would not prefer the capital charge.<sup>37</sup> In 1820, the Bank, reviewing its annual prosecution figures and costs, commented that, of 411 cases taken to court, 251 (61%) had accepted the plea bargain offer, 111 in 'the country' and 140 at the Old Bailey.<sup>38</sup> The tendency of London and Middlesex defendants to accept the plea bargain is marked. In the main prosecuting years in London (1812 to 1821), the plea bargain offer was made by the Bank in 86% of cases (574 cases). Such an offer was made to 88% of the women (144) and 85% of the men (430). The overall acceptance rate of the offer was 88% (503 cases), men and women accepting in exactly equal proportions.<sup>39</sup> It is difficult to comprehend the calculations these men and women made at this stage of the risky journey to the next room of the criminal justice system. The calculations they made, and the pressures they faced to gamble on the best outcome, appear to have been similar for both sexes. The idea that women might get a better deal from the Court if they pleaded not guilty and told their stories was conspicuously absent from the calculation, perhaps an acknowledgement that their actions were unlikely to be viewed with compassion.

The plea-bargaining system exemplified the Bank of England's determination to win this legal battle against utterers. With such a weight on its mind, it is not surprising that the discretion exercised does not easily fit a gendered explanation. The evidence suggests that women were slightly more leniently treated when it came to decisions

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<sup>37</sup> Plea-bargaining was a rare strategy in felony trials at the time. It receives no attention in Landsman, 'The Rise of the Contemporary Spirit'. See also King, 'Punishing Assault: The Transformation of Attitudes in the English Courts', pp.43-74, *The Journal of Interdisciplinary History*, XXVII, 1996, for the tendency in the late 18<sup>th</sup> century for cases to be over before they got to court because of defendants' confessions (pp.50-1). However, this is a different process. Since the Bank of England used the procedure with little comment as early as 1804, it would be surprising if it had not been used in other felony trials during the 18<sup>th</sup> century. Ignorance of the use of this procedure in such a dramatic way by the Bank of England may be because of lack of interest in the action of the Bank in its criminal cases.

<sup>38</sup> BECLS Minutes, M5/325, AB369/2, 21 Mar. 1821.

<sup>39</sup> See Table 5.2. Acceptance rate of 88% derived from those in category 3 as a percentage of those in categories 3 and 4 combined.

about whether or how to prosecute on indictment. However, evidence of how women carried out their criminal transactions was crucial, and it may have weighted decisions slightly in women's favour. The small differences warn against simple views of gender-biased discretion at this stage in the judicial process. The Bank's performance as prosecutor, and the perceived national importance of the crime, are further reasons for avoiding grouping different types of property crimes when considering the operation of gendered discretion. These crimes were in a special category. The Bank would not be diverted from its specific aim and strategy at this stage in the proceedings by the gender of the offender.

#### **Newspaper reporters and 'interesting' women:**

The London newspapers frequently contained short reports of proceedings in the magistrates' and police courts of the metropolis from which we might hope to find opinions and views of a qualitative nature about the men and women appearing there. However, the reporting is ad hoc, depending on what else of interest was happening in town. Cases were not followed through, and names were often not given – just the description, 'a woman' or 'two females'. One feature of the reports stands out, however. Reporters constantly remarked on the appearance of prisoners and defendants in court, almost as if they were reporting on a society event. It would seem that reporters of the middling sort expected those charged with criminal offences to be a rabble of the lowest type, but instead found that, on many occasions, they were surprisingly like themselves. Descriptions such as 'a miserable old woman with one foot in the grave', 'a very shabby appearing old fellow', a squalid looking short man', 'two girls of the town', 'miscreants' or 'a boy of ragged appearance' were often used. However, on the other hand, simple descriptions - 'decently attired', 'decent looking',

‘genteelly dressed’ and ‘respectable’, were much more frequently used, equally of males and females. There was a group of descriptions usually reserved for females – ‘highly dressed’, ‘somewhat prepossessing’ and the most popular of all - ‘interesting’ - or expanded to comments such as ‘most interesting countenance and demeanour’. The same description could be used of a well-dressed, well-mannered young boy.<sup>40</sup> It is not entirely clear what reporters intended to convey by this much used word. It suggests sexual attractiveness, along with reasonable wholesomeness, someone with whom the reporter would quite like to consort. The word ‘interesting’ emerges sharply from the usually otherwise dull, factual, brief reports and lists of names, in a way that suggests the user is surprised at what he sees. The description of Frances Lisson, tried for larceny, bears this out. ‘Her appearance seemed at once to surprise, and interest the spectators; her dress was tasteful though plain; her figure elegant though emaciated, her manners highly polished and her countenance, which had once been handsome, bearing the deepest impression of anxiety and grief...’<sup>41</sup>

It was rare that titillating copy emerged from the lower courts, but, where it was a possibility, the reports were more expansive. At the Middlesex Sessions, in 1811, Catherine Banning and Hannah Conner were charged with assaulting a man in his own house, an act ‘not only violent, but unprovoked and accompanied by acts of the most unseemly and indecent description... one of these termagent ladies having taken it into her head that the prosecutor was mistaken as to her sex and gender, exhibited herself in a way that can more easily be imagined than expressed, to convince him that she was not

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<sup>40</sup> *London Evening Post*, 1780-2; *St James’s Chronicle (British Evening Post)*, 1780-96; *London Chronicle*, 1780-1832; *Morning Chronicle and London Advertiser*, 1781-93; *Morning Herald and Daily Advertiser*, 1781-86; *Lloyds Evening Post (British Chronicle)*, 1781-2; *Gazetteer and New Daily Advertiser*, 1783; *Universal Register*, 1786; *English Chronicle (Universal English Post)*, 1786; *The Times*, 1788-1832; *The Diary (Woodfall’s Register)*, 1793; *E. Johnson’s British Gazette and Sunday Monitor*, 1795; *The Sun*, 1795-1818; *True Briton*, 1795; *London Packet*, 1795; *The Oracle*, 1795; *Evening Mail*, 1795; *The Daily Advertiser*, 1796 *The London Packet and the Lloyds Evening Post*, 1820; *The London Moderator and National Advertiser*, 1821.

<sup>41</sup> *The Sun*, 23 Feb, 1812.

a hermaphrodite.’<sup>42</sup> Reporters enjoyed poking fun at women who behaved in a way they regarded as ‘unfeminine’. In female assault cases, the headlines were: ‘jealousy’; ‘bickering’; ‘fair Israelite boxing beauties’. Sarcasm, intended to be humorous, was used; for instance, in the case of ‘two ladies’ from a well known haunt of prostitutes – their ‘tumult and spitting in each others faces’ was described as ‘the eloquence of the blue-eyed nuns of St Catherine’s’.<sup>43</sup>

The light-hearted, ad hoc, reporting of cases at the lower courts perhaps matches attitudes to the type of cases heard there, particularly against women. Disorderly, unfeminine behaviour, to be laughed at, derided and looked down upon; expected, and not especially threatening to social order. These attitudes reflect the attitudes of the lower courts to women’s offences which were seen in the samples of the records of those courts. Yet, there is an overall sense of surprise that so many of them seemed ‘decent’, ‘respectable’, and ‘interesting’; perhaps these people were not as depraved and dangerous as society wished to believe.

### **Conclusions - the effect of difference and similarity:**

The evidence discussed in this chapter, despite its diversity, shows that the discretionary and negotiative processes at this early stage of the justice system did not operate transparently in respect of gender and gendered behaviour. However, it strongly suggests that men and women were initially brought into contact with the system of justice at this lowest level for widely differing types of behaviour. The lenience shown to women is, therefore, hardly surprising, as decision-makers measured their behaviour according to male orientated norms of what was acceptable or serious. In samples of cases in the City of London, and the Westminster and Middlesex Sessions of the Peace,

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<sup>42</sup> *London Chronicle*, 11 Jan. 1811.

<sup>43</sup> *London Chronicle*, 29 Oct. 1811.

females were only a quarter or less of the total defendants. They very largely appeared for disorderly, drunk, indecent, abusive language and behaviour. Males generally did not. Males appeared for a much wider range of illegal and unacceptable behaviours. There is evidence here of different attitudes to male and female behaviour in society. The wider range of offences with which men were charged makes the strongest possible suggestion that the law was there to control male, not female, behaviour. Female behaviour was another world. It was not regarded as a serious threat to a peaceful ordered society. The much higher frequency of discharges for females is surely further evidence of a response to this clear difference, and the perception that female offending was less serious, or at least that it did not fit male norms.

The evidence at this early stage of the legal process which was gained from Bank of England's records adds weight to the proposition that difference in behaviour will provoke different responses and decisions. The behaviour of London and Middlesex men and women in the circulation of forged currency was similar in nature and thus decisions about prosecution do not show obvious difference by gender. That women were less likely to be prosecuted in the higher court resulted more from the need of the prosecutor for successful prosecutions. This need affected the discretionary and negotiative process profoundly. Institutional pragmatism over-rode other considerations. This is a reminder of the importance of examining different categories of crime separately. Reasons for the decisions which were made vary, crime to crime. Whereas the nature of the law-breaking behaviour was similar, the degree of offending was more often slighter in women's cases – or rather, the Bank was less able to prove more than trivial forged note uttering activity. This made the Bank averse to the risk of prosecution. A further interesting feature was the similarity of male and female decisions to accept the plea bargain offers of the Bank. There was no evidence of an environment

in which the women thought they would be more leniently dealt with by the Court if they pleaded not guilty and told their stories.

## Chapter 3

### Shoplifting Trials At The Old Bailey 1780 To 1823

#### **Introduction:**

In this chapter, the trials for shoplifting at the Old Bailey between 1780 and 1823 will be considered to see how men and women were treated by the Court.<sup>1</sup> What were the differences in verdicts and sentences for males and females, and what might have been the reasons for the differences? Shoplifting was a crime in which females were significantly involved. It was a difficult crime to prove at trial. It provoked conflicting emotions. Small shopkeepers pleaded desperation about 'the daily depredations' they suffered.<sup>2</sup> On the other hand, prosperous traders disapproved of some of the commercial methods employed in the metropolis, which they regarded as unfair enticement of the ordinary person, particularly the ordinary woman. The 1819 Select Committee on the Criminal Law identified women as major shoplifting offenders; shopkeepers' goods were said to be 'flying in the face of every miserable woman who is going past.'<sup>3</sup>

I will first consider the definition of the crime of shoplifting in order to expose the difficulties involved in securing convictions. Then the comparative numbers of men and women who appeared as defendants at the Old Bailey will be established, and

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<sup>1</sup> OBSP for Sessions' years 1780/1, 1781/2, 1789/90, 1790/1, 1791/2, 1792/3, 1793/4, 1794/5, 1798/9, 1800/1, 1801/2, 1802/3, 1803/4, 1804/5, 1805/6, 1806/7, 1807/8, 1815/16, 1816/17, 1817/18, 1820/21, 1821/22, 1822/23 (23 full years) analysed. Sessional years start with December and end with October the following calendar year. Total indictments in each year may be inaccurate to around two or three per year since reporting of charges in the records can be misleading between private and non-private stealing. My purpose was to study only the cases which reached the Old Bailey petty jury. Hence figures and percentages used in this chapter (and chapter 4) differ significantly from King 'Gender, Crime and Justice' pp.44-74, as he included cases dropped at earlier stages in the legal process and cases where a grand jury found no true bill.

<sup>2</sup> View of a linen draper; OBSP 1805-6, Dec. 1805; case 3, pp. 6-10.

<sup>3</sup> Evidence of Thomas Shelton, Clerk of the Arraignments and Oyer and Terminer and Gaol Delivery at the Old Bailey, 12 March 1819, that women are tried for the offence 'more frequently than men.' *Select Committee on Capital Punishment in Felonies*, 1819, VIII (585).

verdicts will be examined to see how they were apportioned between men and women. Factors other than direct gender discretion which might have influenced verdicts and sentences - the role of marriage, social status, behaviour, and use of defence counsel - will also be considered. The way in which men and women carried out this criminal activity will then be explored. This brings into prominence the important issue of gendered behaviours. Did men and women behave similarly, or did the Court hearing commence with a world of difference between them? If there was difference, did this contribute to the verdicts and sentences which mark the end of this stage of the judicial process?

### **The crime of shoplifting:**

Despite contemporaries' views about the prevalence of this crime, only a small proportion reached court. One of the main reasons for this was the definition of the offence. Shoplifting had become a capital crime in 1699, when it was deprived of benefit of clergy.<sup>4</sup> The new severity of the sentence was in response to public perceptions of a rapidly increasing growth of 'shoplifting' in the later years of the seventeenth century going hand in hand with the development of shops in the streets of towns and cities, particularly London. A shoplifter was one who 'at any time...in any shop... privately and feloniously stole any Goods, Wares, or Merchandises, being of the Value of five Shillings or more'. The crucial feature of the crime was that it was 'private', unseen, undetected at the time. The shop should not be broken into nor should force be used, say, to open a desk or drawer, or to pick a lock.<sup>5</sup> One of the features which would prevent successful prosecution was 'cognizance by other persons' that the offence was about to be committed: 'the slightest glimpse of the taking, or even

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<sup>4</sup> By 10 & 11 Will. 3, c. 23 (1699).

<sup>5</sup> In such cases, the crime would, for instance, be burglary, another capital offence.

a suspicion of it, seemed to obviate the capital part of the charge.’<sup>6</sup> Such restrictions allowed a jury to find a high proportion of outright ‘not guilty’ verdicts, and an even higher proportion of partial verdicts, finding defendants guilty only of non-capital larceny.

The major transformation in retailing in London during the seventeenth and eighteenth centuries resulted in greater opportunity for theft from shops. Theft was made easier by increased display of goods in shop windows and showcases to make them more attractive, and by the way that merchandise spilled out over street space – hanging in shop doorways or displayed on the pavement – to tempt the casual shopper. However, defrauded shopkeepers had difficulty showing that a theft had been ‘private’. London shopkeepers and their staff were wary and alert, suspicious of every customer they did not know. They kept their eyes open to comings and goings in the street outside their own and their neighbours’ shops, and, if trade allowed, watched their neighbours’ shop windows. The cases at the Old Bailey show how busy London shops were, full of customers waiting to be served, and full of people, observing others.<sup>7</sup>

London experienced a vast amount of thieving activity in its busy shopping locations - in the City, Whitechapel, Wapping, Fleet Street, Holborn, The Strand, St Giles, Soho, St James, and, later in the early nineteenth century, in Oxford Street and the ‘West End’.

Women featured strongly in capital indictments from the end of the seventeenth century. As many as eight out of ten of those charged with shoplifting during the first 20 years of the 1699 Act were women. Beattie has suggested that the common involvement of women was one of the main reasons behind the heavy-handed statutory

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<sup>6</sup> W. Hawkins, *A Treatise on the Pleas of the Crown*, Vol. 1, p.260, London 1795.

<sup>7</sup> For discussion and description of shops, particularly in London, see J. Rule, *Albion's People: English Society 1714-1815*, Harlow, 1992, pp.76-80; C. Walsh, ‘Shop Design and the Display of Goods in Eighteenth-Century London’, *Journal of Design History*, 8, 1995, pp.157-176; L. Weatherill, ‘Consumer Behaviour and Social Status in England’, 1650-1750, *Continuity and Change*, 2, 1986, pp.191-216.

response - a desire to bring them under control.<sup>8</sup> Such a perception of the behaviour of urban women suggests that female 'insubordination' was viewed in some quarters as dangerous, undermining the deference and obedience which underpinned social order. However, it is more likely that there was a more general concern that control over the labouring population, male and female, had weakened in urban communities, more than in the less anonymous and more easily supervised villages and small towns. The enduring view that women are not able, of their own volition, to be insubordinate, criminal or a danger to society, fed the nightmare of the propertied and commercial classes, that thieving women were agents of receivers, or the tools of criminal gangs.<sup>9</sup> This nightmare imagined not only the plunder of their goods, but also the violence of organised groups. Such a picture of shoplifting does not fit the evidence of more opportunistic activity of the late eighteenth and early nineteenth centuries, neither for men nor for women.

#### **Judicial complexities in shoplifting trials:**

Between 1780 and 1823, the Old Bailey Sessions saw an average of about twenty-nine shoplifting cases a year, a modest total, considering the perceptions of shopkeepers. The difficulty involved in proving a shoplifting case was one of the main reasons for such a low tally. There were other options preferred by tradesmen who were victims of theft. They might wish to avoid recourse to justice all together by failing to pursue the theft, by compounding the offence, or by instigating unofficial punishment in the community. Should the course of open justice be embarked upon, the victim could seek compromise and discharge of the thief by the magistrate, or attempt to pursue a summary trial for a lesser grade of offence. Some pushed for male thieves to

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<sup>8</sup> Beattie, 'Crime and Inequality'.

<sup>9</sup> For a summary of this view of women, see Walker 'Women, Theft'.

be sent to the army. If victims wished (or were prevailed upon) to take the matter further, they could select indictment terms which did not permit a capital sentence, present weak cases, fail to appear, or make it clear to the court that they wanted lenience even if the charges were proved.<sup>10</sup> Most stealing from shops was, therefore, dealt with by the judicial system as simple larceny – not a capital offence. That some shopkeepers pursued a shoplifting indictment suggests they may have been particularly incensed about the unfairness of the crime, wanting a severe punishment as a general deterrence. A few might have been induced to do so by the reward of a certificate (or shares in a certificate) known as a “Tyburn Ticket” granted, on conviction, to anyone who apprehended, or prosecuted a shoplifter (provided they had not received any fee or other reward for doing so). The certificate permitted avoidance of unwanted public office in the parish or ward in which the offence was committed.<sup>11</sup>

An exchange between defending counsel and a prosecution witness illustrates the strong feelings of some of the prosecutors. A shop assistant to a linen draper in Holborn, from whom thirteen yards of printed cotton had been stolen, thought the two women defendants had come to the shop with ‘evil intent’. (The shopkeeper in this case appeared as a prosecutor on several occasions during these years, and presumably encouraged his assistants to take a hard line towards thieves). The shop assistant said he had seen one of the women put a piece of the material under her apron. This evidence potentially negated the case for shoplifting, as the action had not been private. He had intended to let her go out of the shop with the cotton. Asked why, the assistant replied,

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<sup>10</sup> King, ‘Decision-makers’, for a full discussion of the options for such decisions.

<sup>11</sup> 10&11 Will. 3, c. 23 provided for this certificate as an incentive to prosecutions. It had pecuniary value and could be sold on, as a whole or in parts. There does not appear to have been any other type of reward offered for agents in a successful prosecution for shoplifting, although some of the legal drafting is obscure. In 1706 (5 Annæ, c.31) an amendment to the 1699 Act providing for additional rewards only extended to burglary, felonious breaking and entering a house in day time, and accessories of burglary and housebreaking. See D. Pickering, *The Statutes at Large from the 8<sup>th</sup> year of King William III to the Second Year of Queen Anne*, Vol. X, 1763, and *The Statutes at Large from the 2<sup>nd</sup> to the 8<sup>th</sup> Year of Queen Anne*, Vol. XI, Cambridge, 1764.

‘Because I wanted to make it a capital offence’. Counsel persisted: ‘Your Christian charity did not prompt you to tell them you wanted them to commit a felony, that you might have the pleasure of prosecuting?’ to which the witness responded, ‘Exactly’. Not surprisingly, the two women were found guilty of stealing, but not privately.<sup>12</sup>

A few shopkeepers were keen to bring charges for shoplifting, such as William Atkinson, a linen draper of Bishopsgate. When Ann Morton was indicted for stealing seven yards of calico, her counsel tried to expose him as a vindictive prosecutor:

- Q. (Knapp, defence counsel): How many persons have you prosecuted here, within these few years, in this very place?
- A. (Atkinson): That is of no consequence.
- Q. I will have an answer.
- A. To tell the truth, I never was in this court before.
- Q. Have you prosecuted before any magistrates?
- A. Not before this court.
- Q. How many have you prosecuted before justices of the peace? You don’t hear me?
- A. Yes I do, but I don’t think it wants an answer; suppose I have prosecuted twenty, what is that to the business?
- Q. How many have you charged with different things, and received money in order to drop the prosecution?
- A. I came here to speak the truth, and you shall not put me out of it.”

Ann Morton was found not guilty.<sup>13</sup> Her case illustrates some of the complexities in attempting to rationalise the results of these cases. The character and history of prosecutor and defendant, the intervention of lawyers, the facts of each case, and the reactions of the jury to what they heard makes for an interesting multi-layered mini-drama, but often for a puzzling outcome.

### **Overview of shoplifting trials, verdicts and sentences:**

During the twenty-three years analysed, 680 people were tried on indictment at the Old Bailey for shoplifting. Of these, 369, (54% of the total) were female, 311 were

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<sup>12</sup> OBSP: April 1805, Case 289 v. Margaret Berry and Jane Scott, p.258.

<sup>13</sup> OBSP: Sept.1794, Case 530, pp.1165-7.

male. **Table 3.1.** gives a breakdown of the total indictments heard before the petty jury.

**Table 3.1: Shoplifting indictments at Old Bailey Sessions 1780-1823**

Years of war or peace	Years	Total	Average per year	Females (and average per year)	Females as % of total	Males (and average per year)	Males as % of total
War (2 years)	1780-82	63	31.5	49 (24.5)	78%	14 (7)	22%
Peace (4 years)	1789-93	93	23.25	37 (9.25)	40%	56 (14)	60%
War (3 years)	1793-95 1798-99	58	19.3	35 (11.66)	60%	23 (7.66)	40%
Peace/war (3 years)	1800-03	76	25.3	40 (13.3)	53%	36 (12)	47%
War (5 years)	1803-08	147	27	113 (22.6)	77%	34 (7)	23%
Peace (3 years)	1815-18	168	56	50 (16.6)	30%	118 (39.3)	70%
Peace (3 years)	1820-23	75	25	45 (15)	60%	30 (10)	40%
<b>Totals</b>	23 years	<b>680</b>	29.56	<b>369</b> (16)	<b>54%</b>	<b>311</b> (13.52)	<b>46%</b>

Sources: OBSP (CLRO); Criminal Registers HO26 (PRO)

(Note: in 1821 (1Geo.4 c.117) amended the principal Act to remove capital sentencing from shoplifting thefts between five shillings and fifteen pounds).

This indicates that shoplifting was not a crime (judged by indictment levels) which decreased during the years of war. There was an increase in indictments in some peacetime periods, in particular 1815 to 1818, but, more generally, a slight upward trend during earlier war years. Immediately noticeable (in all but the last period analysed), is the expected decline in the number of men prosecuted as wars began and continued. However, the total level of indictments was maintained by the increased percentage of women involved. This might be an expected development, particularly if property crime

is seen as a response to adversity.<sup>14</sup> The more that high prices and lack of employment brought pressure on the urban poor, the greater was the pressure on women to find any way to make ends meet. Shoplifting was a property crime which could easily fulfil the need. Hay's categorisation of shoplifting as a crime of 'violence or professional organisation'<sup>15</sup> does not appear appropriate when matched with the majority of the stories which emerge from the Old Bailey Sessions. It is a view which is not generally appropriate in respect of shoplifting by women.

Verdicts in all these cases were analysed and the results are shown in **Table 3.2**.

This shows a number of clear features, some of which might be expected, some less so.<sup>16</sup>

However, variations in trial outcomes in the different periods are not easy to explain.

That the jury found only 16% of cases fully proven might be expected, in view of the difficulty of proving the capital charge, and the general aversion to bringing in a capital verdict for an offence which did not involve violence. Between half and two-thirds of verdicts lay in the partially guilty area (61%), arrived at either through the jury's 'pious

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<sup>14</sup> Beattie, 'Crime and Inequality'. The pattern of male indictments in my study follows that suggested by Hay, 'War, Dearth and Theft in the Eighteenth Century: the Record of the English Courts', *Past and Present*, 1982, No. 95, p.117-160. He did not fully consider gender in the link between theft and prices in times of war. Beattie's earlier work - 'The Pattern of Crime in England 1660-1800', *Past and Present*, February 1974, No. 62, pp. 47-95 - also neglected the gender dimension, but pointed out the important differences in the City of London compared with Hay's analysis of Staffordshire indictments; London appears not to have been as sensitive to the combination of demobilisation and high prices as other less urban areas.

The several years between 1780 and 1823 which have not been analysed here comprise twelve years of war, and seven years of peace. It is impossible to say how data from these years would affect the overall view of men and women's involvement. It is possible that the balance between war and peace would show an even higher proportion of women defendants over the whole period.

<sup>15</sup> Hay, 'War, Dearth and Theft', p.134.

<sup>16</sup> Comparable figures for verdicts for single specific crimes in London and Middlesex at this period, split by sex appear unavailable. Beattie, *Crime and the Courts*, used an earlier period, a different area (partially urban), grouped capital and non-capital, Assize and Quarter Session verdicts, and male offenders only in some tables. For instance, p.419, n32, verdicts for male property offenders at Assize and Quarter Sessions 1780-1802: 32.7% not guilty, 59.8% fully guilty, 7.5% partial verdicts. His Table 8.4 (p.425) of verdicts in property cases separates capital and non-capital offences, over a long period (1660-1800): 32% not guilty verdicts, 35% guilty verdicts, and 33% partial verdicts. King, 'Gender, Crime and Justice', considered 'private stealing' as a distinguishable group of crimes, generally separately (Old Bailey 1791-1793, 1820-1822), including cases 'not found' by the grand jury. Thus his area for analysis of 'favourable' treatment for women is wider. The proportion of 'unproven' cases in his sample (20.5% males, 28.5% females) is similar to my Table 3.2 in respect of male verdicts. There is difference in my Table 3.2 in respect of death sentences. King gives only 1.5% for men in the categories of 'hanged or sentenced to death and reprieved' and 3.3% for women.

perjury' in reducing the value of the articles stolen, or because the facts of the case did not amount to private stealing in a shop. A significant percentage of cases (23%) resulted in a not guilty verdict. This proportion of acquittals is not surprising for a property crime, and entirely predictable when the offence was so difficult to prove.

**Table 3.2: Verdicts in shoplifting cases: 1780-1823 - Old Bailey Sessions**

	1780-1782	1789-1793	1793-95 & 1798-9	1800-1803	1803-1808	1815-1818	1820-1823	Totals
<b>Total verdicts</b>	59	93	58	76	147	168	75	680
<b>Men</b>	14	56	23	36	34	118	30	311
<b>Women</b>	49	37	35	40	113	50	45	369
<b>Fully capitally guilty</b>								
<b>Total and % of total verdicts</b>	17 (29%)	18 (19%)	13 (22%)	11 (14%)	12 (8%)	35 (21%)	6 (9%)	112 (16%)
<b>Men and % of men's verdicts</b>	6 (43%)	8 (14%)	6 (26%)	8 (22%)	0 -	19 (16%)	3 (11%)	50 (16%)
<b>Women and % of women's verdicts</b>	11 (22%)	10 (27%)	7 (20%)	3 (8%)	12 (11%)	16 (32%)	3 (7%)	62 (17%)
<b>Partial verdicts</b>								
<b>Total and % of total verdicts</b>	21 (31%)	64 (69%)	27 (47%)	46 (61%)	92 (63%)	106 (63%)	56 (75%)	412 (61%)
<b>Men and % of men's verdicts</b>	5 (36%)	45 (80%)	14 (61%)	19 (53%)	24 (71%)	81 (69%)	22 (73%)	210 (68%)
<b>Women and % of women's verdicts</b>	16 (33%)	19 (51%)	13 (37%)	27 (68%)	68 (60%)	25 (50%)	35 (77%)	202 (55%)
<b>Not guilty/acquit</b>								
<b>Total and % of total verdicts</b>	25 (42%)	11 (12%)	18 (31%)	19 (25%)	43 (29%)	27 (16%)	13 (18%)	156 (23%)
<b>Men and % of men's verdicts</b>	3 (21%)	3 (5%)	3 (13%)	9 (25%)	10 (29%)	18 (15%)	5 (17%)	51 (16%)
<b>Women and % of women's verdicts</b>	22 (49%)	8 (22%)	15 (43%)	10 (25%)	33 (29%)	9 (18%)	8 (18%)	105 (29%)

(Sources: OBSP (CLRO); Criminal Registers HO26 (PRO))

The distribution of verdicts between men and women in the not guilty group, although expected, is particularly marked - 29% of females, 16% of males. The proportion of men and women sentenced to death following a fully guilty verdict was almost equal (at 16-17%). The partial verdict group contains a large proportion of males - 67% to the 55% of females. The evidence available in the Court reports does not easily show why decisions appear to have worked more in favour of women than of men. Juries exercised a large measure of discretion, but their decisions were not systematic. The option of deciding that goods stolen were worth less than five shillings (until 1821) exposed partial verdict decisions for what they were - open attempts to avoid a death penalty. The other partial verdict option, more frequently used, of finding the defendant guilty of stealing but not privately, was more subtle, but had the same result. Decisions based on this apparent respect for the facts might have been attempts at leniency, but might have been the result of consideration of the defendant's behaviour in committing the alleged crime. The jury might have heard that the defendant had been suspected before the stealing, had been watched, observed, followed, heard, had used force, had not realised the articles were on his or her person, and so on. There was a tendency to be lenient towards thefts of articles positioned temptingly outside shop doorways, or thefts from shops which asked for trouble, attracting crowds by the offers of sales discounts.<sup>17</sup>

Sometimes the judge, the defendant's counsel, or a remorseful prosecutor, would encourage the jury to arrive at partial verdicts. When an eighteen-year old man, 'troubled with fits and often delirious, very seldom having the right use of his understanding', married and with a young child, stole a printed cotton gown and a pair

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<sup>17</sup> Walsh, 'Shop Design', for descriptions of marketing strategies relying on display and enticement, particularly in the more 'down-market' types of shops in London where the less well-off were customers.

of muslin ruffles from a second-hand clothes shop in Oxford Street, their combined value was set at fifteen shillings by the prosecutor. When the sad story was told in Court, the prosecutor asked the jury to under-value the items. The jury obliged, stating their worth at 4/10d. The young man was sentenced to two years labour on the Thames navigation.<sup>18</sup> (This case also exemplified a tendency for defendants perceived to have mental health problems to be treated leniently by the Court.)<sup>19</sup>

In order to destroy a case for private stealing, cross-examination of prosecution witnesses by defendants' counsel was often aggressive, for instance in trying to show the theft had been observed. A linen draper's wife fell into the trap when giving evidence against two women for stealing fifteen yards of calico. She said she had suspected them 'by the bulk they seemed to have under their gowns'; she watched them and 'saw them secreting something.' In case the jury might not have heard this or missed the meaning, the Judge immediately interpolated, 'Gentlemen, the capital part is taken off, it is stealing only.' The jury obliged with 'stealing but not privily' verdicts.<sup>20</sup> Another woman, Margaret Morgan, benefited from both types of partial verdict. In the first case against her, for stealing twenty yards of printed cotton valued at fifty shillings, the jury found her guilty of stealing but not privately. In the immediately subsequent case against her, although the eight pairs of worsted stockings she stole from another shop were valued at twelve shillings by the prosecutor, the jury valued them at four shillings and she was sentenced to be branded and to spend three months in prison. A prosecution witness saw her leave the shop with the cotton, and remarked to his companion, 'What a pity it is that woman should be about the street, she is so bad with the foul distemper'. Margaret Morgan was not a valued member of the community.

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<sup>18</sup> OBSP: 1780-81, Feb. 1781, Case 127, p. 108.

<sup>19</sup> J. P. Eigen, *Witnessing Insanity - Madness and Mad Doctors in the English Court*, Yale, Newhaven and London, 1995.

<sup>20</sup> OBSP: 1805-6, Oct. 1806, Case 612, p. 510.

Her behaviour in the shop had not been polite. She said she had mislaid her garter, and asked her little boy, who accompanied her, if he knew where it was. He reminded her she had it in her pocket. She replaced it on her leg, to the offended sensibilities of the linen draper's wife, who said 'it was very rude of her to put it on before me; therefore I turned my head'. At that moment, the cotton was concealed in Margaret's petticoats. Margaret's little boy played a significant part in her thefts, running from the shops, ostensibly to get extra money for her so she could buy more items, or meet the total bill. He would be away a long time and she would leave the shop to look for him. The jury clearly did not see her as a threat to the city's commercial well-being.<sup>21</sup> These two different pictures of partial verdict cases were reproduced endlessly in Old Bailey shoplifting cases, at times in favour of men, at times, women.

Where the jury reached a partial verdict, the judge had a choice of sentence. He could opt, for most of this period, for seven years transportation or a range of lesser punishments. The sentences for those judged partially guilty at the Old Bailey are given in **Table 3.3**. This shows that sentences handed down in partial verdicts were fairly equally divided between transportation (46%) and some form of custodial sentence, with or without fining or whipping (47%). However, the proportion of women and men in the two categories differed significantly. The proportion of men sentenced to transportation was 49% and of women, 43%.<sup>22</sup> The women's initial non-capital sentencing follows patterns observed elsewhere, but the actual figures are different. However, since other studies have not differentiated types of larceny, types of private stealing, nor sometimes capital and non-capital cases, nor cases heard at Quarter

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<sup>21</sup> OBSP: 1780-1, April 1781, Cases 221 & 222, pp. 206-6.

<sup>22</sup> King, *Crime, Justice and Discretion*, Table 2.3, found different proportions sentenced to transportation for private stealing (generally) at the Old Bailey (men 71.9%, women 47.8%). However, he also shows percentages well above and below my Table 3.3 figures for this sentence in other parts of the country (Home Circuit, Essex, Northern).

Sessions and Assize hearings, close comparisons cannot be made. The differences in the sentencing picture suggested by the London and Middlesex shoplifting statistics in this

**Table 3.3: Sentences in partial verdict shoplifting cases: Old Bailey  
Sessions: 1780-1823**

		1780-1782	1789-1793	1793-95/ 1798-9	1800-1803	1803-1808	1815-1818	1820-1823	Totals	% of partial verdicts
<b>Partial verdicts</b>	<b>Total</b>	21	64	27	46	92	106	55	411	100%
	<b>Men</b>	5	45	14	19	24	81	22	210	51%
	<b>Women</b>	6	19	13	27	68	25	33	201	49%
<b>Transportation</b>	<b>Total</b>	-	39	14	31	45	34	25	188	46%
	<b>Men</b>	-	29	10	14	12	27	10	102	49%
	<b>Women</b>	-	10	4	17	33	7	15	86	43%
<b>Prison Note 1</b>	<b>Total</b>	14	16	12	13	43	66	26	190	46%
	<b>Men</b>	1	9	3	4	10	50	9	86	41%
	<b>Women</b>	13	7	9	9	33	16	17	104	52%
<b>Whip only</b>	<b>Total</b>	2	-	-	-	3	2	1	8	2%
	<b>Men</b>	1	-	-	-	1	2	1	5	2%
	<b>Women</b>	1	-	-	-	2	-	-	3	1%
<b>Other Note 2</b>	<b>Total</b>	4	1	-	1	1	-	3	11	3%
	<b>Men</b>	3	1	-	-	1	-	1	7	3%
	<b>Women</b>	1	-	-	1	-	-	2	4	2%
<b>No record</b>	<b>Total</b>	1	8	2	1	-	4	-	16	4%
	<b>Men</b>	-	6	2	1	-	2	-	11	5%
	<b>Women</b>	1	2	-	-	-	2	-	5	2%

Sources: OBSP (CLRO); Criminal Registers HO26, Newgate Calendars HO77, Transportation Registers HO11 (PRO)

Note 1: a) Sentences varying from 1 month to 2 years

b) many prison sentences were combined with imposition of a fine (nearly always of one shilling). This was the case for 55 of the women given custodial sentences, and for 36 of the men; the imposition of a fine along with a prison sentence became the norm from 1803 onwards

c) some prison sentences were combined with a whipping - 8 women and 14 men

Note 2: punishments recorded as 'other' were: for men - 3 Navigation, 1 Army, 2 a shilling fine only, and a discharge; for women - 1 branding plus 3 months prison. 3 a shilling fine only.

period, compared with the studies of Beattie and King, appear to be attributable to the more focused nature of this study.<sup>23</sup> The much higher proportion of women over men given custodial sentences for shoplifting, compared with custodial sentences in the broader criminal categories explored by King, supports his suggestion that 'when the

<sup>23</sup> Beattie, *Crime and the Courts* p. 611, Table 10.4. It is not clear whether this relates to statutorily non-capital offences or to all non-capital punishments delivered. Also King, *Crime, Justice and Discretion*: Table 8.8. Sentences for property crimes at Essex Quarter Sessions and Assizes (1740-1805) show similar percentages for transportation sentences to my Table 3.3, but with transportation as a much lower percentage of the sentencing; however, the proportions of men and women sentenced to imprisonment in King's study were almost identical, a different situation from my Table 3.4.

stakes were smaller sentencing policies were much less gendered'. Shoplifting, as a more serious, capital, crime, may provide an example of his assertion that the relative leniency shown to women may have increased with the seriousness of the offence.<sup>24</sup>

The study of an individual crime can contribute to an understanding of the differences in treatment of men and women at all stages of the criminal justice system, allowing a more focused examination of otherwise generalised statistics. This may be useful in the case of crime committed in a metropolitan location in which women were highly active. The later part of this chapter will look at the detail of the behaviour, character and history of the women and men involved, and on the nature of the commission of crime itself. It is only in this area of gendered behaviour that any clues emerge to explain the high acquittal rate for women and their higher likelihood of being given a custodial sentence rather than being initially sentenced to transportation. Without such a possible explanation, we have to fall back on the somewhat unsatisfactory suggestion that the difference depends only on some expression of paternalistic lenience.

### **Shoplifting and the death sentence:**

Since the equal balance of men and women in the fully guilty category, where the sentence was death (until the last period surveyed, when it became life transportation) is perhaps surprising, it is worth considering possible reasons for this. Two people only, both men, were in the end, hanged for shoplifting in this period; exceptions which proved a general rule. Their unusual end was due more to their being members of a gang believed to be dangerous and violent, previously implicated in the death of a

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<sup>24</sup> King, *Crime, Justice and Discretion*, p. 446-447.

jeweller. They were not hanged for shoplifting, but for earlier violence.<sup>25</sup> In many cases which the jury found fully proved, factors other than the story told in Court swayed the jury - such as previous history, behaviour, age, appearance and demeanour.<sup>26</sup> An experienced jury would know that those they found fully guilty, and whom the judge sentenced to death, would not be executed. The dynamics of jury decision-making are difficult to assess. Their decisions had to be unanimous, and were often reached quickly after brief discussion in the courtroom. The need for unanimity and speed worked in favour of the defendant, since it was likely to be more difficult for jurymen who wanted a full guilty verdict to over-ride the determination of those who held out for an acquittal or partial verdict. There is also evidence in the Old Bailey cases of scrupulousness about technical issues, such as the wordings of indictments, which would work in favour of a prisoner. Another crucial nexus was the one that lay between a sentence of transportation and some other outcome. A full guilty verdict might have been a way for the jury to secure transportation, rather than a custodial or other sentence, banking on a conditional pardon to that effect.<sup>27</sup> The reasoning of judges and juries, as they returned verdicts and passed sentence which they knew would not be carried out, has been seen by some historians as a means to enhance the terror of the law at the same time underlining the King's justice and humanity towards his subjects.<sup>28</sup> However, when their decisions are matched with the circumstances of cases and the personalities involved, their reasons appear a good deal less political and more idiosyncratic.

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<sup>25</sup> John Rabbitts, William Brown hanged on 5 Feb 1794: OBSP: 1793-4, Dec. 1793, Case 21, pp.51-57; HO26/3 (PRO). The men were part of the gang 'vulgarly known as the Floorers' implicated in an earlier killing. Other official statistics show the last execution for shoplifting to have been in 1763 (*PP.*, 1819, VIII (585)).

<sup>26</sup> Such considerations appear similar to those which influenced decisions in the later process of considering petitions and appeals for pardon or remission of sentence. See King, 'Decision-Makers', esp. pp.40-47.

<sup>27</sup> See Chapter 6. Although the majority of those sentenced to death for shoplifting received conditional pardons to life or other periods of transportation, it was not a standard substitution. Many sentenced to death in the end received short custodial sentences, service in the army or navy, and free pardons after a few years in prison or on the hulks.

Examination of the stories told in the 112 cases (50 men and 62 women - see Table 3.2), in which sentence of death was passed, may reveal some of the motives for jury decisions. **Table 3.4** suggests how juries may have seen those on whom they passed capital verdicts. A factor which strongly affected juries' decisions was the youth of the offender. This may have partly been a response to growing public concern about youth crime. The jury could be certain that none of these young people would hang, but that there was a strong chance that they would be separated from bad influences, restarting their lives in a new country, or, at worst, spending some time in prison, with the hope of reformation.<sup>29</sup> Some of this group were very young. Amongst the boys, one was nine,

**Table 3.4: Death sentences for shoplifting - Old Bailey Sessions 1780-1818: possible factors influencing decisions to find fully guilty**

<b>Factors</b>	<b>Males</b>	<b>Females</b>
<b>Particularly high value of goods stolen</b>	9 (18%)	2 (3%)
<b>Previous or persistent offences</b>	7 (14%)	7 (11%)
<b>Running away from arrest</b>	0	4 (6%)
<b>Unemployed, very poor, indigent and hopeless cases</b>	6 (12%)	0
<b>Age - young, 17 years old or under</b>	17 (34%)	9 (15%)
<b>Age - "old", 50 years and over</b>	4 (8%)	6 (10%)
<b>Behaviour or appearance - suspicious</b>	4 (8%)	7 (11%)
<b>Drunken-ness</b>	1 (2%)	3 (5%)
<b>Troublesome, difficult, haggling</b>	0	6 (10%)
<b>Physical violence, swearing</b>	0	2 (3%)
<b>Dubious sexual morals perceived or confirmed</b>	0	4 (6%)
<b>Laughed in victim's face, joked</b>	0	3 (5%)
<b>No factor able to be drawn from account</b>	2 (4%)	9 (15%)
<b>Total</b>	50 (100%)	62 (100%)

Source: OBSP (CLRO)

one was ten, two were eleven and three were twelve years of age. Amongst the girls, one was ten, but there were no others under the age of sixteen. This tends to confirm a

<sup>28</sup> Beattie, 'The Royal Pardon and Criminal Procedure in early Modern England', *Canadian Historical Papers*, 1987, pp.9-22; Hay, 'Property, Authority and the Criminal Law'.

<sup>29</sup> H. Shore, *Artful Dodgers: Youth and Crime in Early Nineteenth-century London*, pp.115-121; P. King & J. Noel, 'The Origins of "The Problem of Juvenile Delinquency": The Growth of Juvenile Prosecutions in London in the Late Eighteenth and Early Nineteenth Centuries', *Criminal Justice History*, Vol. 14, 1993; King, *Crime, Justice and Discretion*, pp.288-296.

gender-based concern about the danger of young male criminals.<sup>30</sup> The jury, in some cases joined by the prosecutor, recommended eight of these twenty-six juvenile offenders to mercy because of their 'tender' age. Since a partial verdict could have been returned in any of the cases, had the jury been so minded, the recommendation to mercy seems either a deliberate attempt to instil terror,<sup>31</sup> or a stage on the journey to secure their transportation.

Where the jury or prosecutor made a recommendation to mercy, to meet due legal process the judge had to be given reasons. Unfortunately, the reasons were not made clear in the court reports. Only in one case was the reason formally stated. This case illustrates several of the factors mentioned in Table 3.4. Thomas Hopkins was a young man, (no age given), son of the head butler to the Archdeacon of London, unemployed (although he had previously had a job as shopman to an oilman), and living in poor lodgings. He was charged with high value stealing: £18 worth of jewellery. He was robustly represented by counsel, but was sentenced to death. He was given 'an exceeding good character' by several witnesses, and the jury requested mercy. The Recorder required 'the ground of the recommendation'. The foreman replied, 'Only as we have not heard of any other offence and as he is so extremely young, and has a reputable father'.<sup>32</sup> Mercy was requested in court in twenty-six of the total 112 cases where a death sentence was pronounced. In twenty-one cases where reasons can be deduced, (apart from the eight on grounds of youth mentioned earlier), two gave reasons of old age, three good character, two a reputable family, five a first offence, and one allowed a young man to go to sea as he had, apparently, long desired.

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<sup>30</sup> Shore, 'The trouble with boys: gender and the 'invention' of the juvenile offender in early nineteenth-century Britain', pp. 75-92 in Arnot & Osborne, (eds.), *Gender and Crime*.

<sup>31</sup> Shore, *Artful Dodgers*, p.119-120 for reports of the lack of success at instilling terror in young offenders under sentence of death.

<sup>32</sup> OBSP: 1789-90, May 1790; Case 439, pp. 494-8.

Table 3.4 shows some interesting gendered differences in the factors behind harsh initial judgements on these men and women. For men, apart from the significance of youth, men who were unemployed, poor and indigent were also targeted, and men who had stolen particularly high value goods. For women, the choice of those to stand for a while under sentence of death, and thereby to be more likely to be transported later, was quite differently made. They were mainly women who were seen as troublesome, swearing, drunk, of lax sexual morals – in other words, ‘unfeminine’ women.

Troublesome, difficult, drunk, violent, swearing and provocatively attired and jocular women sometimes clearly offended the jury’s sense of propriety. The court shorthand writer also found them of interest. He did not record the same particulars of the men sentenced to death. Elizabeth Hill and Sarah Dancer had behaved in a manner which would not have impressed a jury. They were charged with stealing eight yards of dimity, a yard and a half of cambric, a yard of muslin, a linen handkerchief, and a lace edged linen cap, to a total value of £2-16s, from a haberdasher’s shop in the City Road, kept by a widow. Elizabeth, referred to as Mrs Hill, was a 19-year-old out of place servant, and Sarah was an 18-year-old children’s pump maker. The shopkeeper did not know she had been robbed until a neighbouring shopkeeper brought the women back to her with some of the stolen property. He told how he and another man had chased them, and how the women had scaled high palings to escape. When they were caught, Hill had sworn ‘dreadfully’, and ‘made a blow’ at him, whereas Dancer ‘I thought behaved in a very becoming manner; she cried.’ Hill was described as ‘pretty violent’. The two women were represented by counsel, but Hill provided many interventions of her own about the shopkeeper’s unhelpful service, how seven or eight men had

apprehended them, and how poorly the magistrate and constable had treated her. Both were found fully guilty, and there were no recommendations to mercy.<sup>33</sup>

Another troublesome woman was Mary Palmer, 18 years old and with a baby. She was charged with stealing two shirts, valued at twenty shillings. The fourteen-year old shop assistant was suspicious of her: 'I did not much like her appearance, she looked like a girl of the town'.<sup>34</sup> Perhaps lax sexual behaviour landed Frances Elliott, aged 23, with a death sentence and no recommendation to mercy. She was spotted by a shop owner as she solicited clients in Covent Garden, wearing a fur tippet she had stolen from his shop the day before. He recognised the hat, not the woman, since his sister had been looking after the shop when it went missing. He expressed interest in her services, made her dismiss the other 'girls' standing around with her, and asked her to go with him. This she did happily, until they arrived at the Bow Street police office where she was charged with shoplifting.<sup>35</sup>

Women with drink problems may have been seen as suitable for harsh punishment. Catherine Burn, aged 20, charged with stealing ten yards of printed cotton, valued at twenty shillings, had been 'troublesome and difficult to suit', demanding from the shopman a running bill total which he refused, talked a lot, and was found with the cotton hanging from under her cloak. She defended herself: 'I was much in liquor, perhaps cotton sticks to flannel, I have been only three weeks in this country'.<sup>36</sup> Another woman sentenced to death, Catherine Forrester, was known as a woman who liked her drink. She came to a chandler's shop for a halfpenny worth of beer to drink in the shop. When she left, the chandler's wife missed a cheese valued at

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<sup>33</sup> OBSP: 1794-5, Sept. 1795, Case 382, pp.1011-1018.

<sup>34</sup> OBSP: 1798-9, Feb. 1799, Case 181, p.182.

<sup>35</sup> OBSP: 1802-3, Jan. 1803, Case 160, p.105.

<sup>36</sup> OBSP: 1801-2, April 1802, Case 402, p.294.

ten shillings, which was soon found under her long cloak. She excused herself: 'I had a drop in my head - I knew nothing till next morning, when the officer told me of it'.<sup>37</sup>

The large proportion of women sentenced to death is perhaps related to the significant proportion of females on trial at the Old Bailey. Juries may have taken them more seriously as they were not under-represented in this crime. The view that female offenders can be seen as less of a threat, and therefore less deserving of harsh punishment, depends on few of them reaching the courts and not having acted with violence or in a threatening way.<sup>38</sup> If those conditions are not fulfilled, it is less likely that their criminal activities will be seen as trivial, unimportant, unthreatening and unpremeditated. Judicial paternalism may not operate to the same extent when women are no longer in the minority.

#### **Marriage and social status:**

Cases of married couples being charged with shoplifting were rare. There were only two in this period. Thus, the concept of the *feme covert* had virtually no effect in practice. In only one case was reference made to marital status, and consequently to marital coercion by way of defence or excuse. It was also rare for women to be cited as a wife, or for there to be any interest in whether they were or had been married. William and Mary Kelly had considered the effects of marriage on the outcome of their trial. They were charged with stealing thirty-six cotton handkerchiefs, and three pairs of cotton stockings, all valued at twenty-seven shillings, from a linen draper in St Giles' High Street. The shopman's evidence showed both, 'especially the prisoner's wife', to be engaged in 'tumbling' the goods around and pulling them off the counter. Mary Kelly left the shop first. She was seized by the shopman a few doors down the street,

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<sup>37</sup> OBSP: 1806-7, Sept 1807, Case 575, p.388.

<sup>38</sup> See King, *Crime, Justice and Discretion*, p.278-284; Beattie, *Crime and the Courts* p. 439.

and voluntarily handed over stolen items from under her cloak. William Kelly had been seen lifting the items from the counter and passing them to Mary. Throughout the case, it was taken for granted by witnesses that the two were married. William Kelly said that he had arrived in London the night before, and met a male friend he knew in Dublin. The next day, as his friend was showing him the city, 'I saw the prisoner (Mary) at the bar whom I knew in Ireland standing at the door opposite me'. His friend wanted to buy some handkerchiefs. Mary and William followed him into the shop. He was amazed, he said, to be charged with having something that was not his, since the stolen goods were found on 'the woman'. Mary supported William's story in an oblique way: 'I never asked him to buy me a halfpenny worth of linen, nor handled any thing of his since I was born', but finally agreed that: 'He desired me to say I was not his wife to get himself clear of this'. The facts did not support a verdict of private stealing against either of them, for the theft had been seen. The jury convicted William of larceny. He was sentenced to seven years' transportation. Mary they found not guilty. The jury may have accepted that they were married, applied the strict principle of marital coercion, and decided that Mary's activity, committed completely in the presence and at the requirement of her husband, amounted to marital coercion. They may have disapproved of William inducing her to lie about their relationship, or perhaps had sympathy for her voluntarily giving up the stolen goods. It might be that Mary Kelly's married status saved her, but the facts of the case obscure the operation of any principle.<sup>39</sup>

The other case involved John and Elizabeth O'Neal, and their 26-year-old servant, Eleanor Ray. The O'Neals were found not guilty, Ray was found guilty of stealing, but not privately. Defence counsel was engaged to make sure nothing was brought home to the couple, that the servant took the blame, but that her punishment

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<sup>39</sup> OBSP: 1794-5, Dec. 1794, case 9, pp.50-52.

was lenient. It was not difficult to succeed in this since the shopman said he had seen Ray 'fumbling about her pockets as if she had taken something'. She had admitted to taking three yards of muslin, and denied that her mistress had any part in this. It might be thought strange that the O' Neal's had been committed for trial by the magistrate and that a true bill had been found by the grand jury. The arresting constable said that only Ray had been delivered into his keeping, but 'I did not like to take her into custody without I took the other two likewise'. There were features of the O'Neal's behaviour which suggested that they, particularly Elizabeth, were not innocent. Elizabeth had been 'difficult', rejecting calicos as too coarse, sending the shop owner to the back of the shop to get more to show her, attempting to pay under value for the calico, and leaving the shop when the shop owner declined her offer. John O'Neal attempted to block the shop owner's view of Eleanor Ray's exit from the shop, and, when she was accused of stealing, he went down on his knees to beg that his wife should be let go.<sup>40</sup>

The story of the O'Neals may be an example of the importance of relative social status. Another case, that of Elizabeth Brown, tells of the Court's response to a distressed genteel, elderly, female. She was charged with stealing nine lawn handkerchiefs, valued at eighteen shillings, from a linen draper in Oxford Street. She was not seen stealing, but the shop assistant thought he saw the lawn under her cloak. She was followed and brought back to the shop. She was recognised as someone who had been 'troublesome in the shop before'. It was unlikely that a full guilty verdict could have been reached, but the sentence could well have been transportation. In fact, she was sentenced only to twelve months in the House of Correction with a fine of one shilling. She evinced the court's sympathy, telling them she was

a gentlewoman of Hamburg, and was very much distressed to pay my lodgings; I acknowledge taking the handkerchiefs; I have a very good family, and though I

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<sup>40</sup> OBSP: 1793-4, April 1974, Case 316, pp.711-2.

have been in confinement ten weeks, I have not let my friends know all the time.<sup>41</sup> I have been twenty-eight years in England, I kept a house at Mary-le-bone; I am now a widow, have had many friends within that time, but they are dead mostly; since I have been a widow I have been twice abroad with a lady, and since then I have maintained myself by my industry, by sewing.<sup>42</sup>

The social or financial status of defendants may have had another effect on the outcome of trials. Some were able to pay for defence counsel. This period saw an increasing use of defence counsel, especially in London.<sup>43</sup> I made a sample analysis of cases between 1789 and 1795 in which defence counsel was engaged.<sup>44</sup> The sample was small, but showed that in these six years, 36% of shoplifting cases (46 cases) were heard with defence counsel, with women twice as likely as men to resort to this assistance.<sup>45</sup> Twenty-nine women (48%) and 17 men (24%) had defence counsel. This may suggest that shoplifters, or their friends, could afford the lawyers' fees.<sup>46</sup> However, in these early days of defence counsel, many barristers, desperate for work, charged surprisingly low fees for defence representation - at between one and two guineas, and often much less. The Old Bailey bar was also the location of a good deal of touting for business, and flouting of the rules of etiquette, such as the custom that a lawyer should not appear for less than a guinea. If a defendant had suitable and sufficient friends, it might not have been difficult to cover a barrister's fees. Barristers might also appear without fee if

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<sup>41</sup> See Chapter 7 for female shame at offending, resulting in lack of 'character' in court.

<sup>42</sup> OBSP: 1793-4, July 1794, Case 406, pp. 860-1.

<sup>43</sup> Beattie, 'Garrow for the Defence', *History Today*, Feb. 1991, pp.49-53; idem. 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries', *Law and History Review*, 9, 1991; Landsman, 'The Rise of the Contentious Spirit'; Langbein, 'Shaping'. None of the research so far has analysed success rates of counsel. More useful on legal detail is Bentley, *English Criminal Justice* pp. 97-124.

<sup>44</sup> Cases identified as involving defence counsel are regarded as the minimum potential number. It is difficult to be sure from the printed record that counsel was present. See Beattie, 'Scales of Justice'. I included only trials where defence counsel was named. I believe this caution is correct, since many trials where there was an exchange of questioning do not bear the hallmark of defence counsel cross-examination.

<sup>45</sup> This outcome relates only to shoplifting. See Chapter 4 for pickpocketing.

<sup>46</sup> Bentley *English Criminal Justice*, p.108 suggests that about a quarter of defendants at the Old Bailey had defence counsel, although he bases this on scrutiny of one month (July 1800) when 25 of the 104 trials involved defence counsel (24%). This ties up with Beattie, 'Scales of Justice'.

they believed a poor person was in danger of facing a capital verdict unrepresented.

There were also other means of obtaining charitable assistance with fees.<sup>47</sup>

The use of defence counsel was a reasonably successful strategy, particularly for men. With defence counsel, 41% of women and 23% of men secured not guilty verdicts; whereas the overall not guilty rate (with or without defence counsel) was 29% for women and 9% for men. The chance of a partial verdict was greatly reduced for both men and women. On the other hand, the chance of the women being found fully guilty with defence counsel (31%) was higher than without (23%). For men, the chance was about the same. It is likely that counsel was engaged in some cases when the situation was already desperate for the defendant. However, the aggressive questioning and behaviour of some counsel may have adversely affected the verdict by offending the jury and the judge. William Garrow, at the start of this period, was a favourite defending counsel. His rudeness and sarcasm towards prosecuting shopowners may have offended their peers on the jury. However, other counsel, notably Knowlys and Knapp, could outdo Garrow in devastating cross-examination.<sup>48</sup>

Information about the status, social and financial, of those who hired defence counsel is sparse. Most were young, in their late teens and twenties, and the cost was born by parents. Sometimes perhaps they had kind friends who put up money to pay for their defence - a deaf young man; a poor insane old man who frothed at the mouth, and Sarah Pine, who drank a lot and was described by her counsel as a 'poor woman'. The record of events in court shows that shoplifting defendants were often well dressed. It may be that shoplifters were a little above the bread line.

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<sup>47</sup> Bentley, *English Criminal Justice*, p.97-124.

<sup>48</sup> Note especially OBSP: 1794-5, Case 18 v. Frances Vaughan and Jane Bailey, pp.68-72: after long, aggressive cross-examination the shop assistant witness fainted in Court under the strain. Bentley, *English Criminal Justice*, pp.100-101: the Old Bailey bar 'had a foul reputation' for bullying of prosecution witnesses and rudeness to the jury and the Bench. He refers to a particularly vituperative encounter between counsel, Alley, and Adolphus, law reporter at the Old Bailey, in 1816 which led to the two men fighting a duel on the beach at Calais.

Nevertheless, shoplifting was not a genteel crime, nor an activity carried out by the middling sort. On a few occasions, the defendant's employment or trade was mentioned. Amongst the males hiring defence counsel was the fifteen year-old unemployed shopman whose father was the Archdeacon's butler. Among the women was a mantua maker with a gentlewoman friend; a children's pump maker, and an out of place domestic servant; a married woman, whose husband paid for her defence in two separate cases. One couple was well enough off to have a servant, and two other women, described by their counsel as most respectable, had a guinea and two pounds and four shillings to put down to pay for goods. An elderly woman 'dressed in a very decent manner' was 'not short of money'. However, the only certainly comfortably-off defendant in this group with defence counsel was a man - a wheelwright, who had inherited one thousand pounds from his father which enabled him and his brothers to live well on their means.

#### **Different gendered behaviour:**

The stories told in court showed significant differences in male and female behaviour. Prosecutors, jurymen and judges were not comparing like with like, although the charge was the same. The difference in behaviour was not as distinctive as in pickpocketing cases, considered in the next chapter; nevertheless, it was considerable.

Examination of the categories of stolen items, and location of the theft, shows that women were well-placed to commit this crime. The preponderance of stolen items were textile materials in their unmade-up state, cotton, calico, silk and lace, or small made-up items for sale in the same type of shop, such as gloves and stockings. They were stolen from mercers, linen drapers, haberdashers, hosiers, and milliners, where

most of the customers were female, and would be expected to be female.<sup>49</sup> However, there were no hard and fast boundaries between male and female choices of goods. Men sometimes stole textile materials, and small items of clothing. Women occasionally chose other items - pencils, leather, a looking glass, a parasol. Now and then both chose cheeses and hams, although some of these items were large and heavy, a deterrent to women. More frequently, both stole shoes, coats, cloaks and shirts, although in the years following the end of the Napoleonic wars, this was predominantly a male area of activity, with the theft of shoes reaching a peak. Where men's shoplifting of higher value items differed significantly from women's was in their choice of jewellery, watches and clocks, a variety of hardware, with a slight interest in larger items such as carpets.

The motivation behind the thefts was likely to have been varied. Where the information was given, we know that a substantial amount ended up in the hands of pawnbrokers, who were both the credit system and the wearing apparel 'middlemen' for a great part of the population.<sup>50</sup> One woman on two occasions stole to add to the stock in her own shop.<sup>51</sup> In some cases, the defendants were seen somewhat brazenly wearing stolen clothing and headgear about town close to the scene of the crime. There is evidence that theft of textiles was not generally indulged in to gratify a universal longing to dress-make, nor even to obtain raw material for paid work in the clothing or accessory trades. In one unusual case, however, twenty-one yards of cotton were traced to a woman's lodgings and were found converted into a dozen or so little girls' frocks, some completely sewn up and some cut out ready to sew.<sup>52</sup>

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<sup>49</sup> The statistics here are similar to Walker 'Women, theft' pp.87-97. Her study is earlier (1590s to 1660s) in the City of Chester, but together with my figures confirms a predictable continuity.

<sup>50</sup> B. Lemire, 'Peddling fashion: salesmen, pawnbrokers, tailors, thieves and the second-hand clothes trade in England c. 1700-1800', pp.67-82, *Textile History*, Vol. 22, 1991; M.Ginsberg, 'Rags to riches; the second hand clothes trade, 1700-1978', *Costume*, Vol. 14, 1980; Beattie, *Crime and the Courts* pp. 189-190.

<sup>51</sup> OBSP: 1794-5, Oct. 1795: v. Mary Clarke, cases 472 & 525, pp. 1338-41, 1343-5.

<sup>52</sup> OBSP: 1821-2, May 1822, v. Mary Bee, case 889, p. 359.

**Table 3.5** sets out the types of items stolen. It bears out that view that the world of stolen clothes and textiles was a woman's world, in which the type of goods stolen were those of which they had knowledge and a means of disposal. Historians of crime have

**Table 3.5: Items stolen - shoplifting cases tried at Old Bailey Sessions 1780-1823**

<u>Type of item stolen</u>	<u>Females</u>	<u>% all females</u>	<u>Males</u>	<u>% all males</u>
<u>Unmade up textiles</u> : lawn, linen, cotton, silk, calico, printed cotton, gingham, baize, net, lace, satin ribbon, muslin, tiffany: in any amount from one yard to a maximum of 180 yards	237	64%	95	31%
<u>Made-up haberdashery and millinery</u> : bonnets, tippets, caps, hats, stockings, gloves, handkerchiefs, shawls, ruffles	78	22%	56	18%
<u>Clothing (new and second hand)</u> : including shoes, jackets, waist-coats, shirts and boots; coats, cloaks	29	8%	71	22%
<u>Jewellery and precious objects</u> : rings, brooches, pins, watches, clocks, silver-plated objects	8	2%	27	9%
<u>Food</u> : cheese, ham, bacon, raisins, beef	5	1%	21	7%
<u>Other items</u> : pencils, leather soles, looking glasses, umbrellas, ink bottles, hardware items, carpets, cases, shop till, tobacco, starch, milk jugs, cutlery, books, etc	12	3%	41	13%
<b>Totals</b>	369	100%	311	100%

*Source: OBSP (CLRO)*

suggested that such theft bore the hallmark of 'less terrifying' petty crime, which led to more lenient treatment.<sup>53</sup> However, it was an important crime. These goods had a high market value, and, after food, were the main items of household expenditure,<sup>54</sup> and, if stolen privately, could have most serious consequences for the offender. If the Courts viewed the theft of textile materials as a 'less terrifying' crime, and, because of this, treated women more leniently, this is an example of gendered decision-making in practice. Criminal activities were being seen through the filter of male perceptions of what mattered. If this is so, it goes a long way to explain the different trial outcomes for men and women at this stage of the criminal justice system.

<sup>53</sup> Walker, 'Women, theft', pp.88-89.

<sup>54</sup> Weatherill, 'Consumer Behaviour' p.298.

A further factor which might affect the sentencing of men and women was the value of the goods they stole, shown in **Table 3.6**. The values are not polarised between men and women. Men feature proportionately more at either extreme of the value spectrum, whilst women feature proportionately strongly in the theft of goods in the more average value range.<sup>55</sup> This emphasises that there is no reason to assume that women generally stole goods of less value. In shoplifting indictments, prosecutors had

**Table 3.6: Value (specified in indictment) of items stolen in London and Middlesex shoplifting cases at Old Bailey Sessions 1780-1823**

(Percentages are those of the total men or the total women indicted in the periods shown.)

		Value 10/- and under		Value 10/1d to £2		Value £2-0-1 to £5		Value over £5	
		<u>M</u>	<u>F</u>	<u>M</u>	<u>F</u>	<u>M</u>	<u>F</u>	<u>M</u>	<u>F</u>
<b>1780 - 1782</b>	Male total 14 Female total 49	1 (7%)	9 (18%)	7 (50%)	24 (49%)	1 (7%)	15 (31%)	5 (36%)	1 (2%)
<b>1789 - 1793</b>	Male total 56 Female total 37	15 (27%)	12 (32%)	23 (41%)	17 (46%)	14 (25%)	6 (16%)	4 (7%)	2 (5%)
<b>1793 - 1795 &amp; 1798 - 1799</b>	Male total 23 Female total 35	3 (13%)	7 (20%)	10 (43%)	20 (57%)	4 (17%)	5 (14%)	6 (26%)	3 (9%)
<b>1800 - 1803</b>	Male total 36 Female total 40	11 (31%)	6 (15%)	21 (58%)	25 (62%)	4 (11%)	9 (23%)	0 -	0 -
<b>1803 - 1808</b>	Male total 34 Female total 113	10 (29%)	18 (16%)	17 (50%)	69 (61%)	5 (15%)	23 (20%)	2 (6%)	3 (3%)
<b>1815 - 1818</b>	Male total 118 Female total 50	41 (35%)	9 (18%)	60 (51%)	36 (72%)	14 (12%)	3 (6%)	3 (2%)	2 (4%)
<b>1820 - 1823</b>	Male total 30 Female total 45	10 (33%)	18 (40%)	17 (57%)	22 (49%)	1 (3%)	4 (9%)	2 (7%)	1 (2%)
<b>Totals 678</b>	Males 311 Females 369	91 29% all men	79 21% all women	155 50% all men	213 58% all women	43 14% all men	65 18% all women	22 7% all men	12 3% all women

Source: OBSP (CLRO)

<sup>55</sup> This correlates with Table 4.2. in Walker, 'Women, Theft', p.86, where men and women are distributed in the same proportions in the scales of value of goods stolen. The values themselves are much higher in my Table 3.8, presumably because of inflation in this later period.

little reason to undervalue goods: they often stressed how valuable they were as a way of showing how much this crime hurt them.<sup>56</sup>

Among the men who stole in the most valuable range, half stole jewellery and watches valued at between £13 and £67. The remainder stole carpets, shawls and large amounts of textiles valued between seven guineas and £20. Of the twelve women in the highest value category, ten stole textiles, large amounts, valued between £6 and £20. One stole sixty pairs of shoes (over a long and undetected period), and one stole a ring worth £30 - but the victim finally failed to attend court to prosecute. Most of the men stealing in the highest value category were sentenced to death, but few of the women.<sup>57</sup> This suggests that theft of high value articles, especially of jewellery, was seen as a 'threatening', serious crime. It may have been seen as serious because men did it, and this behaviour needed to be controlled. When women stole in the same high value category, this may have been seen merely as an aberration, causing little concern, and perhaps some compassion.

The evidence presented at the trials highlighted another area of difference between the activities of males and females, which is at least as significant as the types and value of the items they stole. This was the way in which they concealed the activity of stealing, an important part of their modus operandi. This had much to do with the way males and females dressed when about town, and bore relation to what they stole, or were able to steal. Female clothing played a crucial role. Witnesses for the prosecution gave details of how this was done in 192 female cases, and in 145 of men's cases. **Table 3.7** gives details of methods of concealment of stolen goods in these cases. Women's clothing provided a useful means of effecting a specific type of theft, whereas

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<sup>56</sup> Beattie, *Crime and the Courts*, p.181-4 for reasons for undervaluing goods in various types of larceny cases.

<sup>57</sup> See Table 3.4.

men operated in a more ad hoc way, and none too discreetly in some cases. The use of the cloak in female shoplifting was an outstanding feature. Shop owners and their assistants were highly aware and suspicious of women in cloaks. Questions from counsel and judges often sought to establish whether a woman was wearing a cloak. Asked what sort of cloak a woman was wearing, whether it was long or short, a linen

**Table 3.7: Methods of concealing the movement of stolen items described in shoplifting cases tried at Old Bailey Sessions 1780-1823**

Methods		Females	% female	Males	% male	
In	Cloaks	60	31%	0	---	
Clothing:	Petticoats, skirts, gowns,	58	30%	1*	0.5%	
	Under coat, waistcoat, shirt	4	2%	31	21%	
	In or under apron	22	12%	14	10%	
	In loose or fitted pocket	13	7%	12	8%	
	In muff or glove, up cuff	6	3%	2	1%	
	Down bosom, up stays	7	4%	0	---	
	In hat	0	---	8	5%	
	In breeches	0	---	5	4%	
Otherwise:	In hand	7	4%	9	6%	
	Under or in arm	12	6%	33	23%	
	Under sack or wrapper	0	---	3	2%	
	In bag, basket, pillow case	2	1%	5	4%	
	Worn on body	0	---	5	4%	
	Carried on shoulder, over arm	0	---	14	10%	
	Drawn on a string, on stick	0	---	2	1%	
	Taken as delivery agent	1	0.5%	1	0.5%	
<b>Total</b>		<b>192</b>	<b>100%</b>	<b>145</b>	<b>100%</b>	

Source: OBSP (CLRO)

\* This man wore a long country smock.

draper's brother described it as grey, 'such as women commonly wear'.<sup>58</sup> Confronted by two women in long red cloaks, a hosier immediately thought them 'strange'.<sup>59</sup> Red

<sup>58</sup> OBSP: 1798-9, Dec. 1798, case 39 v. Sarah Pine, p.47.

<sup>59</sup> OBSP: 1798-9, Jan.1799, case 81, v. Bridget Sullivan and Betty Murphy, p.82.

cloaks were particularly suspicious.<sup>60</sup> In 1808, Maria Smith was charged with stealing eleven shawls from a linen draper in Ludgate Hill. The jury was antagonistic towards the shopkeeper. His was 'the shop to which so many people are thronging to purchase goods', needing nine shop assistants to deal with the 50 or 60 people in the shop. How could he suspect any particular person of shoplifting? The shopkeeper knew how he could - she wore a red cloak and a straw hat. The jury asked if he thought people in red cloaks excited suspicion. He said red cloaks and straw hats were fashionable,<sup>61</sup> and they certainly excited his suspicion. The jury dismissed his prejudices. He should have more reason to suspect a woman in a genteel dress, they said, rather than this flamboyant woman. She was found not guilty.<sup>62</sup> A poor, old woman indicted for stealing twenty-one yards of printed calico, wore two cloaks. 'She stooped to pick up (a half-penny) and I observed she was longer than necessary in that posture; when she arose from stooping I observed a kind of bulk under her cloak, that I had not observed before; she had two cloaks on, and she appeared very much in liquor ... I told her that I thought she had taken away with her more than her own; she threw back her cloak immediately' and 'she seemed very ready to be searched; she had got two cloaks on, a black one and a red one'.<sup>63</sup>

Witnesses recall items being put under cloaks, cloaks being lifted or flung aside to reveal stolen goods, cloaks rustling suspiciously, bulging shapes under cloaks, cloaks of women tangling together, and a cloak which a woman kept passing over her face

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<sup>60</sup> The wearing of a red cloak was seen as an old-fashioned mark of poverty by Pastor Moritz, in *Travels in England* quoted in R. Bayne-Powell *Travellers in Eighteenth-Century England*, 1<sup>st</sup> edition, London, 1951, p.184. On the other hand, J. Tozer & S. Levitt, *Fabric of Society: a Century of People and their Clothes 1770-1870: essays inspired by the collections at Platt Hall, the Gallery of English Costume, Manchester*, Manchester, 1983, show red cloaks as a country woman's dress, out of fashion in town by the second decade of the nineteenth century, and worn only by the elderly. There is no suggestion that a red cloak marked out a prostitute, although the link between poverty, life-cycle distress and prostitution might indicate such a link.

<sup>61</sup> A contrary view of fashion; see previous note.

<sup>62</sup> OBSP: 1807-8, Feb. 1808, case 257, v. Maria Smith.

<sup>63</sup> OBSP: 1794-5, July 1795, case 363 v. Sarah Pine (first appearance), pp 956-9.

ostensibly to smother her cough. A picture is presented of a female world of flowing clothes, rustling skirts and a confused dance of concealing movements, adjustments of dress, shufflings, waddlings, and materialisation of swathes of textiles from secret places under women's clothing, some warm from where they had been hidden. The case against Catherine Drew and Catherine Carney gives a vivid example of this sort of scene. The two women were charged with shoplifting as much as fifty-four yards of printed calico from a linen draper in Holborn. They had come to the shop on two consecutive days to buy calico. On neither occasion did they have sufficient money to pay for the piece which had been cut for them. On the second day, the shopman had observed Drew 'stoop down in pretence of tying up her stockings. I perceived her making a great bustle in tying up her stockings, which excited my notice, when she arose up, she took both her hands, pretending to draw up her petticoat... I perceived the sides of her waist to have increased very much, nearly double to what it was before, which induced me to go round the counter immediately; her eyes were fixed on me; her sides decreased and I picked up that piece from beneath her petticoats near the counter; I accused her of having taken it, and she denied it'. While this bustle was going on, the other woman was moving out of the shop door with the large amount of printed calico under her arm.<sup>64</sup>

Women's dress was of interest in other ways. Jane Norton, indicted for stealing thirteen yards of black silk lace from a haberdasher at Holborn Bridge, was described by prosecution witnesses as not being short of money, and 'dressed in a very decent manner; and being an old woman, one could not suspect her'. Despite vigorous defence by her counsel and seven witnesses to her good character, she was sentenced to death.<sup>65</sup> A decently dressed woman was certainly not above suspicion, perhaps to the contrary.

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<sup>64</sup> OBSP: 1803-4, Sept. 1804, case 471. p.416.

<sup>65</sup> OBSP: 1789-90, September 1790, case 596, pp. 719-21.

Charlotte Power, a fine dresser, was indicted for stealing a pair of silk stockings from an Oxford Street hosier. Her long-tailed white muslin gown and her smart parasol were her undoing, raising the shopman's suspicions. The Court, on the other hand, were impressed with her, calling her a "lady", an unusual form of address for a female prisoner. They sympathised with her difficulties in handling her 'train' in which she was accused of secreting the stockings. When the stockings were found in her dress, she had seemed confused. 'I should think so too', responded the jurymen. Charlotte explained that she wore the same gown to Court - to show them that 'it is a nice dress, I held it up a great deal'. The stockings she had desired, she said, 'I wanted them as good as I could get them and as rich'. Finally, dissatisfied with what she had been offered, she had swept her train off the counter, taken her parasol and bade the shopman good-day. Her astonishment at being accused of shoplifting seemed sincere to the jury, who found her not guilty.<sup>66</sup> In the trial of Frances Nowland, her counsel made a feature of finding out how she was dressed at the time of her shoplifting offence. 'Not as she is now', was the reply. She turned up to Court less well-dressed. Her co-defendant, Ann McDougal, turned out in the good clothes Nowland had worn on the day she went to the shop.<sup>67</sup> Appearance was important for the female shoplifter and to the Court. It was barely an issue when men were defendants.

### **Men and women working together:**

Most men and most women carried out their shoplifting on their own, or were charged with the offence as individuals. When thieving was carried out in a group, women were more likely to work with other women than to work with men. During the period, 150 women (40% of all female shoplifting defendants) were indicted in same sex

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<sup>66</sup> OBSP: 1804-5, Sept. 1805, Case 619, p.543.

<sup>67</sup> OBSP: 1816-17, Dec. 1816, Case 44, p. 22.

groups. Seventy-three men, (24% of all male shoplifting defendants) were indicted in same sex groups.<sup>68</sup> The more common tendency of women to shoplift in twos and threes might contribute to their lower overall conviction rate. A jury might have been content to apportion blame to one of the pair or three whom they could regard as the ringleader, finding the others not guilty. This happened in twelve of the sixty-seven female groups (18%). One (or more) of the group was found not guilty, the other(s) fully or partially guilty. This split occurred only in four of the thirty-three male groups (12%) accounting for a much smaller overall number of male acquittals. The numbers are small, but indicate the need to look in detail at small differences in order to explain larger differences in the judicial treatment of men and women.

Over the whole of the period, there were only twenty-two instances of indictments of mixed-sex groups or pairs. Where verdicts were split - not guilty and guilty - the decision went either way, in favour of male or female. There is a possibility that women working with men did not reach this stage of trial, having been discharged by magistrates.

### **Conclusion:**

This new examination of the statistics of shoplifting trials at the Old Bailey, together with a closer look at some of the stories of how the crime was committed and what was stolen, has provided suggestions about the reasons behind judicial decision-making. Some of these suggestions may be tentative, seen in the setting only of shoplifting. However, they provide clues which may be fleshed out when other

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<sup>68</sup> The 150 women were indicted in 67 different groupings. The 73 men were in 33 different groups. The average numbers in a male or a female group were almost identical (2.23 for women, 2.21 for men). The tendency of women to associate in crime has sometimes been seen as reflecting female dependency on male agency, e.g. Beattie, 'The Criminality of Women' p.92 without statistical evidence. The evidence in this chapter shows that female association is with other females. Walker, 'Women, Theft', pp.83-86, and Fig. 4.1.

categories of crime are analysed. Women were highly visible in the shoplifting category, being 54% of those indicated at the Old Bailey in the years studied. This in itself is important, since women are so often believed to be little implicated in serious crime. Juries and judges did not have a uniform response to the men and women appearing before them. Women, as a category, were not the recipients of lenient judgements. Some women were; many more women than men. The comparison of verdicts, and, therefore, of initial sentences, is interesting. Men and women were equally found fully guilty of this offence and, at this stage, equally sentenced to death. Where partial verdicts were reached, women were, at this stage, more likely to receive custodial sentences, while men were more likely to be sentenced to seven years' transportation. However, the most obvious manifestation of judicial lenience towards women is in the much greater proportion of women found not guilty and acquitted – 29% of females compared with 16% of men. It is not by any means easy to discover exactly why juries exercised this discretion in favour of females. The evidence presented in this chapter does not bear out stereotypical views about 'feminine' behaviour – for instance, the suggestions that women are less brave, more dependent, less criminally inclined, behave less threateningly. To the contrary, many of the women tried for shoplifting were seen by the jury to be audacious, independent, serial thieves, stealing items of high value.

Where fully guilty verdicts were returned, where no lenience was exercised towards females, examination of the stories told in court suggests that decisions were prompted by reactions which differed according to the gender of the offender. The men who faced the death penalty at this stage were likely to be young (sometimes very young), unemployed, poor and indigent, suggesting that the middling and trading sort who made up the Old Bailey juries feared this group of the plebeian, urban population. The other significant group of males sentenced to death were those who stole

particularly high value goods, especially jewellery, and their behaviour would be seen as a particular danger. The selection of women found fully guilty was of a different order. The stories show them to have been 'troublesome', loud, swearing, fighting, drunk, resisting arrest, of lax sexual morals. They too were part of the poor, urban, rabble, 'unfeminine' in behaviour, needing to be treated severely. Decisions at the Old Bailey were strongly affected by the gendered expectations of the jury.

The strongest suggestion that emerges from the analysis in the Chapter is that men's and women's experiences of shoplifting activities were significantly gendered - in their method of working, and in the type and value of goods stolen. Women mainly stole textiles and clothing, which may have been seen as a crime of necessity, only a minor threat to the security of society, despite the fact that, after food, clothing was the most important staples of daily life, of considerable value. Women did not steal mainly in the least valuable category - that was the arena for poor men's opportunistic thefts. They did not, however, steal in the most valuable category. Most men stole different items to women. They also stole textiles and clothing, but most often hardware items, money and jewellery. High value money and jewellery thefts were seen to be particularly serious. Expected, and feared, male behaviour defined the criminal norm, and the seriousness with which the crime was viewed.

The details of shoplifting activity provide evidence of a significant distinction in the way men and women worked. We see the subtle use of female clothing for secreting stolen items, the crucial role of the cloak, and the frequent location of the offence in shops in which women were 'at home', the expected customers, often working in small groups. Men could be subtle too, but their more open, sometimes brazen methods of stealing, a more 'snatch and grab' approach, is distinctive and different from female shoplifting. None of these observations on different gendered behaviour may appear

especially significant in relation to one crime, but accumulated with similar and contrasting evidence from the two other crimes, such behaviour may be seen to create a highly gendered environment for judicial decision-making. This may provide another view of the treatment of men and women by the judicial system, one which does not rely solely on paternalism as a means of explaining lenient treatment of women.

## Chapter 4

### Pickpocketing Trials At The Old Bailey 1780 To 1808

#### **Introduction:**

The men and women tried at the Old Bailey for the crime of 'stealing privily from the person' (pickpocketing) will be considered similarly to those tried for shoplifting.<sup>1</sup> Similar questions will be addressed. Pickpocketing was another property crime which, until 1808, attracted the death penalty if fully proved. During the period 1780-1808, the numbers of women indicted for this offence in London and Middlesex significantly exceeded the numbers of men. However, in most respects, it was a different type of crime, from the reasons for its appearance on the statute book in the sixteenth century, to the wide range of situations, divided on gender lines, to which the description 'privily stealing from the person' was applied. It was even more difficult to prove than shoplifting. The few indictments heard by the petty jury at the Old Bailey were the tip of the iceberg of theft from the person. The question remains, as with shoplifting, as to why a pickpocketing charge should have been brought.

This chapter will first deal briefly with the crime of pickpocketing and its history, the ways in which it was carried out, and the tight boundaries of its legal definition. The numbers of men and women who appeared as defendants at the Old Bailey will be considered, together with an examination of verdicts and sentences. The ways in which men and women committed the crime of pickpocketing will be analysed, where and when they did it, and who they were. In the case of pickpocketing, the question of

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<sup>1</sup> OBSP for Sessions' years 1780/1, 1781/2, 1789/90, 1790/1, 1791/2, 1792/3, 1793/4, 1794/5, 1798/9, 1800/1, 1801/2, 1802/3, 1803/4, 1804/5, 1805/6, 1806/7, 1807/8 (17 full years) analysed. These are the same years as Chapter 3, but ending when pickpocketing ceased to be a capital crime, and when the term 'private' was no longer used to describe stealing from the person. The same possibilities for inaccuracies apply. See Chapter 3.

diverse gendered behaviour was more pertinent to the court's judgements than it was in relation to shoplifting.

### **The crime of pickpocketing:**

Pickpocketing - larceny 'clam et secreta' from the person - became a capital offence in 1565.<sup>2</sup> It was defined as the act of 'feloniously taking any money, goods or chattels, from the person of any other, privily, without his knowledge, in any place whatsoever'. From early practice, the stolen item had to be worth more than twelve pence in order for the accused to be deprived of benefit of clergy. Lesser amounts stolen 'clam et secreta' were defined as petty larceny. The preamble to the 1565 Act clarified the activity which the law drafters wished to deter and punish by the imposition of the death penalty. The language used is that of a section of society outraged by the audacity and impropriety of 'cut-purses or pick-purses'. This 'certain kind of evil-disposed person...do confeder together, making among themselves as it were a brotherhood or fraternity of an art or mystery, to live idly by the secret spoil of the good and true subjects of this realm'. This they did 'at time of service or common prayer, in churches, chapels, closets and oratories... also in the Prince's palace, house, yea and presence, and at the places and courts of justice.... And in fairs and markets, and other assemblies of the people, and....at ...(the) execution of such as been attainted of any murder, felony or other criminal cause, ordained chiefly for the terror and example of evildoers...without respect or regard of any time, place or person, or any fear or dread of God...under the cloak of honesty of their outward appearance, countenance and behaviour, subtilly, privily, craftily...to the utter undoing and impoverishing of many.'<sup>3</sup>

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<sup>2</sup> 8 Eliz., c4, s2 (1565).

<sup>3</sup> 8 Eliz. c4, preamble, Pickering, *The Statutes at Large from the 2<sup>nd</sup> to 31<sup>st</sup> year of Elizabeth*, Vol. VI, Cambridge, 1764.

Whether this hyperbole was justified by reality, either in the sixteenth or the eighteenth centuries, is uncertain. However, the image which provoked horror and shock was one of gangs of thieves, one man stealing and handing on to others, in places where the public gathered. The statute provided the death penalty only for the individual whose hand took the item, not for those who aided and abetted. Eighteenth-century case law built on this distinction; for example: 'it depends almost generally upon a nice species of dexterity which does not require the assistance of a second person to perform'.<sup>4</sup> This meant that, if two people were indicted together, and there was not clear proof as to which one made the final act of taking, neither should be found guilty. The apparent mis-match between the intention and words of the statute were a cause of some of the technical difficulties which judges and juries experienced in dealing with this crime. Its intention was directed at activities almost entirely, but not exclusively, carried out by men, not women. In practice, women, as streetwalkers, or prostitutes, for instance, were, in London and Middlesex, more often caught by it than men, and for activities which did not seem to have been in the minds of the lawmakers.

The statute also stipulated that the theft must be effected without the victim's knowledge. This was hard to demonstrate. Failure to do so led to many unsuccessful prosecutions, when the victim had to admit that he had some idea of what was going on in an encounter in which he was deprived of possessions. Case law shows how, gradually, through practice and precedent, criteria were established requiring that there should be no knowledge on the victim's part that a theft was happening, and that no violence might be used or fear caused. These criteria were not fully established as legal practice until the last quarter of the eighteenth century. Before this time 'open' larceny,

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<sup>4</sup> For instance, *R -v- Murphy* in 1 Leach 266 - 1783, in Radzinowicz, *A History of English Criminal Law*, Vol. 1, London, 1956, Appendix 1 on Capital Statutes, p.661; Hawkins, *A Treatise*, Vol. 1, p.253-4; East, *Pleas of the Crown*, Vol. 2.

such as the snatching of a hat from someone's head in the street could be tried as larceny 'clam et secreta'.<sup>5</sup> The statute was 'intended to suppress a certain species of dexterity, against the success of which the common vigilance of mankind was found not to be an adequate safeguard and protection, and therefore if the larceny is in the slightest degree detected at the time it is committing, the offender is not within the penalty of the act.'<sup>6</sup>

The circumscriptions went further. An Old Bailey case of 1782, celebrated in case law, established precedent on the words 'without his knowledge'.<sup>7</sup> Thomas Gribble had been drinking at a public house in Long Acre with an acquaintance, Thomas Sheridan, who was 'much in liquor', so much so that Gribble invited him to his apartment to sleep it off. When Sheridan woke, he missed his silver watch, chain, seal and key, valued at forty shillings and eight pence. Gribble admitted to the theft, and said he had already pawned them. The Court decided this was not a case of private stealing, because of the intoxication of the victim. The Judge stated that 'the statute was made to protect that property which persons awake can secure.' This simple statement was elaborated in the case-law: 'The act was intended to protect the property which persons by proper vigilance and caution should not be able to secure; but that it did not extend to persons who by intoxication had exposed themselves to the dangers of depredation, by destroying those faculties of the mind by the exertion of which the larceny might probably be prevented'.<sup>8</sup> This principle explains why judgements went so frequently in favour of female defendants and against their male victims. If the victim of a pickpocket had removed or opened items of his clothing, an offence of private stealing would be difficult to sustain. If the victim was drunk, the restrictions about 'proper vigilance and caution' made the case equally difficult to prove. There were many instances where

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<sup>5</sup> For example, the decision in *R - v - Steward* (1690) (in Radzinowicz, *A History of English Criminal Law* Vol. 2, Appendix 2, p.663).

<sup>6</sup> Hawkins, *A Treatise*, Vol. 1, p.255; East, *Pleas*, Vol. 2, p.706.

<sup>7</sup> OBSP: 1781-2, May 1792, Case 179.

<sup>8</sup> 1 Leach 240 in Radzinowicz, *A History of English Criminal Law*, Vol. 1, Appendix 2, p.663.

pickpocketing law was used to penalise plebeian male behaviour, their drunkenness and, hypocritically perhaps, their resort to prostitutes. There might even be a sense in which men as victims were in 'double-jeopardy', while the behaviour of female pickpockets was seen as unthreatening.

Another restriction related to the place in which the crime occurred. Two women had emptied the pockets of a coachman asleep in his carriage as he waited for a fare at the door of a brothel. Their action did not wake him. The Court ruled that it was not the intention of the statute to find this sort of act worthy of capital punishment since it was 'evident from the preamble of the statute, that it was intended only for the protection of persons in public meetings, and places of proper resort'.<sup>9</sup> The statute did indeed have such an intention, but if the principle had been followed, few cases would ever have been proved against a woman. Margaret Kennedy's trial in 1797 established that the privily stealing law was not infringed where a drunken prosecutor, picked up by a woman of the town, having fallen asleep in the house they had gone to, was relieved without his knowledge of two guineas. 'There having been no fraud used by the prisoner in making the prosecutor drunk, but he having fallen into that state by his own default; and that it was all to be taken as one transaction.'<sup>10</sup> This established a precedent that could influence judgements about thefts which took place in women's rooms and lodgings. Sometimes it did and sometimes it did not.

In only one of the cases analysed in this period was there a recorded exchange between parties in the courtroom about the reason a capital charge was brought. The shock and outrage of a victim, John Marshall, a surgeon from Bloomsbury, mirrored the sentiments of the statute's preamble. John Scape, a twenty-one year-old, picked his pocket of a silk handkerchief as he walked down Chancery Lane at six o'clock on a

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<sup>9</sup> 1 Leach 240 note a) Radzinowicz, *A History of English Criminal Law*, Vol. 1, Appendix 2, page 663.

<sup>10</sup> East, *Pleas*, Vol. 2. p. 706: case decision before the twelve judges, 1797.

sunny July evening. Marshall said he had been ‘wholly unconscious’ of the theft until told by other people in the street. Although Scape had knelt to beg forgiveness, he ‘could not think of doing that, in consequence of his robbing me at that time of day’. Another witness heard Marshall say, ‘it was such a daring thing that he could not think of (forgiving) it’. The jury must have shared the victim’s sense of outrage, finding Scape fully guilty. When he was sentenced to death, there was no recommendation to mercy from the victim.<sup>11</sup>

There was also a tendency to mete out rough justice at the discovery of a pickpocket. Philip Sutton was brought to court against the odds of the crowd dealing with him in their own way. He was charged with stealing a linen pocket containing two half-crowns, two shillings and ten half pence from a woman in the crowd watching executions at Tyburn. ‘The bystanders were all for dealing with him in the customary way by ducking him on the spot’, but a constable in the crowd did not permit it. Sutton was sentenced to one year in Newgate since the capital charge could not be proved against him, the victim having been aware of the theft. Why did she bring a capital charge? Was pressure brought to bear on her? Who was she - an ordinary woman, jostling in the crowds at the executions, with a moderate amount of money for a day out? Sutton told the Court that he met her in a public house before the incident, and had offered her money (for what, he did not say) which she refused. Did the victim feel she had endured some kind of insult?<sup>12</sup>

### **Overview of pickpocketing trials, verdicts and sentences:**

It is reasonable to suppose that pickpocketing was a common crime, far more common than prosecutions suggest. Newspaper articles reported such thefts at public

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<sup>11</sup> OBSP: 1804-5, Sept. 1805, case 557.

<sup>12</sup> OBSP: 1780-1, Dec. 1780, case 28.

gatherings, fairs, playhouses, and processions - but not in whorehouses and prostitutes' rooms. The Gentleman's Magazine warned of 'expert genteelly-dressed men and women' who went to such public occasions to plunder watches, purses and pocket books.<sup>13</sup> Rarely did one of those 'genteelly dressed' women reach Court, and few of the men either. During the seventeen years analysed, an annual average of only about thirteen cases of pickpocketing were brought before the Old Bailey Sessions, less than half the annual average number of shoplifting cases. No doubt, the difficulty of proving the facts of the charges because of the circumstances, often embarrassing, in which many of the thefts had occurred, was deterrent enough to the victim. This combined with the nature of the law, and the generally low value of goods stolen was a further deterrent. A charge of simple larceny could bring punishment enough.<sup>14</sup> Small as the London and Middlesex totals are for this period, they are in excess of figures for Surrey,<sup>15</sup> emphasising that this was an urban crime, perpetrated in places where crowds gathered and where prostitution flourished.

**Table 4.1** shows that female pickpocketing defendants constituted 55% of the total - 123 individuals. There were 99 male defendants. This proportion is also different from the Surrey figures, where Beattie found a much higher proportion of women - around two women to every man.<sup>16</sup> The higher proportion of men in the London and Middlesex figures may reflect the interesting public life of the city, where crowds gathered to stare, watch, cheer, admire and be curious at the slightest opportunity, and

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<sup>13</sup> *The Gentleman's Magazine and Historical Chronicle*, 1795, Vol. 65, Part II, p.657.

<sup>14</sup> Simple larceny (whether grand larceny where the item stolen was worth more than one shilling, or petty larceny for goods of less value) encompassed a group of 'clergyable', i.e. non-capital, offences, and these were by far the greatest majority of property offences tried on indictment, certainly in the London metropolitan area. See Beattie, *Crime and the Courts*, pp. 181-185 and his tables 4.1 and 4.7.

<sup>15</sup> Beattie, *Crime and the Courts*, p.180; idem. 'The Criminality of Women', p. 91. In Surrey, only 112 people were indicted for pickpocketing during 61 years between 1663 and 1802.

<sup>16</sup> Beattie, *Crime and the Courts*, p.180, but in idem. 'The Criminality of Women', p. 91, sample years in Surrey during 1663-1802 give a less divergent proportion for this crime, with men at 53.3% and women 46.7%, but in a total of only 30 cases.

**Table 4.1: Pickpocketing indictments at Old Bailey Sessions 1780 -1808**

Years of war or peace	Years	Total	Average per year	Females (average per year)	Females as % of total	Males (average per year)	Males as % of total
War (2 years)	1780-82	37	18.5	28 (14.00)	76%	9 (4.5)	24%
Peace (4 years)	1789-93	51	12.75	27 (6.75)	53%	24 (6.00)	47%
War (3 years)	1793-95 1798-99	37	12.33	26 (8.66)	70%	11 (3.66)	30%
Peace/war (3 years)	1800-03	46	15.33	10 (3.33)	22%	36 (12.00)	78%
War (5 years)	1803-08	51	10.2	32 (6.4)	63%	19 (3.8)	37%
<b>Totals</b>	17 years	<b>222</b>	13.05	<b>123</b> (7.23)	<b>55%</b>	<b>99</b> (5.82)	<b>45%</b>

Source: OBSP (CLRO)

where males would form a significant part of these occasions.

The figures indicate that pickpocketing, like shoplifting, was not a crime where indictments decreased in years of war. The proportion of women to men is similar overall to the proportion in shoplifting (where women were 54% of the total).

Indictments against women were at a high level in wartime but the pattern is not simple.

The peak years for male indictments (1800-03) co-incide with some years of exceptionally high consumer goods prices.<sup>17</sup> There is little doubt that pickpocketing was a crime committed largely from economic need. It may fit the 'serious and more skilled' description suggested by Hay, where the activities of some of the men were concerned.<sup>18</sup>

However, the exercise of skill does not mean that the theft was not motivated by need.

Like shoplifting, some planning of the thieving was needed, but it seems to have been mainly opportunistic. Where male victims of women were concerned, there was a strong presumption in court that the victims' unwary and foolish behaviour had resulted in an outcome which was only to be expected as a hazard of such an encounter. By the

<sup>17</sup> B.R. Mitchell & P. Deane, *Abstract of British Historical Statistics*, Cambridge, 1962; Table 1, p.468; via E. B. Schumpeter, *English Prices and Public Finance 1660-1822: Review of Economic Statistics 1938*.

<sup>18</sup> Hay, 'War, Dearth and Theft', p.145.

end of the eighteenth century, the disinclination of victims to prosecute, and of the Courts to find cases fully proven, showed that pickpocketing was no longer regarded as the serious crime envisaged in the late sixteenth and seventeenth centuries.

Verdicts in capital pickpocketing cases at the Old Bailey between 1780 and 1808 are set out in **Table 4.2**. The lack of success in proving a charge of private stealing from the person is immediately noticeable. The number of men and women found fully guilty was very small. Why were these few found fully guilty? The large proportion of

**Table 4.2: Verdicts in pickpocketing cases: 1780- 1808 - Old Bailey Sessions**

	1780-1782	1789-1793	1793-95 & 1798-9	1800-1803	1803-1808	Totals
<b>Total verdicts</b>	37	51	37	46	51	222
<b>Men</b>	9	24	11	36	19	99
<b>Women</b>	28	27	26	10	32	123
<b>Fully capitally guilty</b>						
<b>Total and % of total verdicts</b>	3 (8%)	3 (6%)	0 -	6 (13%)	2 (4%)	14 (6%)
<b>Men and % of men's verdicts</b>	1 (11%)	2 (8%)	0 -	5 (14%)	1 (5%)	9 (9%)
<b>Women and % of women's verdicts</b>	2 (7%)	1 (3%)	0 -	1 (10%)	1 (3%)	5 (4%)
<b>Partial verdicts</b>						
<b>Total and % of total verdicts</b>	15 (41%)	37 (73%)	14 (38%)	28 (61%)	23 (45%)	117 (53%)
<b>Men and % of men's verdicts</b>	4 (44%)	16 (67%)	5 (45%)	24 (67%)	11 (58%)	60 (61%)
<b>Women and % of women's verdicts</b>	11 (39%)	21 (78%)	9 (35%)	4 (40%)	12 (38%)	57 (46%)
<b>Not guilty/acquit</b>						
<b>Total and % of total verdicts</b>	19 (51%)	11 (22%)	23 (62%)	12 (29%)	26 (51%)	91 (41%)
<b>Men and % of men's total</b>	4 (44%)	6 (25%)	6 (55%)	7 (22%)	7 (37%)	30 (30%)
<b>Women and % of women's verdicts</b>	15 (54%)	5 (19%)	17 (65%)	5 (50%)	19 (59%)	61 (50%)

Source: OBSP (CLRO); Criminal Registers HO26 (PRO)

defendants found not guilty or otherwise acquitted is striking (41%). The difference between men and women is particularly striking, with half of the women being acquitted compared with less than a third of the men. Men more frequently fell into the partially guilty category (61%) than women did (46%). Compared with shoplifting verdicts, these figures show far fewer fully guilty verdicts (6% compared with 17% for shoplifting) and many more not guilty verdicts (41% compared with 23% for shoplifting). Smaller proportions of pickpockets than shoplifters received partial verdicts, although there is more similarity here (53% for pickpockets and 60% for shoplifters).<sup>19</sup> The reasons for the widely varying decisions between males and females appear to be almost entirely a factor of different gendered behaviour and the highly gendered nature of the statute itself. This will be discussed later in the chapter.

**Table 4.3** sets out sentences allocated by the judges for those found partially guilty at the Old Bailey. Here the differences between men and women continue. Table 4.2 showed that a significantly higher proportion of men were likely to end up in this category - 61% of all men tried on indictment, compared with 46% of all women tried on indictment.

Men made up 51% of the total of the partial verdicts, women 49% - the same proportions as in shoplifting. The large proportion of this group which was sentenced to seven years' transportation (69%) is noticeable when compared with shoplifting cases (46%). Even more striking is that 80% of all males in the partially guilty group received a transportation sentence. This suggests that the life-style profile of these men and boys made them, in the eyes of the judiciary, ideal candidates for sending to the new penal colony. The proportion of females in the partially guilty group who were sentenced to transportation was significantly lower than the men, at 58%. However, this was a

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<sup>19</sup> I have found no comparable statistics for pickpocketing either at this or any other period.

**Table 4.3: Sentences in partial verdict pickpocketing cases: Old Bailey  
Sessions: 1780-1808**

		1780-1782	1789-1793	1793-95 & 1798-9	1800-1803	1803-1808	Totals	% of partial verdicts
<b>Partial verdicts</b>	<b>Total</b>	15	37	14	28	23	117	100%
	<b>Men</b>	4	16	5	24	11	60	51%
	<b>Women</b>	11	21	9	4	12	57	49%
<b>Punishment</b>								
<b>Trans- portation</b>	<b>Total</b>	1	26	12	27	15	81	69%
	<b>Men</b>	0	12	5	22	9	48	80%
	<b>Women</b>	1	14	7	5	6	33	58%
<b>Prison</b>	<b>Total</b>	10	8	2	2	7	29	25%
	<i>Note 1</i> <b>Men</b>	2	1	0	2	2	7	12%
	<b>Women</b>	8	7	2	0	5	22	39%
<b>Other</b>	<b>Total</b>	1	1	0	0	0	2	2%
	<i>Note 2</i> <b>Men</b>	1	1	0	0	0	2	3%
	<b>Women</b>	0	0	0	0	0	0	-
<b>No record</b>	<b>Total</b>	3	2	0	0	0	5	4%
	<b>Men</b>	1	2	0	0	0	3	5%
	<b>Women</b>	2	0	0	0	0	2	4%

*(Sources: OBSP (CLRO); Criminal Registers HO26 (PRO))*

*Note 1: a) sentences varied from 2 years (2 females, 1 male) down to a week.*

*b) most prison sentences were combined with imposition of a fine (one shilling) or with a whipping. Ten of the female custodial sentences incorporated fines, and two of the males. Three female sentences incorporated whippings, and three of the males.*

*Note 2: Two men were sent to serve in the Navy.*

substantial number, and well in excess of the proportion of female shoplifters (43%) sentenced to transportation at this stage. This might suggest that the Court saw women shoplifters and pickpockets as different types of woman. Some shoplifters were seen as practised criminals, and sentenced to death. Or they were seen as unfortunate and were treated more leniently through imprisonment. Female pickpockets' activities may not, in themselves, have been seen as seriously criminal. On the other hand, transportation might have been seen as a useful way of dealing with their undesirable presence on the streets of the capital. The high male transportation rate left few men to receive a prison

sentence (12%), most of which were sentences of six months or less. A much larger proportion of women (39%) received custodial sentences, the majority for 6 months or less.

The use of defence counsel in pickpocketing cases did not have a major impact on verdicts and sentencing of men and women. During the same sample years (1789 to 1795) as analysed in Chapter 3, a much lower proportion of pickpocketing defendants used counsel, and, unlike the shoplifting cases, a lower proportion of the women used counsel than the men. The proportions were reversed, with men being twice as likely as women to do so. This may suggest that female pickpockets were poorer than female shoplifters, although fees for criminal counsel were not excessive and could have been within the reach of some pickpocketing defendants or their friends.<sup>20</sup> During these years, 21% of pickpocketing defendants used counsel (30% of the men, and 15% of the women). None of this small number was found fully guilty. Although the numbers were small, use of counsel was a worthwhile strategy for the five men found not guilty (forming a higher than normal proportion of men found not guilty). It made little difference to the women.

Little information is available about the personal situations of the defendants who were able to afford the services of counsel. One of the men was the notorious George Barrington, who led a colourful, gentleman's life as a result of his criminal activities, and another was a ladies' hairdresser who was in employment. The other six men remain anonymous, other than that they all produced copious character witnesses at their trials. Two of the seven women with counsel were sisters, described as 'so genteelly well-dressed' by the prosecutor. The other five women were apprehended as they earned their money on the streets. They accosted their victims, all of whom were

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<sup>20</sup> Bentley, *English Criminal Justice*, pp. 97-99.

drunk, in streets and doorways in the hours of darkness. Their victims were robbed either in the women's rooms or in the street. The only other information about them places one as an out of work housemaid, and one as a 35 year-old widow with two young children, and one who may have secured the courts' sympathy (a sentence of one week in Newgate with a one shilling fine) with her description of how her client victim refused to pay her what he had agreed for her sexual services, giving her a black eye instead.

### **Death sentences for pickpocketing:**

Table 4.2 showed that only a small number of pickpockets received sentence of death at this stage of the criminal justice system - fourteen people, five women and nine men, the sentences spread thinly and regularly through the 17 years. It has been suggested elsewhere that the reason juries would return a fully guilty verdict, when everyone involved with the process knew that a death sentence would not be carried out, was to ensure that a transportation sentence would be the final result.<sup>21</sup> There were few pickpocketing cases where the jury felt they had to make this particular decision. Elizabeth Hylett, who stole a canvas bag containing four and a half guineas from a soldier, was described as 'a girl that came from America', she was well known to the watch, and in her trial used forthright language, accusing the soldier of 'compulsion' in the sexual act.<sup>22</sup> Hannah Carryl, another woman of the streets, told a complex tale in her defence for stealing a silk purse containing five guineas and eight shillings, which involved encounters in a playhouse passage, and holding the victim's coat while he joined a street fight.<sup>23</sup> Mary Smith robbed a drunken Chelsea College pensioner of

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<sup>21</sup> *PP.*, 1819, Vol. VIII, (585) shows no executions for stealing privately from the person in London and Middlesex since 1767. I have found no evidence to the contrary.

<sup>22</sup> OBSP: 1780-1, Case 6.

<sup>23</sup> OBSP: 1780-1, Case 501.

seven and a half guineas and four shillings with which he had gone out to buy clothes. There was evidence that she was violent towards the old man when they met up in a public house.<sup>24</sup> Ann Watson stole eight shillings from a hotel porter in a private room;<sup>25</sup> and Eliza Kelly stole two guineas and a few shillings from a man in the street at night.<sup>26</sup> Apart from the suggestion of strong language and rough behaviour in two of these cases, there is nothing which obviously explains why these five women should have been selected for a fully guilty verdict, since their stories are typical of the cases of nearly every female 'pickpocket'.

In the cases of the nine men found fully guilty, it is possible to suggest reasons for some of the decisions. Lucius Hughes stole a gold watch, worth thirty pounds, together with a gold chain worth five pounds, and two gold seals from His Excellency Baron Kutzleben, a German nobleman attending the Opera House. Hughes paid for upsetting nobility - but may also have been known as a thief, as he was before the Court again in the same session on another charge of theft.<sup>27</sup> William Jones, a 'poor boy', aged 18, stole £16 and bought himself a coat. His victim was asleep, having drunk half a pint of mulled raspberry. The verdict here was harsh in the circumstances - a drunken victim, asleep, and the theft seen by others. Perhaps this was the jury's way of putting new opportunity in the way of a young man who seemed to have little chance in life in London.<sup>28</sup> Lawrence Keen, from America, feigned lameness, stole a handkerchief, worth only five shillings, from a clergyman. The clergy often appear to have been strong upholders of the law. Keen had chosen a victim who believed in deterrence and retribution.<sup>29</sup> Thomas Houghton stole a watch worth £3 at Hendon fair.<sup>30</sup> Thomas

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<sup>24</sup> OBSP: 1791-2, case 222.

<sup>25</sup> OBSP: 1801-2, case 203.

<sup>26</sup> OBSP: 1806-7, case 600.

<sup>27</sup> OBSP: 1781-2, case 157.

<sup>28</sup> OBSP: 1790-1, case 154.

<sup>29</sup> OBSP: 1791-2, case 260.

<sup>30</sup> OBSP: 1800-1, case 533.

Wynch stole a pound and a pocket book from a wool sorter in town from Northampton, at 11 o'clock in the morning. Wynch was 23 years old, and a good candidate for life at the other side of the world.<sup>31</sup> John Scape, who stole from the surgeon, Marshall, a case referred to earlier, chose his victim unwisely.<sup>32</sup> The remaining three cases involved thefts in crowded streets of pocket books containing substantial sums of money (from £6 to £172).<sup>33</sup>

In the men's cases, the verdicts may have been appropriate responses to appease the outrage of a German baron, a clergyman, and a surgeon, or to make a gesture to show that crime at public fairs was intolerable, and that visiting traders should not be molested. However, the reasoning for the women's cases is difficult to categorise. The stories which emerged in court and resulted in a death sentence were not much different from the stories where partial verdicts were returned. It may be that some women came across as more troublesome than others, acting with more agency, less 'troubled' and less unfortunate. However, this is a subjective reading of the stories. When Priscilla Hodder, stole half-a guinea, two half-crowns, and three shillings from a cooper, while 'stroking him down' at midnight behind a public house, she was found partially guilty. The jury may have taken against her prosecutor since he appeared to have been mean in his payment for her services, offering her only sixpence.<sup>34</sup> Other cases turn on the jury's sense of fair play towards women providing sexual services, or on a view that male victims received their just deserts for seeking out women on the city streets at night. In general, juries did not seem to find the behaviour of most female pickpockets as threatening. They may even have sought to penalise male victims for stupidity, drunkenness and lewdness. However, the stories remind us that, whenever we think we

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<sup>31</sup> OBSP: 1801-2, case 810.

<sup>32</sup> OBSP: 1804-5, case 557.

<sup>33</sup> These three cases not reported in the OBSP but in the Criminal Register (HO26/8) for 1801-2.

<sup>34</sup> OBSP: 1790-1, Jan. 1791, Case 78.

are penetrating the record and finding meanings for decisions, those records continue to hide most of what we want to know.

**Gendered differences in pickpocketing behaviour:**

Analysis of the Court records provides ample evidence of difference of treatment of men and women. Reasons for this can be found in the environment of the criminal activities, as they were explained in court. Consideration has been given to what was stolen and from whom; to what is known about the defendants and how they operated - most significantly, where they operated. With respect to items stolen, the differences between men and women do not appear to be significant, rather emphasising the opportunistic nature of much of the crime. However, in the method and location of the crime, the differences are most striking.

The variety of items stolen by pickpockets was limited to watches and accompanying items - keys and seals, money, handkerchiefs, and occasionally to other items, some of which must have been a surprise to the thief. **Table 4.4** gives an account

**Table 4.4: items stolen: pickpocketing cases tried at Old Bailey Sessions: 1780-1808**

<b>Items stolen</b> (most valuable item in one theft 'haul')	<b>By females</b>	<b>By males</b>
<b>Watches</b> (with keys, seals etc.)	<b>43</b> (35%)	<b>20</b> (20%)
<b>Money</b> (plus purses, pocket books, sometimes empty)	<b>77</b> (63%) maximum £154	<b>38</b> (38%) maximum £172
<b>Handkerchiefs</b>	<b>0</b>	<b>31</b> (31%)
<b>Other items</b>	<b>3</b> (2%) opera glasses, spectacles, manicure set	<b>10</b> (10%) e.g. spectacles, steel elastic truss, inkstand, shirt, breeches, cord binding, garnet studs, pencil case,
<b>Totals</b>	<b>123 (100%)</b>	<b>99(100%)</b>

*Source: OBSP (CLRO)*

of the items stolen. Apart from noting that women did not steal handkerchiefs, being much more likely to net watches and money than were the men, there is little to be learned from further analysis. There was no difference in the value of the stolen items, or at least the value as stated in the indictment, between men and women. Because of the greater likelihood of men stealing handkerchiefs, the overall value of women's thefts was greater than men's.

Victims of indicted pickpockets in this period numbered 194, of whom 175 were male. The nineteen female victims were evenly distributed between the male and female thieves. They were a varied group of married and unmarried women, servants, a lodging house keeper, and a few genteel ladies on outings to shops and houses in various parts of London. Amongst the male victims, no particular group or class was predominant. This is especially true of the male victims of female pickpockets. The men who tangled with prostitutes, and who were prepared to indict them for a capital offence, were a fairly wide cross-section of the less financially flourishing members of male society, mainly tradesmen, artisans, labourers, shopkeepers, clerks, servants, a farmer, surprisingly few soldiers and sailors (only six were so identified), an attorney, and a handful who said they had no trade or who lived on inherited money (three only). The group most vulnerable to the women's attentions, and presumably the most threatened by such criminal activities, were porters and similar types of servants - from grocers' shops, hotels, restaurants, coffee houses, the post office, livery stables, East India and West India company offices - presumably men who had to earn their living by being able to move around the city at all hours, and to demonstrate reliability and honesty with money and other goods entrusted to them.

Male victims of male pickpockets came from nearly as wide a cross-section of society as the females' victims, although with a higher representation from the slightly

better-off merchant and gentry group (15 identified). The cases brought against pickpockets were not often brought by victims in a higher station in life. The gentry and the successful middling sort were presumably wise enough not to find themselves in the areas of London where such misfortune could befall them. If they should be so unwise, then they would avoid becoming involved in prosecutions which could easily damage their reputations and family standing. Their losses would not be sufficiently significant to them. The stage was left to ordinary tradesmen, artisans and other working men.

There is little evidence available in the Court records as to who exactly were the male pickpockets, and the Criminal Registers barely fill the gaps. There were men designated as 'labourer' and a wide selection of urban occupations – coachmen, servants, an errand boy; shop assistants, an earring seller and a debt collector; a hairdresser, a chimney-sweep and a harness maker. Small artisans too – weavers, jewellers, printers, watchmakers, chair makers, shoemakers. There were two soldiers and a sailor. There was a man from America, and the notorious George Barrington, who had a reputation for being just the kind of well-dressed, sophisticated villain, frequenting socially desirable venues, against whom the capital charge of private stealing was properly directed.

It is always impossible to state with any certainty the status and background of women appearing as defendants in criminal cases. Their occupations are rarely mentioned in court or other official records. It would be an over-simplification to say that the vast majority of women indicted for pickpocketing were prostitutes. Nevertheless, the evidence of both victims and accused showed that private stealing from the person happened as an adjunct to sexual activity or 'treats', in encounters on the streets of London in the dark hours, alone or in 'parcels of girls'. The views held by judges and juries about the life-styles of poor women who found themselves on trial

made a link with prostitution almost inevitable.<sup>35</sup> It is not surprising that the court records suggest that 76% of female pickpocketing defendants were, or were seen as, prostitutes, streetwalkers, whorehouse owners, or young women out for a 'good', preferably lucrative, time in male company. In a few other cases, alternative means of earning a living were mentioned - fruit seller, watercress seller, market traders, pot scourers, a washerwoman, out-of work housemaids, a woman who ran a greengrocer's shop. All were typical of the marginal, insecure world inhabited by urban woman, where boundaries were blurred between servanthood - whether in domestic or in casual trades - and the service of male sexual appetites. Prostitution, characterised by its transitory, seasonal and part-time nature, may have been on the increase on the London streets in the late eighteenth century as other employment opportunities for women declined.<sup>36</sup> Relieving 'clients' of their personal belongings was an extra benefit to be derived from a package of treats and sex, and was a better way of earning a living than relying solely on the small amounts of money negotiated with them for sex. The number of women who found themselves at the Old Bailey for so doing significantly exceeded their proportion in any other property crime in London.

Women operated in pairs more often than men, but their joint indictments did not have the same effect on the jury's decisions as they did in shoplifting cases. Twenty-eight of the women were indicted in pairs, and six in two groups of three. Verdicts were generally identical for the pair or group; only in two pairs were different verdicts returned on the individuals. Just eight men were indicted in pairs, and verdicts and punishments were equal. It was unusual for men and women to be indicted together.

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<sup>35</sup> Shore, quoting John Fielding, in 'The Trouble with Boys', p. 78, Arnot & Osborne, *Gender and Crime*.

<sup>36</sup> King, 'Female Offenders', pp.191-216. In 1791 and 1793, about a fifth of all women tried at the Old Bailey (two-fifths of those where a work context was established) 'involved alleged sexual transactions for money'. Also B. Hill, *Women, Work and Sexual Politics in Eighteenth-century England*, London, 1994; Henderson, *Disorderly Women*.

There were only three such indictments - two involving one man and one woman, and one involving two men and one woman. In all three groups, there were differing verdicts and punishments, and in all three the decisions involved harsher verdicts and sentences against the women. The irrelevance of issues related to marriage or 'marital coercion' is even more marked in this crime than in shoplifting cases.

The most striking difference which emerges between the ways in which men and women went about their pickpocketing activities lies in the 'where' and 'when' of the commission of the crime. Table 4.5 summarises the place, the time and the environment

**Table 4.5: place, time, environment of pickpocketing cases: Old Bailey Sessions 1780-1808**

	Women	Men
<b>1. Private lodgings, rooms, apartments, and whorehouses, at night</b>	<b>38</b> (31%)	<b>2</b> (2%)
<b>2. Private rooms in public houses, drinking clubs, boxes in public houses, any time</b>	<b>9</b> (7%)	<b>0</b> -
<b>3. In coaches, any time; in the watch-house cage, night</b>	<b>1</b> (1%)	<b>6</b> (6%)
<b>4. In yards, alleys, dead ends of streets, park gates, public house lobbies, at night</b>	<b>26</b> (21%)	<b>0</b> -
<b>5. In the street, in the hours of darkness</b>	<b>22</b> (18%)	<b>4</b> (4%)
<b>6. In supper-houses, wine vaults, in a shop, in the open in public house, by the fire, in the tap room</b>	<b>3</b> (2%)	<b>12</b> (11%)
<b>7. Openly in the street by daylight, people around, no large crowds</b>	<b>5</b> (4%)	<b>39</b> (39%)
<b>8. In public places with crowds, fairs, theatres, opera house, processions, watching events and people, Custom House, Tyburn etc.</b>	<b>7</b> (6%)	<b>30</b> (30%)
<b>Unknown*</b>	<b>12</b> (10%)	<b>7</b> (7%)
<b>Totals</b>	<b>123 (100%)</b>	<b>99(100%)</b>

(Source: OBSP (CLRO))

\* Details are unknown in cases where, for instance, the prosecutor did not turn up to court and the evidence was not therefore brought.

of the alleged crime as the victim and defendant presented the facts in Court. The differences in 'where' and 'when' between the men and the women are so great that they beg the question as to whether the same crime was being committed. The evidence in Table 4.5 has been presented in an order: from 1 - the most private, enclosed and dark, to 8 - the most public, open and light. The division is, of course, subjective, but reasonable. We may see the halfway-point between dark and light, private and public, coming after group 5 - the street in the dark hours. By this point, 78% of the women's activities have happened, and only 12½% of the men's. From group 6 onwards, into the more public areas, 82% of the men's activities happened, and only 12% of the women's. The inversion of the method, place and time of operating between men and women is virtually complete.

Darkness and light concerned the Old Bailey Court, as it concerned all who were anxious about street crime and effective policing. Views about street lighting and the watch were intimately joined.<sup>37</sup> In court proceedings, it was essential for a victim to be able to identify the perpetrator of the offence, and questions about candles and lamps formed part of the ritual of the courtroom evidential catechism. Sarah Strickland's apartment was candle lit;<sup>38</sup> Mary Ann Deochan ran off with the candle from her room leaving her victim stranded in the dark;<sup>39</sup> Henrietta Spencer's victim held a candle to see her face in a dark alley;<sup>40</sup> Sara Smith's victim said there was a very bad light in her room and there was no candle;<sup>41</sup> Mary Partridge's victim, picked up whilst he made water at a cab stand said that all the time he was with her it was so dark, he could not see her face.<sup>42</sup> The watchman had to call the lamplighter to assist in searching the ground for

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<sup>37</sup> Beattie, *Crime and the Courts*, pp. 67-72.

<sup>38</sup> OBSP: 1780-1, Feb 1781, Case 133.

<sup>39</sup> OBSP: 1805-6, June 1806, Case 433.

<sup>40</sup> OBSP: 1780-1, Oct 1781, Cases 640-641.

<sup>41</sup> OBSP: 1789-90, Feb. 1790, Case 123.

<sup>42</sup> OBSP: 1789-90, Feb. 1790, Case 128.

the watch that Mary Ann Fisher was accused of stealing.<sup>43</sup> St James' Park gateway thefts were invariably said to have taken place by starlight, and the sad victim of Charlotte Walker, who had asked her to see him safe home but had found himself minus his valuables in a sordid room, when asked who had brought him there, said, 'Eh! Eh! A woman in the dark'.<sup>44</sup>

Table 4.5 shows that there were cases of women operating in public, brightly lit space, and men in private dark spaces. The few cases of women or girls operating in public open space include some operating with male companions – one in a public house tap room,<sup>45</sup> one in Oxford Street on a summer afternoon,<sup>46</sup> and one in the crowds on Lord Mayor's Day.<sup>47</sup> Another picked a pocket in the Royal Theatre where her client had fallen asleep with his head in her lap,<sup>48</sup> and another stole from a country girl newly arrived in London, persuading her to join a group of drinking friends in an Oxford Street public house.<sup>49</sup> A group of young girls was involved in tricking two different women in the street, informing them that their petticoats were trailing and offering help to pull them up, on each occasion stealing purses and money.<sup>50</sup> Another group of girls had fun jostling an old woman as she watched children going to St Paul's School.<sup>51</sup> Conspicuous for their unusual female behaviour were Hannah and Mary Wheeler, accused of stealing a purse and money from a woman in a large crowd at Charing Cross in the afternoon, looking at a building which had burned down the night before.<sup>52</sup> Particularly unusual was Hannah Findale, who stole a pocket book containing a well-

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<sup>43</sup> OBSP: 1801-2, Case 717.

<sup>44</sup> OBSP: 1790-1, Case 616.

<sup>45</sup> OBSP: 1791-2, Case 222.

<sup>46</sup> OBSP: 1798-9, Case 324.

<sup>47</sup> OBSP: 1802-3, Case 11.

<sup>48</sup> OBSP: 1805-6, Case 11.

<sup>49</sup> OBSP: 1878-9, Case 364.

<sup>50</sup> OBSP: 1801804-5, Cases 472 and 473.

<sup>51</sup> OBSP: 1806-7, Case 466.

<sup>52</sup> OBSP: 1784-5, Case 387.

fitted-out manicure set from a woman waiting in the Bow Street entrance to the Covent Garden Theatre as a small crowd waited for the doors to open for a matinée performance. She cut the woman's petticoat down the length of its pocket, turned the pocket inside out, removed the pocket book and manicure set, and was apprehended as she went in a second time, attempting to remove a watch she had detected there.<sup>53</sup>

As a rule, men and boys did their private stealing among crowds watching processions, at public hangings, at fights, in crowds watching the quality pass by, at horse fairs and theatre foyers, and were pulling handkerchiefs from pockets in the streets in broad daylight. Women on the other hand were taking fair advantage of inebriated, importunate and unwise men in dark alleys, public house yards, dead ends, up against walls, at park gateways, and during sexual activity in more private places. They took men to their lodgings, through dark alleys and lanes, and in total darkness or by candlelight, relieving them of money and watches, breeches on or off, having ensured the men had been plied with alcoholic beverages and made sure that they had a girlfriend near at hand to receive the items removed from the men's persons or clothes.

The differences in the place, time and manner of committing the crime of pickpocketing are so great, that it is clear that like is not being compared with like. The divergence cannot have been lost on juries and judges, and, even if their decisions were not deliberately and systematically based on these gendered differences, it is inconceivable that they were not sub-consciously affected. Such differences might contribute a further dimension to the public/private distinction which has become an important concept for historians of gender, a distinction which seems to have little

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<sup>53</sup> OBSP: 1792-3, Case 421. This adult female dexterity contrasts with the view of a boy that girls were not as dextrous as boys; 'they pull it out all of a flare'; in H. Shore, *Artful Dodgers*, p.59.

explanatory power for the lives of the urban poor. The paths of women and men crossed and collided as these plebeian folk, labourers, servants, women of the town, moved about, making ends meet, acquiring as good a living as they could, doing what they could, when they could, and, not surprisingly, doing it differently, at different times and different places. It is not only that 'spaces, places and our senses of them (and such related things as our degree of mobility) are gendered through and through'<sup>54</sup> but that public and private space is interchangeable depending on what is done there, who does it and when it is done.

### **Conclusion:**

The analysis presented in this chapter has shown how a law made for largely male activities was used more often to judge the activities of urban women. These women stole 'privately' and secretly, but not in the way that had been envisaged by the statute makers. The crime was extremely difficult to prosecute successfully particularly because of the need for the victim to have been sober, vigilant and acting with propriety. It was therefore particularly difficult to prove in respect of nearly all the women defendants who had carried out their thieving as an adjunct to providing sexual services. The overall acquittal rate was high, especially high for the women (at 50% compared with 30% for men). Very few indeed were found fully guilty and there was a significant difference in punishment allocated to men and women found partially guilty. The men were much more likely to be transported (80% of men found partially guilty, only 58% of the women). The women were much more likely to be given a custodial sentence.

These differences reflect the sometimes extreme difference in the life-style and behaviour of male and female pickpockets. Most of the women earned all or some of

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<sup>54</sup> D. Massey, *Space, Place and Gender*, Cambridge, 1994, p. 186.

their money on the streets of the capital, offering sexual intercourse or other sexual 'treats' to men; some were also, or alternatively, engaged in earning some money in some of the most marginal and insecure urban occupations, as washerwomen, potscourers, watercress-sellers, in menial domestic service or as sewing women. Male pickpockets were not in secure occupations, but a little more so than the females – sometimes in skilled and semi-skilled artisanal trades, as servants, in the armed services, and other service occupations. Difference in occupation and, perhaps, in needs meant a hugely varying way of going about the task of secret stealing, in method, in place, in environment and in time of day. At this stage of the judicial system, gender – and the gendered behaviour and life-style that resulted on the streets of the capital – was the strongest influence on decision-making and discretion.

## Chapter 5

### Bank Of England Trials At The Old Bailey - 1804 To 1833

#### **Introduction:**

Trials at the Old Bailey for forging, uttering and possession of forged Bank of England paper money are the third group of property crime hearings to be considered. Chapter 2 presented evidence of the high rate of prosecution of currency crime at the beginning of the nineteenth century. At their peak, prosecutions brought by the Bank of England well-exceeded the number of prosecutions for shoplifting and pickpocketing. Historians have shown little interest in this group of crimes, perhaps regarding it, as did contemporary crime recorders and reporters, as a specialist occupation, barely touching the lives of the uneducated and unskilled, and certainly not the lives of women.<sup>1</sup> Such an understanding, as shown in Chapter 2, is far from the truth. It is important to understand that this was a crime for which many people went to the gallows.

There are similarities and dis-similarities with the property crimes of shoplifting and pickpocketing. In London, the men and women involved in these activities shared much of the same spaces. Forged note activity took place in the same shops, public houses, coaches, alleys, and lodgings. The names of constables, watchmen, counsel and some shop-owners appearing in the forgery drama are familiar. However, the stories which unfolded in Court were not similar. They were complex, and beset with technical detail. The prosecution process worked, for the most part, like a well-oiled machine. When juries deliberated, they did so intensely, but the need for judges to use discretion in sentencing was largely removed. A distinctive feature of the Bank cases, at this stage

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<sup>1</sup> Excepting McGowen, 'Forgery Discovered', although this deals with the crime in mid-18<sup>th</sup> century and focuses on a narrower group of perpetrators than those involved in the Restriction period. *Idem*. 'From Pillory to Gallows', and 'The Bank of England' (forthcoming). The standard history is Acres, *The Bank of England from Within*; Slinn, *A History of Freshfields*.

of the judicial process, was the lack of a personal relationship between victim and defendant. This relationship significantly affected decisions in shoplifting and pickpocketing cases. The Bank of England presented a professional, bureaucratic, face as victim, and, having decided to prosecute, was not likely to ask for discretion from the Court.<sup>2</sup> This changed the dynamics of court procedure and decision-making. The lack of this relationship may have made capital sentencing easier. A further distinctive feature of the cases is that the proportion of women involved, whilst about average for all property offences, was much smaller than the proportion in shoplifting and pickpocketing.

Moving on from the evidence presented in Chapter 2 about the decisions by the Bank to prosecute on indictment, this chapter considers the trials at the Old Bailey Sessions between 1804 and 1833, the numbers prosecuted for crime involving the paper currency, and the verdicts. The operation of the massive plea bargaining system<sup>3</sup> meant that there were few cases where evidence was presented and defences made. Scope for decision-making about sentences was limited by the verdict. Some of the few stories told in Court will be explored, and the activities of men and women scrutinised. Overall, these stories tell inconclusive tales, but provide some clues to differing attitudes to the men and women before the Court.

Attitudes to bank note forgery, and the death sentence it attracted,<sup>4</sup> varied from year to year during the period of the Restriction, depending on the numbers of prosecutions for uttering instigated by the Bank of England up and down the country.

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<sup>2</sup> Chapter 7 considers how the relationship changed in the post-sentencing environment.

<sup>3</sup> Chapter 2.

<sup>4</sup> Bank of England note forgery or fraudulent alteration became a capital crime when benefit of clergy was removed from it in 1697 (8 & 9 Will. 3, c.20). In 1725, this was extended to offering, disposing or putting away a forged note (12 Geo.1, c.32, s.9). Forgery itself was a capital crime only if it was a person's second such offence (5 Eliz. c.14). The death sentence for these crimes was not abolished until 1832, replaced by transportation for life. In 1801, a further number of paper currency offences were placed on the statute book, but were not capital offences; among them was possession of forged Bank notes, punishable by 14 years transportation. This allowed the Bank of England to use alternative charges, and offer a plea bargain.

In the earlier years, note forgery crime was regarded most seriously by many in English society. It was believed to threaten the nation's commercial well-being. It carried a strong aura of treason. Insidious in nature, difficult to observe and apprehend, it was particularly detested by upholders of English freedoms. However, as the years went by, and the numbers prosecuted, hanged and transported for this crime rose, public unease was expressed. The attention it provoked contributed significantly to the debate on capital punishment and penal policy in the early decades of the nineteenth century. The Bank was never troubled by more than transient opposition from the law and judiciary. However, adverse responses to high levels of prosecutions and executions around 1818 were expressed in newspapers, private publications and in Parliament, and local traders were constantly anxious about low value notes, greatly fearing having a forgery passed off on them. They would not be reimbursed by the Bank and would become involved in further loss of money and time in assisting the Bank in its prosecutions.<sup>5</sup> At times, it was said that, unless forgers and their associates were punished with utmost severity, their activities would proliferate until all trade and activity ceased and:

the circulation of money and information, upon which commerce depended, would come to a halt. These frauds concerned not property itself, but the instruments that facilitated the movement of property. The offence seemed less a form of theft than a life threatening assault upon the forms that sustained a commercial people.<sup>6</sup>

After 1818, a different attitude prevailed.<sup>7</sup> The Restriction was seen to have 'diffused depravity' and 'an effusion of human blood' had resulted.<sup>8</sup> 'It could not be denied that in the course of the last ten years, no capital punishment had excited so much odium, and rendered the administration of public justice so unpopular as that in cases of

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<sup>5</sup> Bank of England, Freshfields Papers, F2/84, AB56/10.

<sup>6</sup> Views of William Paley, in McGowen, 'Forgery Discovered' p.114.

<sup>7</sup> Encapsulated in the famous cartoon by George Cruickshank: 'Bank Restriction Note; a Protest against the Severity of the Penalty for Forgery', published in *The Bank Restriction Barometer* by William Horne London, 16 Jan. 1818.

<sup>8</sup> *The Sun*, 25 Feb. 1818, reporting Sir James MacIntosh in debate in the House of Commons.

forgery'.<sup>9</sup> The Government equivocated during the first three decades of the century, unable to decide on the appropriate response to the crime.<sup>10</sup> Public opinion also wavered. The executions of men for dealing in higher value notes in 1821 were welcomed by the correspondent of *The Times*.<sup>11</sup> In wider debates about Bank note forgery and the death penalty, the Bank of England was the convenient target for all shades of antagonistic opinion. Animosity was directed at the Bank for compromising the currency by restricting the circulation of gold. Yet, day to day, in the Courts, as the numerous cases were heard, few men and women were acquitted, scores of death sentences were passed and actually carried into effect, and automatic sentences of transportation resulted from use of the 'liberty' to plead to the lesser offence of possession. The lack of room for discretionary manoeuvre by juries and judges was infrequently lamented.

#### **Prosecutions for forged Bank note offences:**

The Bank of England prosecuted 737 people at the Old Bailey between 1804 and 1833 for a variety of forgery activities, and for uttering or possessing forged Bank of England notes. Of these, 551 were men (75%) and 186 were women (25%). The vast majority of these faced trial between 1812 and 1821 – a total of 669 people. Between 1804 and 1811, there were 49 hearings, and between 1822 and 1833, nineteen

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<sup>9</sup> Sir James Mackintosh, *Parliamentary Debates*, 1823, IX (New Series), 412.

<sup>10</sup> For details of the incompatibility of suggested government strategies, see J. Miller, *An Enquiry into the Present State of the Statute and Criminal Law of England*, London, 1822, pp. 126-135.

<sup>11</sup> *The Times*, 22, Nov. 1821.

hearings.<sup>12</sup> In London, the proportion of men prosecuted was slightly lower, and of women slightly higher, than in other parts of the country.<sup>13</sup> However, prosecutions in London took longer to reach substantial proportions, compared with other parts of the country. In the early years of the Restriction period, London was not a centre of currency crime. Birmingham, Liverpool and Manchester dominated. Detection of currency crime increased slowly in London as the policing endeavours of the Bank developed. The years from 1812 to 1821 saw a huge increase in the prosecution of Bank note crimes both in the metropolis and in other parts of the country. The Bank's policing system was by then well-developed, astonishingly efficient and effective, and its bureaucracy ensured excellent record keeping, so that it knew precisely whom it was targeting. Further, the number of forged notes in circulation reached a critical point, and the Bank's solicitors believed that the ending of the war had brought home to the country people expert in forging and disposing of bad notes.<sup>14</sup> The plea bargaining system, although it had been used as early as 1804, was manipulated extensively in these years to push scores of people quickly through the judicial system. In 1821, the period of Restriction ended. There was no longer need for significant use of low denomination paper money. In London, prosecution virtually came to a standstill, although not in the major cities of the rest of Britain.

Examination of the Bank of England cases at the Old Bailey is unlike examination of other felony cases. The range of charges, from single charges of possession of forged notes to multiple charges of forging, selling, and disposing

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<sup>12</sup> Numbers of trials counted from the OBSP. There are only three cases in the Bank's records which do not appear in the OBSP records (3 men, all of whom, according to Bank records, were found guilty of the lesser offence of possession and sentenced to 14 years transportation.) These three have not been included in the numbers here. One woman (Ann Davis) was not recorded in the Bank's records, but her case was reported in the OBSP (Sept. 1821, pp. 411-2) and newspapers; her case has been included. *A Draft of return of prosecutions for forgery on banks for 10 years commencing with the year 1818*, MISC.MSS.368.14 (CLRO) gives figures which tally with the OBSP and Bank of England records.

<sup>13</sup> The out-of-London proportions were: 78% men, 22% women.

<sup>14</sup> R. McGowen, seminar paper at Nene College, Northampton 1997; and 'The Bank of England' (forthcoming).

(uttering), together with alternative charges of possession, was complex. Within these multiples and alternatives there were further divisions. Traders who had also been deceived in the transaction could be cited as additional victims. A 'belt and braces' laying of separate informations could specify the forged instrument as a Bank note or a promissory note, or alternative descriptions given to the dwelling or lodging where forged notes were held or possessed. In most cases, the Court record followed the technicalities well. Sometimes there was confusion about the charge to which the defendant was pleading. More often, there was confusion as to the order in which alternative charges were heard when a plea bargain option was presented.<sup>15</sup>

There were six options for the Bank and the defendant. The Bank, if certain of proving the guilt of a serial forger, or a seller or utterer of bad notes, preferred an indictment for a capital charge only. The normal response of the defendant would be a plea of not guilty. Being found guilty in such a case meant that the judge had to pass sentence of death. The second option was the unusual plea of guilty to the capital charge, (which occurred in 2% of cases in the period 1812-1821). The Court disliked this response. It exhorted some defendants not to do so, since it wanted to hear all the evidence so it could make its own decision. The reasons for such an apparently fatalistic response to a capital charge may be explained by attempts by the Bank to manipulate judicial discretion by promising these defendants that, if they pleaded guilty, transportation for life, not execution, would be their punishment.

The third option was the over-ridingly popular one - the plea bargain. If defendants were willing to plead guilty to the lesser charge of possession of forged notes and face an automatic sentence of 14 years' transportation, the Bank would not put the

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<sup>15</sup> For plea bargain cases, the BECLS records have been checked to verify the option that the Bank offered (although it is possible that the situation could change between that decision and the hearing in Court). Through this comparison, most of the discrepancies have been resolved and a reasonably accurate picture obtained of charge options, defendants' responses in Court, and sentences.

capital charge.<sup>16</sup> This had a huge effect on trial outcomes, and, later, on the future of the convicted men and women as they sought to mitigate their sentences. Most cases were pursued on this basis, preventing discussion in Court. The Bank of England's pursuit of the plea bargain, the bribe which saved many a life, was controversial and created tensions.

The fourth option was for defendants who were offered this 'bargain' to decline the Bank's 'clemency', refuse to plead to the lesser charge and stand their ground with a not guilty plea to the capital charge. Of the 600 offered the plea bargain option, 72 refused it. Of these refusers, twenty-two were winners and were discharged. Many of the fifty who refused and who were found guilty of the capital offence, found that the Bank became their implacable enemy when they later petitioned for commutation of sentence or other favours. It is a mark of the Bank's determination that many of those who refused the offer, and were found not guilty, were later charged with further offences. The second time around, they were unlikely to be offered another chance of a plea bargain. The Bank as prosecutor, through its energetic solicitors, was single-minded to an extraordinary degree and was markedly successful in ridding itself and the country of people who abused its paper currency. There remained two further options for pleading in Court – a plea of not guilty, or a plea of guilty, to a charge of possession of forged notes, presumably because this was all the Bank stood a chance of proving.

**Tables 5.1, 5.2, and 5.3** show the pleas made in response to the charge options. Where there was a not guilty plea, if that plea was successful, that information is also shown. The sentencing options were pre-determined by the charge: capital, or, on the lesser charges, transportation (mainly for 14 years) with no other option available to the judge. The tables present the information separately for three groups of years (Sessions

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<sup>16</sup> See Chapter 2.

years 1804-12, 1812-21, 1821-33. The death penalty was abolished in 1832. There were no prosecutions for the lesser (possession) cases after 1821: all were for uttering or forging.)

**Table 5.1: pleas & verdicts: Bank note cases: Old Bailey Sessions 1804-1812**

<u>Plea</u>	<u>Women (% of all women's pleas)</u>	<u>Women not guilty</u>	<u>Men (% of all men's pleas)</u>	<u>Men not guilty</u>
1. Not guilty to capital charge	6 (30%)	1	8 (28%)	2
2. Guilty to capital charge	-		-	
3. Plea bargain accepted	10 (50%)		15 (51%)	
4. Plea bargain refused	1 (5%)	1	-	-
5. Not guilty to lesser charge	2 (10%)	2	4 (14%)	2
6. Guilty to lesser charge	1 (5%)		2 (7%)	
<b>Totals</b>	<b>20 (100%)</b>	<b>4 (20% women's pleas)</b>	<b>29 (100%)</b>	<b>4 (14% of all men's pleas)</b>

Sources: OBSP (CLRO); Bank of England - BECLS; Criminal Registers HO26 (PRO)

**Table 5.2: pleas & verdicts: Bank note cases: Old Bailey Sessions 1812-1821**

<u>Plea</u>	<u>Total pleas in group (% of all pleas)</u>	<u>Women (% of all women's pleas)</u>	<u>Women not guilty (% of those pleading in category)</u>	<u>Men (% of all men's pleas)</u>	<u>Men not guilty (% of those pleading in category)</u>
1. Not guilty to capital charge	54 (8%)	11 (7%)	3 (30%)	43 (8%)	7 (16%)
2. Guilty to capital charge	13 (2%)	3 (2%)		10 (2%)	
3. Plea bargain accepted	503 (75%)	126 (77%)		377 (74%)	
4. Plea bargain refused	71 (11%)	18 (11%)	5 (30%)	53 (10%)	16 (30%)
5. Not guilty to lesser charge	27 (4%)	5 (3%)	1 (23%)	22 (4%)	3 (14%)
6. Guilty to lesser charge	1 (0%)	0		1 (0%)	
<b>Totals</b>	<b>669 (100%)</b>	<b>163 (100%)</b>	<b>9 (5.5% all women's cases)</b>	<b>506(100%)</b>	<b>26 (5% all men's cases)</b>

Sources: OBSP (CLRO); Bank of England: BECLS; Criminal Registers HO26 (PRO).

**Table 5.3: pleas & verdicts: Bank note cases: Old Bailey Sessions 1821-1833**

<u>Plea</u>	<u>Women</u>	<u>Women not guilty</u>	<u>Men</u>	<u>Men not guilty</u>
1A. Not guilty (death penalty still in place)	2	1	10	2
1B. Not guilty (when maximum sentence life transportation)	1	0	4	1
2. Guilty (death sentence still in place)	0		2	
<b>Totals</b>	<b>3</b>	<b>1 (30%)</b>	<b>16</b>	<b>2 (13%)</b>

Sources: OBSP (CLRO); Bank of England: BECLS; Criminal Registers HO 26(PRO).

Tables 5.1 and 5.2 show how remarkable were the effects of the plea bargaining system. However, the Bank was not deterred from preferring capital indictments when this suited its strategy against forgery. It did so in a calculated way, sufficient, it hoped, to terrify potential offenders, teaching them a lesson through a well-controlled flow of executions. Indeed, once the Bank had decided to prefer a capital indictment, it would not be swayed from this course; not by the petitions of the great or the humble, nor by the requests of magistrates, Members of Parliament, nor officials of the Home Department. On the other hand, a few years after the beginning of the period of Restriction, when the numbers of offenders trapped by the growing effectiveness of the Bank's policing began to grow from a small stream to a fast-flowing river, the Bank feared that public opinion would not bear the huge numbers of executions which would follow. It used the threat of death in complex, sometimes contradictory, ways.<sup>17</sup>

Perhaps the most remarkable, and terrifying, feature shown in these three tables is how few defendants were found not guilty, of either the capital or the transportable offence. In all these 29 years, only 14 women were found not guilty (7.5% of all women tried) and 32 men (5.8% of all men tried). This emphasises that this was indeed a special and different set of offences, quite unlike shoplifting, pickpocketing and other property offences.

The offence of possession of forged bank notes, punishable by 14 years transportation, had been added to the statute book in 1801. It was largely proposed and drafted by the Bank's legal advisors.<sup>18</sup> The Bank justified its support for this measure by suggesting that it would permit apprehension of the accomplices of utterers. Immediately the new offence became available, the Bank's legal advisors used it in

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<sup>17</sup> Ideas developed by McGowen, 'The Bank of England' (forthcoming).

<sup>18</sup> The same addition to statute made it a non-capital offence to engrave plates for Bank notes, to possess paper suitable for this purpose or imitate the Bank of England's style of printing.

combination with capital charges. The Bank began to prefer alternative charges, allowing minor utterers and sellers of forged notes the choice of pleading guilty to the 'lesser' offence. It would then decline to give evidence on the capital charge. In practice, as can be seen from the figures, this proved a 'popular' way of proceeding. At first, the Bank gave the impression that the use of this legal device was at the discretion of the judge and with his permission, but later it set out a formula to be used at the discretion of its solicitor - only returning to the older form after censure by the Secretary of State of this arrogant attitude which compromised the independence of the Courts.<sup>19</sup> Criticism of the Bank came from many quarters, but was never strong enough to deter it from a policy which was successful and held capital sentencing at a 'tolerable' level.

The Bank's legal advisers were forced on several occasions to justify this manipulation of the judicial system. If all offences were prosecuted capitally, they said, the majority would be recommended to pardon on condition of transportation – 'This will be mischievous... remission of sentence always tends to the encouragement of crime which... will inevitably destroy the present salutary impression that convictions for forgery are almost always fatal'.<sup>20</sup> Improper conduct on the Bank's part in making promises to defendants about lighter sentences was vigorously denied. However, throughout the first three decades of the nineteenth century, the Bank, through its lawyers, felt it had control of the judicial procedure, rarely coming off second best, whatever the pressure of criticism.

The Bank was at its most arrogant in prosecution strategies emerging in 1817. Thomas Edwards, to be charged at the Old Bailey with extensive selling of forged notes, petitioned the Bank for a possession charge on condition that he gave information to

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<sup>19</sup> For instance, BECLS M5/320-AB368/ B577-14 - entries for Jan. and July 1818.

<sup>20</sup> Observations of Serjeant Bosanquet on the manner of conducting Bank prosecutions, Bank of England; Freshfields papers F2/84 - AB56/10. These papers are undated; from incidents described in them they are likely to be from 1821 when consideration was being given to changing the punishment for forgery.

apprehend other offenders. The Bank responded that, if he pleaded guilty to the capital charge, it would see that he was granted life transportation.<sup>21</sup> The Bank continued with such a strategy during 1817 and 1818. Objections were raised by the Secretary of State following the capital conviction at the Old Bailey of Elizabeth Wingfield and Hannah Polley - the Bank 'allowing them to plead guilty to the capital offence on condition of their being transported for life'. The Bank was rebuked by the Secretary of State who noted that this was

extremely unusual and as he (Lord Sidmouth) believes unprecedented and that he is satisfied that HRH the Prince Regent will not approve of the prisoners having been induced to plead Guilty, by an assurance which compromises the Royal Prerogative, and is likely if drawn into precedent, to be attended with serious inconveniences, not only to the public but to the Bank of England itself.<sup>22</sup>

From this point, this strategy ceased.

### **Verdicts and sentencing in Bank of England cases:**

The effectiveness of the Bank of England's prosecution strategy, its reward driven policing, its carefully structured entrapment of many suspects, and its attention to detailed record keeping, together with the national mood against these crimes, resulted in a different verdict and sentencing pattern from pickpocketing and shoplifting. In particular, as shown, the high not guilty/acquittal rates for shoplifting and pickpocketing, especially for women, were not repeated. Verdict and sentencing options were severely restricted by the relatively few 'not guilty' pleas which were entered (see

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<sup>21</sup> BECLS: M5/319 - AB367/3, 26 June, 3 July 1817. Edwards pleaded guilty to the capital charge; a death sentence was recorded. Later, when the Bank tried the same strategy with Margaret Watkins, at Monmouth Assizes, the judge refused to accede. Although her two male partners in crime were respited from the capital part of their sentence before he left town, he appears to have been so affronted at the Bank's behaviour that she was left to be executed. She petitioned the Bank for mitigation of the sentence since, she said, it had 'given orders' for her to plead as she did. The Bank replied 'that the said petition cannot be entertained, as the Bank never interfere therein.'

<sup>22</sup> OBSP: 1817-18, 17 June 1818, Case 915; BECLS M5/320 - AB 368/1, B577-14, 15 June, 2 July 1818.

tables 5.1, 5.2, and 5.3.) When these ‘not guilty’ pleas are examined in more detail, it is apparent that women were more likely than men to succeed in these pleas. **Table 5.4** shows how this worked.

**Table 5.4. Outcome of not guilty pleas: Bank note cases:  
Old Bailey Sessions 1804-1833**

	<b><u>Women not guilty pleas</u></b>	<b><u>Women found not guilty</u></b>	<b><u>% of women’s not guilty pleas</u></b>	<b><u>Men not guilty pleas</u></b>	<b><u>Men found not guilty</u></b>	<b><u>% of men’s not guilty pleas</u></b>
<b>Not guilty to a capital only charge</b>	19	5	26%	61	11	18%
<b>Refuse plea bargain, plead not guilty to capital charge</b>	19	6	31.5%	26	5	19%
<b>Not guilty to lesser charge</b>	7	3	43%	26	5	19%
<b><u>Total all not guilty pleas</u></b>	<b>45</b>	<b>14</b>	<b>31%</b>	<b>140</b>	<b>32</b>	<b>23%</b>

*Sources: Bank of England: BECLS; OBSP (CLRO).*

Although so few were found not guilty, women were significantly more likely than men to be fortunate. The plea bargaining system meant that the jury rarely had an opportunity to hear the full, usually lengthy and complicated story of the criminal activity. When the stories were told, the jury tended to find the women’s protestations of innocence, mistaken identity, entrapment, and lack of intention to commit a crime, more telling than the men’s.

It is unlikely that the success of women in not guilty pleas shown in Table 5.4 would have been known to the public in general. Even so, there was a common presumption that the Court was lenient towards women. Although Tables 5.2 and 5.3 show that there was little difference in men's and women’s strategies when offered the chance of plea bargaining, a suggestion that female defendants were more likely to avail themselves of this ‘clemency’ was made in the newspaper reports of the two trials of Eliza Burnham in 1820. On her first appearance in Court, she refused a plea bargain

offer and was found not guilty. She told the Court that she had been ‘seduced to a bad house by a gentleman named Smith’, and there had been given three notes. She spent them with no idea they were forged. The newspaper report, unlike the Court report, specified the jury’s reason for finding her not guilty. First, they returned a verdict of ‘guilty of uttering but not with a felonious intent’. The judge advised that such a verdict amounted to an acquittal since the law required criminal intent. When the foreman repeated that they were certain that she was without knowledge of the offence, the jury were instructed to find her not guilty. Ever determined, the Bank had her back in Court a month later for a similar offence. Unusually, it offered her another plea bargain, which she indicated to the Court that she would again refuse. As the case commenced, she

called out in a loud voice - My Lord, my Lord, I wish to withdraw the plea and plead guilty. Mr Serjeant Bosanquet [for the Bank] said he had not the slightest objects and begged to add that all the prisoners charged at the Session with the same offence had been allowed the Bank’s privilege (if they chose to avail themselves of the indulgence) of pleading guilty to the minor offence; but they had chosen at first to adopt a different course, under the idea perhaps that as they were females the severity of the law would not be exercised upon them. This however was a fallacious notion because the public security required that the law in these cases should be carried into full *execution*.<sup>23</sup>

Table 5.5 shows the verdicts in all the Bank note trials from 1804 to 1833. This comparison of outcome at the end of the trial shows an unusual parity between men and women. The small excess proportion of men sentenced to hang, and to transportation, was matched by the already noted small excess of women found not guilty. These

**Table 5.5: results of Bank note trials - Old Bailey Sessions - 1804-1833**

<b>Result</b>	<b>Total</b>	<b>Women</b>	<b>Men</b>
<b>Death sentence</b>	<b>127 (17%)</b>	<b>30 (16%)</b>	<b>96 (17%)</b>
<b>Transportation (including for life)</b>	<b>564 (77%)</b>	<b>142 (76%)</b>	<b>423 (77%)</b>
<b>Not guilty/acquitted</b>	<b>46 (6%)</b>	<b>14 (8%)</b>	<b>32 (6%)</b>
<b>Totals</b>	<b>737 (100%)</b>	<b>186 (100%)</b>	<b>551 (100%)</b>

Sources: OBSP (CLRO); Bank of England: BECLS; Criminal Register HO26 (PRO).

<sup>23</sup> *The London Packet and Lloyds Evening List* Sept. 18/20, Oct. 27/30 1820; BECLS AB369/2, M5/324, 23 Aug. 1820, 11 Oct. 1820; OBSP 1819-20, Case 952 with 19 others. Eliza Burnham was sentenced to 14 years transportation, and left for Australia in June 1821: BECLS M5/325; AB369/3, 2 June 1821.

outcomes are in stark contrast to those for shoplifting and pickpocketing, examined in previous chapters. This is a reminder that there are drawbacks in combining statistics for 'property' crimes, treating them as if they were the same and as if attitudes to them were the same. The contrast here is likely to be explained by the general public view of the crime itself, and the efficiency of the Bank's prosecuting effort.

In the trials where a plea of not guilty was entered, court reporting was detailed and technical. It took time to prove the case, involving the prosecution in establishing long chains of events and evidence. For a prosecution for uttering, the chain involved: identification of the accused; name and address given at the time of proffering of the 'bad' note; how this information had been written on the note; the meaning of any other writing on it; whether the accused lived where they said they did; how the note had been secured by the recipient; how it had been kept separate from other notes; delivery to the Bank; evidence from Bank inspectors and clerks as to the official signatures and other details of the notes, their paper, their date; evidence that the accused knew the note was false; who they had obtained it from. With so many stages to be proved, it is surprising that the Bank did not fall down in more than a few cases. Some of the acquittals came in cases in which the Bank did not offer full evidence since it intended to use the accused as a witness against another person. Provided the Court heard the cases in the right order, the Bank got its way. Occasionally the jury made life difficult for the Bank. They particularly disliked cases where there had been entrapment through elaborate and long-winded plots set up by Bank officials, the Bank's solicitors, and constables.

The stories told in court suggest that, unlike shoplifting and pickpocketing, there was little difference between the activities of men and women, an additional explanation for the similarity of trial outcome and sentence in these cases. In other parts of the country, a higher proportion of men was indicted for forgery of notes, and for having

plates, instruments and paper. This was not so in London. A few direct forgery cases were heard at the Old Bailey, but generally, cases against men and women related to the various means of getting notes obtained elsewhere into circulation. Their behaviour was not noticeably dis-similar from each other as they went about their business in London and Middlesex. Because of the massive use of plea bargaining, effective comparison, based on larger numbers, is not possible. Nor is it possible to say that men were more involved in the capital crime of uttering and women in the transportable crime of possession. In fact, there is every reason to suppose that the proportions were the other way around, since women were more likely to be buying small items in shops. Tea, sugar, as well as ham, candles, and small items of clothing, were frequently the triggers for a forgery exchange. It was usual for men and women to work together in the circulation of false notes. Male/female co-operation continued after conviction as they waited in prison for the transport ships, men and women using their visitors of the opposite sex to supply notes which could be traded in confinement.

The reports of the limited number of not guilty pleas have been scoured to see if it is possible to deduce reasons for acquittals and not guilty verdicts. Information from these stories must be used with caution. It results from a subjective reading of a report which, although likely to be accurate about the facts given in Court, can only tell us what was admitted in Court. **Table 5.6** suggests some reasons for these verdicts.

**Table 5.6: probable reasons for not guilty verdicts: Bank of England cases – Old Bailey Sessions - 1804-1833**

<b>Probable reasons</b>	<b>Women</b>	<b>Men</b>
<b>1. Identity not proven</b>	1	3
<b>2. Chain of evidence faulty</b>	1	3
<b>3. Knowledge not proved</b>	2	9
<b>4. Used as evidence against another - case not fully presented</b>	3	3
<b>5. Bank entrapment - jury object to this</b>	0	3
<b>6. Used or tricked by someone else - e.g. client, spouse, known offender</b>	5	4
<b>7. No clear probable reason discernible</b>	2	7
<b>TOTALS</b>	<b>14</b>	<b>32</b>

*Source: OBSP (CLRO)*

The proportion of women (36%) in the small subgroup (category 6) of people who may have been acquitted because they were seen as having been used or tricked by someone else may be of interest. It is significantly larger than the proportion of men (13%). In general, however, detailed reading of the cases suggests that the technicalities of the charge, presented with great care, were studied carefully by the jury. The not guilty decisions in the first three categories of Table 5.6 were arrived at only on the technical failure of the Bank's case. The fourth category – failure to present full evidence against a prisoner when a satisfactory case had been proved against their accomplice - favoured women. The fifth category - failure of a case because of the entrapment activities of the Bank – features a few men and no women. Entrapment was used against male suspects in London. The decoy was always a man,<sup>24</sup> often someone who had served a sentence for a minor offence and needed work, or who had negotiated a discharge for a Bank note offence on condition that he worked for the Bank to trap others. These men would meet suspects in public houses and clubs, in a type of social exchange and setting in which women were not involved. These were not the casual 'pick-up' situations associated with pickpocketing. Bank note selling and uttering was a carefully planned, long series of events. It was unlikely that a woman could be trapped in this way by a male decoy. Women involved in this work usually knew well the men they were working with, often through marriage or co-habitation. Counsel for the accused in entrapment cases had a field day, suggesting that every prosecution witness was a felon, paid by the Bank to lie. John Williams in 1819 had three lawyers arguing for him in a long and complex case, at the end of which he was found not guilty. His counsel tried to show the main witness to be a lying poacher, living off giving evidence

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<sup>24</sup> The Bank used female decoys in other parts of the country. A Mrs Danks, described as 'a Bank agent', operated in Birmingham in 1818 - BECLS M5/320, AB368/1, B577/14, 5 Feb. 1818.

for the Bank. Every prosecution witness was discredited in the same way. They attacked the Bank for deceit, unfair entrapment, and mistaken identity.<sup>25</sup>

A closer look at those in the sixth category - tricked or used by some other person - shows that, so far as males were concerned, one was the unfortunate 'instrument' of an older, 'wiser' man; one was tricked by a male street peddler; one had been duped by a male visiting him in the debtors' prison, and one had been tricked, he said, by a woman who needed help because she was lame.<sup>26</sup> As to the five women in this group, they were able successfully to suggest that blame lay with men with whom they were involved. For Sarah Dell, it was the man she lived with. At a grocer's shop in the Strand, she had bought tea and moist sugar and paid with a £1 note. In the usual way, she was asked to write her name and address on the back of the note. This she gave as Northumberland Avenue. When asked where she had obtained it, she said 'of her husband who was then gone on'. On being told that the note was 'bad', she ran off and was arrested after a chase. Her address was ascertained in the Borough. Why had she shopped so far from home? She responded that she was visiting friends. Asked if she was a married woman, she said she lived with a man called Smith, a 'poor man', and went about as his wife. They had three children and ran a chandler's shop. The man she lived with, John Briant Smith, gave evidence for her. He had given her the note to buy bread and things they needed for their baby. When she had been arrested, he had gone to Bow Street to say that any money she had was given to her from his takings in the chandler's shop. 'I thought if there was any danger I'd take it all on myself... I was ready and then I was discharged'. He defended her passionately. Her counsel also made

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<sup>25</sup> OBSP: 1818-1819, Case 24.

<sup>26</sup> OBSP: 1814-15, Samuel Gilbert, case 697; BECLS M5/315, AB366/2, B577/9, 15 & 21 June 1815 - 'a mere instrument of George Morris who escaped detection'; in response to a petition from his 'respectable' parents, the Bank offered a plea to the lesser offence, which Gilbert declined; OBSP 1818-19, Case 1141, Richard Jennings; OBSP 1819-20, Case 775, John Myers; OBSP 1817-18, Case 53, George Mansfield.

much of the fact that the Bank had offered her a plea bargain which she refused, since he protested her total ignorance and innocence. Seven character witnesses later, the not guilty verdict was almost inevitable.<sup>27</sup>

Mary Rushton said she had her bad money from a man she frequently visited in Newgate gaol. Handing over a forged £1 note for tea and sugar in a grocer's shop in Drury Lane, she gave a false name and address. When the shopkeeper wanted to check the address she had given, she said she was an 'unfortunate girl' and that a 'gentleman' had given her the note. The turnkey at Newgate gaol gave evidence for her, saying she had frequently visited a young man who was in prison for note offences; it was no surprise that she ended up with bad money.<sup>28</sup> Eliza Smith, although she had given a false address to a shopkeeper, maintained that the money was from her husband's pay and that he had given it to her.<sup>29</sup> Mary Singleton described herself as 'an unfortunate girl'. She put in a long written defence, explaining that the note had come from a client.<sup>30</sup> Mary Ann Thompson offered a £5 note to a linen draper for a shawl and some stockings. When the note was suspected, she suggested she would get her husband to change it for a good one with the person he got it from, left the shop and was arrested by a police officer. To the officer she said she had it from 'a gentleman' to treat herself to a new shawl. A witness said, 'I believe she is an unfortunate woman', and that he had seen her with a gentleman and heard the offer about a new shawl.<sup>31</sup>

Although the stories of those found not guilty are few, they suggest that Bank note offences were viewed as planned, deliberate and dangerous offences. Where defendants might be only casually involved, and where they were game enough to refuse

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<sup>27</sup> OBSP: 1810-11, Case 344.

<sup>28</sup> OBSP: 1813-4, Case 123.

<sup>29</sup> OBSP: 1819-20, Case 1272.

<sup>30</sup> OBSP: 1820-21, case 50. *The London Packet and Lloyds Evening Post*, Dec. 8/11, 1820. Singleton was again charged April 1821, (Case 501), took the option to plead to the lesser offence and was sentenced to 14 years transportation.

<sup>31</sup> OBSP: 1831-32, Case 2308.

a plea bargain and stand their trial, the jury would, if they could, find their apparent ignorance of criminal intent sufficient to throw suspicion on to another person. There are insufficient cases to suggest that women, whether wives or women of the town, would be able to play this card frequently. The Bank was too manipulative to allow more than the ungrateful very few to thwart them and plead not guilty to a capital charge.

### **The role of gender in the crime and its trial:**

The relatively 'gender-balanced' outcomes of these cases, largely managed through the manipulative plea bargaining procedure, may suggest an equivocal role for gender in these crimes and in the judicial process. Sometimes the relationships between men and women did not protect women in the way that might be anticipated. For example, Mary Jenkinson, found guilty in 1805 of the capital charge of uttering, was, at the time of her arrest, living with Cornelius Holt, well-known to the Bank as a major trader in forged notes, whom she called her husband. She was apprehended for proffering a forged £2 note in a pawnbroker's shop. She was plied with brandy in public houses by the constables on the way to Bow Street public office. Their aim was to get her talking about Holt. She would only say she had got him off forgery charges when he came before the magistrates earlier, and had told him 'he would bring her to the gallows'. She accused the constables of getting her drunk and 'behaving ill' to her, threatening her with death because Holt had given her the money. Although the jury recommended her to mercy, since they felt she was under Holt's influence, his involvement did not protect her since he had not been in her company when she passed the note.<sup>32</sup>

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<sup>32</sup> OBSP: 1804-5, Case 202.

A married couple, Susannah and Michael Gerain, met different fates. Susannah, an 'old woman' of 77, was capitally charged with uttering notes in a shop. Witnesses told how she gave her correct name and address, and she said she had the notes from a newly married couple in the neighbourhood whose names she did not know. When the Bank inspector searched the Gerains' lodgings, she said she had picked up the notes in the street. Her husband, Michael, aged 60, said he found the notes on his round as night watchman. While she was saying that he knew nothing about them, he was saying, 'My wife is very wrong, she is telling you stories, I gave them to her'. A quantity of forged notes and counterfeit tokens were found in their lodgings. At the trial, Susannah changed her story, claiming innocence, saying her husband had found the notes and brought them home. Her case was heard before her husband's (the Bank charged him only with possession) and she was capitally convicted. Michael was found guilty of possession. He told the Court he wanted to report his finding of the notes to the Vestry but his wife forced him not to and had taken them from him to utter. He was sentenced to 14 years transportation. Susannah died in prison awaiting execution. Michael became one of the few men to whom the Bank paid pecuniary relief, for four months, whilst he was awaiting transportation in Newgate. There must be a strong suspicion that Michael was instrumental in his wife's conviction. The Bank Solicitor was present at his examination before the magistrates, and although he denied making arrangements with Michael, the subsequent unusual reward suggests the contrary. It is probable that Susannah was known to the Bank for this sort of activity. A married woman could not be protected from the law in such circumstances. The Bank, by varying the nature of the charges against man and woman, also precluded use of the excuse of marital coercion.<sup>33</sup>

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<sup>33</sup> OBSP: 1809-10, Cases 103 and 106; BECLS - M5/309, AB 364/2, B 577/3 28 Dec. 1809, 24 Jan. 1810, 12 May 1810, 3 Aug. 1810.

When Thomas and Elizabeth Leach were apprehended for uttering notes, the Bank offered them the opportunity of a plea bargain. Thomas took the offer and was sentenced to transportation. Elizabeth took her chance, pleading not guilty to the capital charge of uttering. Her unsuccessful defence strategy relied on the involvement of her husband in what she did, even his presence with her. The details provide an interesting view of the operation of the judicial system on a rare occasion when marriage emerged as a major issue in a criminal case. Elizabeth was represented by counsel and the case was hard and long. Evidence showed that she had gone to a pawnbroker's shop to buy some stays with a £1 note. The pawnbroker recognised the note was forged, took her name and address, wrote it on the note, and continued with the usual procedure of enquiring where she had obtained it. Elizabeth said she had received it in a tailor's shop, then became annoyed and refused to answer any more, but said she would take him to the tailor or to her house so he could verify the facts. When the pawnbroker seemed eager to do so, Elizabeth became less eager. She said she had moved from the address she had given and 'if I went with her she'd get me a good note. Her husband would make a fine piece of work with her if he knew it to be a bad one, that he had taken it for two shirts that had been sold in (their clothes) shop'. Her next ploy was to say she was unable to walk anywhere, as she was unwell, so the pawnbroker took her to Bow Street public office. Officers found a small supply of forged notes in the Leach's premises. Under examination at Bow Street, Elizabeth had been anxious to protect her husband. She said she had taken the money in their shop and had hidden it, not telling her husband. The Court wanted to know if she was trying to prevent suspicion falling on her husband and what the relationship was between them. Bank counsel said, 'She is indicted as a single woman. The husband, as he is called, was apprehended for a different offence than the woman at the bar now is indicted for.' Elizabeth's counsel

established that Thomas and Elizabeth were 'man and wife'. Elizabeth made her own submission:

Them notes that were in my work bag, my husband gave me the day before, to purchase some articles I wanted in the house - he said he'd come with me to buy them, I thought that would be good, so left them there till he was able. The reason that I denied these notes being in the work bag, I did not know what to say, being in the hands of officers, I imagined my husband might know something of them, I knew I was in the hands of officers, I said I knew nothing about it; my husband was at the door when I went in for the stays and when I came out he was gone.

This classic attempt to seek protection through the excuse of marital coercion failed and a death sentence followed.<sup>34</sup> The jury may have seen how contrived it was. However, the Bank had thwarted the likelihood of Elizabeth's success in the use of this legal excuse by separating the charges against her and her husband, tempting him with a plea bargain so that his story would not be told in Court. Since Elizabeth's defence relied on reference to Thomas's story which had not been told, the excuse of marital coercion did not work. A husband and wife must face the Court with a coherent, mutual account for there to be a chance of success. In Bank note offences, this means of escape for a woman was almost impossible.

An attempt at an excuse of marital coercion was made by Susannah Farmillo, who refused the offer of a plea bargain to plead not guilty to a charge of uttering a forged £1 to buy tea, sugar and coffee in a grocer's shop. When the shopkeeper said he would send his lad to check her address, she ran from the shop. She joined a man outside the shop and both were apprehended. The next day, as they were before the magistrate, the male prisoner said loudly for all bystanders to hear 'that he gave her the note and he believed that she never had one penny but what he gave her'. Thus

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<sup>34</sup> OBSP: 1810-11, Cases 571, 572, 575; BECLS M5/311, AB365/1, B577/5, 3 July 1811. *The London Chronicle*, July 15, 1811, in a brief, inaccurate report on the Leach cases, stated: 'her plea of marital coercion not being allowed by the judge who observed that there was a limit to this procedure'; this observation was not recorded in the OBSP.

prepared, they gave a coherent story about their relationship to the magistrates. At the Old Bailey hearing, Susannah's counsel pressed hard to establish marital coercion. One witness said, 'they spoke as man and wife'. Susannah provided a well-worked, classical statement:

My husband gave me the note and told me the name and direction I was to put on it, which I did. He was standing at the shop door and told me to go in and buy sugar. I obeyed him as by law and duty I am bound to do. I believe his handwriting is on the note.

If Susannah's husband had been indicted as well, there might have been some hope for her, since it appeared that he was in the vicinity and closely involved. However, the Bank declined to charge him after he had been before the magistrate. Without a charge against the man, there was little chance for the woman to establish a successful defence.<sup>35</sup>

Sometimes case outcomes are difficult to understand when men and women who worked together were charged by the Bank. The following two cases involved men and woman, who were not married couples. Charlotte Newman and George Mansfield were jointly charged on a capital-only charge. The story here was of a series of passings of forged notes in which they were described as 'companions', Charlotte going into shops to spend the money, and George remaining outside to keep watch. They went to liquor bars, and a shoemaker's, where George was arrested as he stood outside. Charlotte was arrested later when the shoemaker brought in to the Bank a forged note. Charlotte described herself as 'an unfortunate woman'. She said she had received the note from a gentleman in a coach that morning. She denied being in a man's company in or near any shops. When she and George had been searched at the public office, it was found that they each held keys to the same lodgings. This caused them some consternation.

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<sup>35</sup> OBSP: 1817-18, Case 1455; BECLS M5/321, AB 368/2, B 577/15, 3 Sept. 1818.

George refused to tell the officers his home address since his wife was expecting a baby and would not be pleased to know he was living with Charlotte. Mansfield persisted in saying he had no idea what Charlotte was doing with forged notes. Charlotte made no defence other than to say that Mansfield was innocent and knew nothing of any of her transactions. The jury found Mansfield not guilty. They found Charlotte Newman guilty - she was a woman who was executed. Her husband had already been transported for house-breaking and a large amount of forged notes had been found at Newman and Mansfield's lodgings. The Bank would have been disappointed at Mansfield's escape. He too was a housebreaker, an accomplice of Charlotte's husband. The Bank might have been more successful had it preferred separate charges, since putting them together allowed the woman the opportunity of placing all the blame at her own door, perhaps in some misguided hope of mercy.<sup>36</sup>

The cases against James Gardiner and Jane Harrison had entirely different outcomes. Gardiner and Harrison were jointly indicted, capitally only, in two separate cases. The extent of their note selling activities was considerable and the Bank was determined to have them both convicted. They are the only example of defendants against whom two separate indictment charges were brought, for similar offences, on separate days. The Bank used an elaborate and financially costly entrapment procedure, involving a cheese-monger and his friends who signed on to the Bank's payroll for these cases. The defendants had the help of three counsel. Gardiner was not a poor man. He lived in a large house in Rose Street, Covent Garden, which was variously used for music and dancing, meetings of a 'painting society', concerts at which he played the flute or the violin, and a place to which men 'came with girls - it was used for such purposes'. He carried on a cautious and successful trade in selling forged notes around

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<sup>36</sup> OBSP: 1817-1818, Case 53; BECLS M5/319, AB 367/3, 13 Nov. 1817, 14 Dec. 1817: HO26 for record of execution (PRO).

the public houses and clubs of Covent Garden - when he was not 'playing at concerts' further afield. Jane Harrison lived with him as his housekeeper. In both cases, Gardiner was found guilty and sentenced to death, and in both cases, Harrison was found not guilty. The decisions in her favour are difficult to understand when her situation is compared with that of other women who were found guilty. Her involvement was unequivocal, and her defence - that she did not understand what she was selling - was ingenuous. The Court record contains evidence from the entrapment witnesses, such as: 'I delivered the copper (to pay for notes) to Harrison - Gardiner was not there'. Or, 'She asked me if I wanted to do anything that evening. I said, 'Yes, I wanted to go to work'. She asked how many I wanted. I said 'Two', and paid ten shillings. She took a piece of whitey-brown paper out of her pocket, containing a great number of notes: after looking them over on the table she picked out two for me and said 'these two are very good ones'; wrote on the front of each (a false name and address) and then delivered them to me. I conversed with her about someone else who would like some.' On another day, the conversation was: 'Do you want anything tonight?' I said 'Yes, half a score, but I can only take five tonight'. She went to a table drawer, took a paper parcel, which contained a great many notes, and said, 'I will pick you out five good ones, which she did and told me they were good ones. I asked her how much they were. She said £1 and 5 shillings. I gave her that. Gardiner came in and confirmed that they were very good.' It is difficult to believe that she lacked knowledge of what she was involved in, since she repeated this kind of conversation and activity with others who, unknown to her, were working under cover for the Bank. It is likely that aversion to entrapment of a young woman was at the heart of the jury's decision about Harrison. Defence counsel castigated the entrapment procedures, and maligned those whom the Bank was paying to do this work. The case against Gardiner was watertight: he had nothing to say in his own defence, presenting only some alibis - that he was playing his

violin elsewhere at times when he was said to be negotiating with the decoys. Harrison submitted a written defence – ‘My Lord and gentlemen of the Jury, I am very young, under 20 years of age. I was living with Mr Gardiner as his housekeeper and delivered out the papers without any knowledge of their being forged notes.’ The jury may have wanted to believe her, particularly since the entrapment procedure had been so elaborate. Perhaps they felt the prize of Gardiner, clearly a leading player in the Bank note forgery game, was sufficient for justice. They may have thought that Harrison operated under duress from a more powerful man, but they may have been affected by her as “an interesting looking female”, as the *London Chronicle* reporter clearly had been.<sup>37</sup>

The limited number of not guilty pleas in Bank note forgery cases has deprived us of a store of stories from which to tease out evidence of discretion in favour of women. However, what we have in the records of the prosecution of this crime, in the public arena of the Old Bailey Sessions, is another reminder of the need to consider different groups of crimes discretely. It is apparent that Bank note forgery was a distinctive crime, and was seen as such by judges, juries, and the public at large. At this stage of the judicial process, men and women were treated equally by the Court, and responded with equal resignation or spirit to the offers of their prosecutor. The judicial process was distorted by the plea-bargaining option which prevented juries reaching their own decisions.

### **Conclusions on difference in a different sort of crime:**

It has been useful to study the trials of a different sort of capital property crime in order to show that attitudes to the offence itself can affect verdicts (if not sentences in

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<sup>37</sup> OBSP: 1819-20, Cases 641 and 651. *The London Chronicle*, May 23, 1820 - brief, inaccurate reference to the charges against Harrison, and no reference to James Gardiner or the cases against him.

this somewhat controlled legal situation), and therefore the importance of looking more closely at the variations within categories of property crimes. The seriousness with which this set of crimes was regarded, the lesser opportunity for court deliberation created by the massive use of plea-bargaining, the lack of personal relationship between prosecutor and accused, and the efficiency of the prosecuting machine, all changed the dynamic of the trials. There was often a suggestion in not guilty pleas that it was the Bank of England which was on trial for its prosecution policies and its handling of the Restriction crisis. Juries allowed the benefit of any doubt, created by the Bank's high-handedness or entrapment, to the defendant.

The dynamics were further altered by the smaller proportion of women involved. Had their proportion been as great as in pickpocketing and shoplifting, verdicts in not guilty plea cases might have been more lenient in order to avoid sentencing large numbers of women to death. Few stories were told in court; therefore, we cannot be sure that there was always little difference between men and women in their modes of operating to utter, dispose or put away forged notes. However, when the stories were told in not guilty pleas, similarity of illegal activity is clearly seen. Whether transactions took place in shops, in public houses, clubs, alleys, private houses or lodgings, the task did not vary.

Although there is evidence that women were slightly more likely to be found not guilty if they pleaded not guilty, the over-riding picture is of equivocal gender distinction at this stage of the judicial process. It was only when the public exercise was over, when the relationship between Bank and prisoner was out of the public gaze, that discretion on gendered lines emerged strongly.

## Chapter 6

### The End Of The Journey Or Further Doors Unlocked?

#### **Introduction:**

This Chapter and Chapter 7 together examine what can be known about the next stage of the journey for the men and women sentenced at the Old Bailey. This is a part of the journey through the judicial system which is rarely systematically explored. It is difficult to do so because of the nature of official record-keeping. However, this is an important stage in a consideration of the effect of gendered discretion. Verdicts and sentences tell only a part of the story. This Chapter will deal with the more immediate decisions taken following sentencing, when the doors to freedom or lesser punishments were opened, or closed, in a more or less bureaucratic manner, by the representatives of the State. Chapter 7 will elaborate on a more discretionary aspect of the final stage of the journey – the State's responses to prisoners' own appeals, and the mitigation of conditions of sentence by one of the major prosecutors, the Bank of England.

The men and women sentenced at the Old Bailey found that the journey through the justice system continued to twist and turn. The post-sentencing experience for these convicts seemed to be as full of surprises and idiosyncratic responses as had all which preceded it. The detail of what happened confirms the vastly discretionary, sometimes seemingly unpredictable, nature of the English system of justice. Notions of a 'Bloody Code', operated with efficiency and effectiveness, have long been discarded by historians. Yet, the power of that myth remains. In the biography of Mary Bryant, sentenced to hang for highway robbery at the end of the eighteenth century, we read: 'Like a protagonist in a Greek tragedy, once she had embarked on a course of action, the result was inevitable given the times in which she lived'.<sup>1</sup> There was nothing

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<sup>1</sup> J. Cook, *To Brave Every Danger – the Epic Life of Mary Bryant of Fowey*, London, 1993, p.33.

inevitable about what happened to her. Nor was there anything inevitable about what happened to men and women tried for any serious crime at the end of the eighteenth or the beginning of the nineteenth century.

In this chapter, I will first briefly consider the workings of the system for pardon and remission at this period. Its changing nature, with the development of a more bureaucratic system of granting 'automatic' pardons to ease the dangerous overloading of incarceration facilities, will also be briefly examined, with a consideration of the effect that this may have had on prisoners from London and Middlesex, and its implications for males and females.

Then, following a reprise of the sentences handed down at the Old Bailey, I will examine how shoplifting and pickpocketing offenders<sup>2</sup> appear to have been punished, as far as records allow this to be done. The deterioration in official record keeping around this time bears witness to the increase in criminal business in the courts following the end of the wars with France.<sup>3</sup> However, the evidence at least shows clearly how many convicts, male and female, did not serve the sentences passed on them. Death sentences were remitted to become sentences of transportation, or even imprisonment. Transportation was remitted to imprisonment, and prison sentences were shortened. In some cases, free pardons were issued.

This period saw an increasing shift to secondary punishments – transportation in its second wind, and imprisonment. I will next consider the gendered implications of

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<sup>2</sup> Sentences for Bank note crimes, which were either death sentences or sentences of 14 years transportation, do not show the same shifts. Therefore, discussion about these takes place later in the Chapter when executions are considered.

<sup>3</sup> This deterioration consists of failures to make entries at crucial points in the Criminal Registers (HO26), Newgate Calendars (HO77) and the Transportation Registers (HO11). For instance, in the Criminal Registers, apart from missing or inaccurate information about prisoners and offences, where decisions on their disposal from Newgate after sentencing were held back to the following month, the decisions may not be duly recorded in subsequent months. The Newgate Calendar may list names of people who were not executed in the end, and the Transportation Register shows similar inaccuracies. In dealing with the relatively small group of people under consideration in this thesis, these inaccuracies can be misleading.

both of these, based on the evidence available from London and Middlesex. The final sections will consider the difficult question of gender and the death sentence. Why were so few women executed, and what might have been the nature of those who were?

### **The system for pardon and remission:**

From the 1780s to the 1830s, the move from capital punishment to transportation and then to imprisonment was gathering momentum.<sup>4</sup> Early in this period, and for the century or so before, a wide range of punishment had been available, from hanging, to transportation, imprisonment, hard labour, military service, whipping, branding, and fining. It is important, when examining the use of any particular punishment, not to obscure the way different punishments related to each other and to the crimes for which they were prescribed. Beattie considered it important to start with the crime and move on to punishment. I have tried to approach the subject in a similar order. Since his study ends in about 1800, it retains a strong emphasis on the death penalty, and the appeal system that flowed from it.<sup>5</sup> Continuation of such a study to the early 1830s necessitates consideration of appeals against 'lesser' punishments, and of how, at so many stages of this complex journey, there was a need for choice and pre-emptive action. This choice was widely exercised – by victims, prosecutors, constables and magistrates in deciding on prosecution; by juries and judges in their verdicts and sentences; by the prisoner and his or her friends and acquaintances in deciding to appeal against sentence; and by the servants of the Home Office, the Secretary of State, the gaol and hulk superintendents and their committees, and the King in Council in making decisions to vary or annul sentences. The opportunities for discretion and choice were

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<sup>4</sup> Innes & Styles, 'The Crime Wave'; Ignatieff, *A Just Measure of Pain*; idem. 'State, Civil Society'; Beattie, *Crime and the Courts*'; Atkinson, 'State and Empire'.

<sup>5</sup> Beattie, *Crime and the Courts*.

legion at all stages, and there were many 'gatekeepers' to open or keep closed the barriers on the convicts' journeys through the criminal justice system.

In the early nineteenth century, the use of the royal prerogative of mercy was a more limited instrument than its late eighteenth-century full-blown, discretionary manifestation.<sup>6</sup> In that earlier period, 'most sentencing and pardoning decisions were almost certainly based on universal and widely agreed criteria rather than on 'class favouritism and games of influence.'<sup>7</sup> Peter King's method of enquiry into the factors behind the decision-making might be extended to find how these 'criteria' were used in a system staggering under the weight of daily business and therefore much concerned with pragmatic and practical action. I will return to this possibility in Chapter 7.

Beattie saw the pardoning procedure in the eighteenth century as a more organised and systematic procedure than it later became, certainly in relation to London and Middlesex cases, by the early decades of the nineteenth century. He was interested in decisions taken about people sentenced to hang and saw the process of pardon as, to a considerable extent, a procedure for selecting the right men and women to be executed.<sup>8</sup> The decisions made later, particularly in the early decades of the nineteenth century, were about different possibilities, in a busier environment. The handling of appeals against sentence, and the whole pardoning process, became more complex, less cohesive, and significantly flexible.<sup>9</sup> By the 1820s, a more bureaucratic response had been added to the discretionary system – a system of automatic pardons on grounds of time served, good behaviour, and state of health. The mixture of discretionary

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<sup>6</sup> For example, Hay, 'Property, Authority'; Beattie, *Crime and the Courts*; King, 'Decision-makers'; idem. *Crime, Justice and Discretion*.

<sup>7</sup> King, 'Decision-makers', p. 58.

<sup>8</sup> Beattie, 'The Royal Pardon'. His emphasis is on appeals against death sentences, using the State Papers Domestic (SP) rather than the Home Office archive. His references are also to secondary works of historians who may not have used HO17.

<sup>9</sup> S. Devereaux, 'In Place of Death: Transportation, Penal Practices and the English State, 1770-1830' in C. Strange (ed.), *Qualities of Mercy: Justice, Punishment and Discretion*, Vancouver, 1996.

pardoning – to be begged for – and automatic pardoning, suggests greater flexibility in the system. However, what was happening was perhaps an attempt to ‘present a more pleasing image of justice’ in a period of social crisis, to avoid the alienation of many who were uneasy about the penal regime, and to create a more consensual atmosphere in a time of increasing debate about the validity and effectiveness of the judicial system.<sup>10</sup>

What seemed to be a lottery for defendants at the Old Bailey up to and including their sentencing in court appeared to continue as such after their sentencing.

Nevertheless, to those involved in the appeals and pardoning system, whether applicant or ‘gatekeeper’, the system may have had its own inner logic and rules, based partly on understandings of who was a ‘proper object’ for mercy, and partly on the pressing needs of the State to decrease the burden on institutions of incarceration. It is not possible to know, over the whole of the period covered by this thesis, how many convicts appealed against their sentences, nor how many went on to serve their sentences without further judicial struggle; nor how many were let off their sentences before they were completed. In the case of those who appealed successfully to the discretionary system – and we can assume that they were a significant proportion – we cannot be sure why they should have been successful.<sup>11</sup>

### **Criteria in bureaucratic decision-making:**

With a more bureaucratic system of pardons and remission of sentences, the criteria for making decisions became less opaque. At least from 1819, a system of ‘automatic’ pardons was developing. This may have been a practical way of coping with the overload on confinement facilities, in prisons and prison ships and hulks. At

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<sup>10</sup> R. McGowen, ‘The Image of Justice and Reform of the Criminal Law in Early Nineteenth-century England’, *Buffalo Law Review*, 32, 1983.

<sup>11</sup> Chapter 7 furthers this particular question.

least there was an executive system, with rules, which reduced the need for subjective discretion. Many men and women were set free well before the expiry of the terms of their sentences, from gaols and the General Penitentiary in London, on grounds of the length of time served, behaviour in confinement, good service in the gaol's employment, a good character before trial, availability of employment, and the prisoner's state of physical and mental health. Returns sent quarterly to the Home Secretary show that large numbers of men and boys were released from the hulks. The pressure for space was particularly great in prison areas for males, hence they benefited significantly from this strategy. The lists of convicts to be given a free pardon and discharged were accompanied by reports from the gaol keepers, or the Superintending Committee of the Penitentiary, or the captain of the ship or the surgeon of ship or prison. The criteria for pardon were transparent.

For instance, a request from the General Penitentiary for free pardons for four women and eight men specified that ten of them had 'served most of their sentence' (upwards of 3 ½ years of a 7 year transportation sentence commuted to a prison sentence), and that the state of health of the other two (women) caused concern. The Penitentiary Committee reported that all these prisoners were of exemplary behaviour and had friends to receive them. The paper was annotated at the Home Office - 'This appears to be all regular. Approved. All free pardoned 5<sup>th</sup> October 1829'.<sup>12</sup> There were many such systematic applications from the General Penitentiary and other prisons. One, from Newgate in December 1821, related to a group of prisoners who had been employed in the gaol, seven men and one woman, all tried at the Old Bailey in 1818 and 1819. One of the men, and the woman, had received sentences of 14 years transportation, the rest 7 years. None left England. The men had been cooks in the gaol

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<sup>12</sup> PRO: HO17/50 part 1/Ho63; HO17/58/Km4.

kitchen, wardsmen, a gatekeeper and a plasterer. All were said to have families, friends or employment to go to for support, all had worked well, were of good behaviour, proving their reformed natures, and all were said to be of former good character. These glowing reports may have been true, but there could have been other factors at work. Those in charge of the gaols may have had other reasons for offering their names. They could have been particularly difficult prisoners, or they could have paid well for the recommendations.<sup>13</sup>

Batches of letters, and, later, completed proformas, came to the Home Office each quarter from the hulks. Large numbers of men and boys received free pardons.

The letter or list heading would state:

A List of x being two out of every hundred convicts confined on Board the xx at xxx who have served more than half their sentence, are of orderly and uniformly good behaviour, selected by the captain who makes oath to the Impartiality of his choice of them to the Superintendent as fit objects of the Royal Mercy.

The formula used here (two in every hundred on board the hulks) resulted in the release, with a free pardon, of about 100 males every quarter. In June 1824, fourteen women, originally tried in courts all over the country and transferred to hulks in 1823 from Millbank prison to alleviate the effects of disease, were listed as 'the last remaining fourteen female convicts on board Narcissus'. All received free pardons. Most had been sentenced to 7 years transportation, reduced to 4 years in the Penitentiary. Now, having been found homes to go to, they were freed after between 18 months and 4 years. One who was originally sentenced to 14 years transportation, reduced to 5½ years, had served only 2 years, and one, originally sentenced to death for robbery, commuted to life transportation, reduced to 8½ years, had served 2½ years.<sup>14</sup> For these

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<sup>13</sup> HO17/57/Kh50

<sup>14</sup> HO17/53 part 2/1k8.

women, the chance provided by the epidemic of infectious diseases at Millbank, was their gateway to freedom.

### **Old Bailey sentences: opening and closing of doors:**

The intention to be specific about crimes and criminals has been a crucial factor in the approach used in this thesis – three specific crimes in a specific part of the country have been the basis of the study. Unfortunately, as the records of the judicial process are worked through, the names of some of the men and women tried at the Old Bailey disappear. Gaps occur as early as 1809, when official record keeping began showing carelessness, no doubt occasioned by increasing criminal cases handled by the courts. From about 1816, the records become more unreliable.<sup>15</sup> Sentencing information for the crimes considered in Chapters 3, 4 and 5 is recapitulated in **Table 6.1**. Many of these sentences were not carried out, but it is not possible to be certain just how many. In respect of the death sentences set out in Table 6.1, none of the fourteen prisoners was hanged for pickpocketing. Only two of the 112 sentenced to hang for shoplifting were executed.<sup>16</sup> There is recorded evidence of 53 male executions for Bank note forgery crimes in London between 1805 and 1829 (55% of the 96 men sentenced to death). In the same period, five women were executed in London for Bank note forgery crimes, 17% of the 30 women sentenced to death. We should not assume that an act as serious as an execution would always be officially recorded. However, these figures are likely to be correct.<sup>17</sup>

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<sup>15</sup> See footnote 2 to this Chapter. Records used are HO 26 (Criminal Registers for London and Middlesex); HO77 (Newgate Calendars); HO11 (Convict Transportation Registers); the Appeals Archive HO13, HO17, HO19, HO 47; (all PRO). Gaps in the national records for those sentenced for Bank note crime filled by use of the Bank of England records.

<sup>16</sup> Official statistics (e.g. *PP.*, 1819, Vol. VIII, (585)) show no executions in this period for shoplifting or pickpocketing. Two executions recorded for shoplifting in London in the period (PRO HO 26/3).

<sup>17</sup> P. Jenkins, 'From Gallows to Prison? The Execution Rate in Early Modern England', *Criminal Justice History*, 8, 1986. BECLS Minutes confirm this calculation.

**Table 6.1: Sentences for shoplifting, pickpocketing and Bank note crimes: Old Bailey 1780-1833**  
(For the specific years see Chapters 3-5)

Sentence	Shoplifting 1780-1823			Pickpocketing 1780-1808			Bank note crimes 1804 - 1833					
	Total	M	F	Total	M	F	Total	M	F	Total	M	F
Death	253	156 19%	97 20%	112	50 20%	62 24%	14	9 14%	5 8%	127	96 18%	30 17%
Trsp	833	573 69%	260 53%	188	102 41%	86 33%	81	48 73%	33 55%	564	423 82%	142 83%
Imp	219	93 11%	126 26%	190	86 34%	104 40%	29	7 11%	22 37%	0	0	0
Other	21	14 2%	7 1%	19	12 5%	7 2%	2	2 3%	0	0	0	0
<b>Totals</b>	<b>1326</b>	<b>836</b> 100%	<b>490</b> 100%	<b>509</b> 100%	<b>250</b> 100%	<b>259</b> 100%	<b>126</b> 100%	<b>66</b> 100%	<b>60</b> 100%	<b>691</b> 100%	<b>519</b> 100%	<b>172</b> 100%

*Sources: OBSP (CLRO); BECLS (Bank of England)*

From 1791<sup>18</sup> until about 1817, it is possible to be reasonably sure of the immediate fate of all but a few of London's shoplifters, pickpockets and forged Bank note utterers. This is not to say it is possible to know what happened finally in all cases, since early commutations of sentence could be followed by further mitigation. From 1817, it is unwise to rely on the official records. The Home Office appeals papers (studied further in Chapter 7) may provide an abundance of information on the fates of convicts, particularly after 1817, but, although most appeals initially resulted in no change to a prisoner's situation, even so hundreds of convicted criminals did not hang, were not transported, and served far less time in prison than their original sentence stipulated.

We have seen from a study of the verdicts and sentences for the three different crimes that each could bring different responses from juries and judges. Similarly, they could also bring particular responses from those in a position to make, or assist, decisions which confirmed or modified sentences. The seriousness with which forged Bank note circulation was viewed by those in positions of power is illustrated by the fact

<sup>18</sup> The first year for the Criminal Register series, HO 26, PRO.

that, between 1804 and mid-1817, of the 26 death sentences for this crime passed at the Old Bailey - eighteen men, and eight women - all eighteen men were executed. This reinforces the view expressed in Chapter 5 that this was a crime unlike others. However, only two of the eight women were executed.<sup>19</sup> There was a gendered post-sentencing response, even to this particular crime. Since the attitudes to Bank note crime were so specific, they have been excluded from the following Table 6.2, which presents the immediate commutations of the death sentences passed by the Old Bailey Court for pickpocketing and shoplifting during the selected periods, where I have been able to trace them.<sup>20</sup>

**Table 6.2: Shoplifting and pickpocketing: Commutation of death sentences passed at the Old Bailey 1791 to 1817<sup>21</sup>**  
(15 years during this period)

<b>Death sentence commuted to:</b>	<b>Men</b>	<b>% of men</b>	<b>Women</b>	<b>% women</b>
<b>Transportation:</b>				
<b>Life</b>	10 )		16 )	
<b>14 years</b>	1 ) 14	56%	0 ) 18	58%
<b>7 years</b>	3 )		2 )	
<b>Imprisonment:</b>				
<b>2 years</b>	1 )		3 )	
<b>1 year</b>	2 ) 3	12%	5 ) 11	35%
<b>6 months</b>	0 )		2 )	
<b>3 months</b>	0 )		1 )	
<b>Army, Navy, navigation</b>	4	16%	-	
<b>Discharge on sureties</b>	0		2	7%
<b>Free pardon</b>	1	4%	-	
<b>Philanthropic Society<sup>22</sup></b>	2	8%	-	
<b>Died awaiting decision</b>	1	4%	-	
<b>Total</b>	25	100%	31	100%

Sources: Criminal Registers HO26; Convict Transportation Registers HO11 (PRO)

<sup>19</sup> HO26 Criminal Registers; HO77 Newgate Calendars; BECLS Minutes.

<sup>20</sup> Some cases untraceable even in this period (4 men, 3 women). These omitted from Table 6.2.

<sup>21</sup> Only during these years are the records sufficiently full to make this analysis.

<sup>22</sup> A school charity established in 1788 'for the prevention of crime, encouragement of industry, culture of good morals among children training up to a vicious course, public plunder, infamy and ruin'. It took children of both sexes between the ages of 8 and 12, and could keep them until they were 21. From about 1810, it became difficult for the Society to take girls since it was unable to separate daughters of convicts who had been merely misbehaving from girls who were themselves convicted criminals, as space did not permit. The school did not think it proper to mix the two categories. A. Highmore, *History, Design and Present State of the Various Public Charities in and near London*, London 1810, pp. 860-868.

From this information, it is impossible to say that women were generally moving on to different or more lenient destinations from the men. Similar proportions of men and women had their death sentences changed to transportation. Although a substantially higher proportion of females was directed towards imprisonment, that difference was balanced by the number of alternative punishments or controlled activities available for males. At this stage of the journey, there is no evidence of more lenient treatment for women. It might even be said that the balance was tipped slightly in favour of men, since there were many more options for them other than prison.

Further scrutiny of the official records, to find out what happened to the London and Middlesex pickpockets and shoplifters originally sentenced to seven years transportation between 1791 and 1817, shows that the vast majority of the women found themselves on board transportation ships (70% of them). Of the men, 25% are listed on board transportation ships, with another 47% on hulks in the Thames or around Portsmouth. Further research may show how many of those on the hulks eventually made the voyage to Australia. The remainder of the men and women originally sentenced to transportation were found other ways out of making the long voyage. Of the women, 19% ended up in prison for terms from six months to five years, 3% were quickly given free pardons, two women (2%) died soon after pardoning, and there are another five (6%) for whom I can find no detail. The alternative exit from the transportation journey was rather different for the men. None of the men who escaped transportation appears to have ended up in a conventional prison. One was allowed voluntary exile, one was fined, one was pardoned, one was released on security for good behaviour, nine (9%) were pardoned to serve in the army or navy, and there are twelve more for whom details of this stage of the journey cannot be found. In the case of those originally sentenced to fourteen years transportation for Bank note crimes, there

appears to have been little scope for escaping the voyage to Australia. Of the 142 women sentenced to fourteen years transportation, it appears certain that 125 (88%) set off to Australia, maybe slightly more. Of the 'Bank women' who escaped transportation, one woman was pardoned after many years in the Penitentiary, and, in the case of the remaining sixteen or thereabouts, it is difficult to be certain, since delays were caused by illness or giving birth – they may have sailed in the end. It is certain that 75% of the men who had offended against the Bank sailed for Australia. One man remained in prison and one on the hulks since they were deemed too old to go to the other side of the world; one lad of 15 whom the Bank had prosecuted by mistake was sought a place in the Philanthropic Society. There were delays and other uncertainties about the remaining 22%, but it is likely that the majority of these made their way to New South Wales. We have here another illustration that the nature of the crime and the prosecutor affects what can be said about discretion and the role of gender. Overall however, both the flexibility and responsiveness of the system, and the new type of bureaucratic discretion created through overload in the post-sentencing system, allowed many convicts to escape through doors which might, in an earlier period, have seemed closed to them.

### **Gender and transportation:**

The evidence discussed previously emphasises the importance of the role of transportation as the main secondary punishment for these three crimes at this time, although it is clear that by no means all those sentenced or commuted to transportation ever left the shores of Britain. The significance of transportation as the main residual punishment for felony in this period bears strongly on the choices made by the decision-makers in the justice system. Its use has also to be seen alongside the evolution of

methods of prison discipline and the growing importance of incarceration, particularly by the later years of the period. Further, it became impossible for the Home Office to avoid the pressures to 'manage' the choices of punishment for convicts, and to be the centre of the debate about those pressures.<sup>23</sup> Such developments necessarily diminish the operation of discretion based on élite views of the character and behaviour of those who had committed crimes. We are edging into a more bureaucratic age, and the fates of men and women awaiting punishment increasingly depended on the pragmatic decisions of the government, faced with coping with the needs and problems of the time.

Transportation was 'a magnificent way of exporting problems', a way of ridding the country of undesired and dangerous low-life. They would never be seen again on these shores, and the administrative problems they created would be dealt with by someone else.<sup>24</sup> The evidence for transportation to New South Wales points clearly to a policy of ridding the nation of problems, rather than to a grander strategic imperial project.<sup>25</sup> The heterogeneity of the transportees, particularly in the early phases of the Australian venture, the dominance of urban men and women, and their lack of skills for creating a penal society and a convict economy were obvious. 'But, suited for Australia or not, they were at least out of England'.<sup>26</sup>

It is beyond the scope of this thesis to examine the way in which gendered decisions were taken on transportation. However, it is noticeable that the imbalance in the numbers of men and women, and in the 'type' of woman arriving in the penal colonies of New South Wales and Van Diemen's Land was a matter of constant

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<sup>23</sup> A. Atkinson, 'State and Empire and Convict Transportation 1718-1812', pp.25-38 in C. Bridge (ed.), *New Perspectives in Australian History*, Occasional Seminar Papers, No.5, London, 1990.

<sup>24</sup> J. Innes, 'The Role of Transportation in Seventeenth- and Eighteenth-Century English Penal Practice', pp.1-24 in C. Bridge, (ed.) *New Perspectives*.

<sup>25</sup> M. Gillen, 'The Botany Bay Decision, 1786: Convicts, Not Empire', *English Historical Review*, 97, 1982, pp.740-766; Innes, 'The Role of Transportation'; Atkinson, 'State and Empire'; contrast A. Frost, *Convicts and Empire*, Melbourne, 1980.

<sup>26</sup> Innes, 'The Role of Transportation', pp.20-21.

irritation, both to those administering the colonies and those in the Home Office charged with the despatch of convicts. The Parliamentary Select Committees on Transportation of 1812 and 1838 were much exercised by the issue. Governor MacQuarrie of New South Wales, from a very early stage, deplored the lack of suitable female convicts arriving there. In 1810, the colony reported that there were 2,734 male convicts there and 1,266 females, an undesirable situation.<sup>27</sup> MacQuarrie, in 1810, required the government to send him as many male convicts as possible, 'the prosperity of the country depending on their numbers; whilst, on the contrary, female convicts are as great a drawback as the others are beneficial'. His objections were to the quality of female transportees; to their 'depraved' sexual behaviour, their unsuitability for work as servants, and, frequently, to their poor state of health. Yet, women were desperately needed to assure the future of the colony, and enough of them to control the men's sexual behaviour.<sup>28</sup> The dilemma was unresolved by the end of this period. By 1821, the imbalance was worse, with 12,608 male convicts to 1,206 female convicts in New South Wales. The British government's policy for selecting transportees was explained:

A selection is in the first instance made of the male convicts under the age of 50, who are sentenced to transportation for life and for 14 years; and the number is filled up with such from amongst those sentenced to transportation for 7 years, as are the most unruly in the hulks, or are convicted of the most atrocious crimes; with respect to female convicts, it has been customary to send, without any exception, all whose state of health will admit of it, and whose age does not exceed 45 years.<sup>29</sup>

Such a policy could hardly have assisted the administration of New South Wales. The government justified its selection policy (or lack of it) and admitted the pragmatism of its dealings:

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<sup>27</sup> 1810 Muster. W.C. Wentworth, *A Statistical Account of the British Settlements in Australia*, Third Edition, Vol. 1, London, 1824.

<sup>28</sup> Report of Select Committee on Transportation, *PP.*, 1812, Vol. II, (341); W.C. Wentworth, *A Statistical Account; Despatches and Papers relating to the Settlement of the States 1812-1819* in W.A. Gullick (ed.), *Historical Records of Australia*, Series 3, Vol.2, Sydney, 1921.

<sup>29</sup> *PP.*, 1812, Vol. II, (341).

they are aware that the women sent out are of the most abandoned description, and that in many instances they are likely to whet and encourage the vices of the men, whilst but a small proportion will make any step towards reformation; but yet, with all their vices, such women as these were the mothers of a great part of the inhabitants now existing in the Colony, and from this stock only can a reasonable hope be held out of rapid increase to the population... The supply of women to the colony, must, however, be materially diminished by the proposed system of employing convicts in Penitentiary Houses....<sup>30</sup>

Thus a difference in policy towards female convicts was driven by the needs of the State and by developments in penal policy in England, especially the development of Penitentiaries – and in New South Wales, by establishment of the female factory at Paramatta.<sup>31</sup> The part played by transportation, the gendered selection of transportees – however crudely made by the Home Office - and the growing role of the Penitentiaries, especially for women, must be added to the complex equation of decision-making about punishment.

It is reasonable to suggest that transportation was a worse punishment for women than for men. All, male and female, endured appalling conditions on board the ships. They were usually confined in irons, with inadequate food and medicine, coping with extremes of heat and cold, while disease spread easily in such cramped, ill-ventilated environments. Children, other than babies at the breast, had to be left behind. For mothers, who had had the care of their young children in prison, the burden of abandoning them, never to see them again, must have been particularly distressing. Babies being weaned went with their mothers on the ships, and the difficulties of coping in such circumstances must have been daunting.<sup>32</sup> The fitters-out of the convict ships

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<sup>30</sup> Ibid.

<sup>31</sup> Earl Bathurst to Governor MacQuarrie, February 1814, and MacQuarrie's response October 1814, *Historical Records of Australia*, Series 1, Vol. 8, July 1813-December 1815, Australian Commonwealth Parliament, 1916, p.134 and p. 312.

<sup>32</sup> 1820s reforms outlawed confinement in irons, allowed children up to the age of seven to accompany their mothers, and embarkation of women with very young babies was delayed until the child was weaned. Smith, *Women in Prison*, p.114, Zedner, *Women, Crime and Custody*, pp.174-5; Hughes, *The Fatal Shore*, ch.8.

had given no thought to women who might give birth on the ships; this they did on filthy shelf 'beds', in chains. On board ship, the women were generally regarded as prostitutes, and many were used as such by the ships' officers and crews. On arrival in the colony, the women, grossly outnumbered by men, lived crude, brutalised lives in consequence. Transportation was not a lenient sentence for any convict; for women it was exceptionally severe.<sup>33</sup>

### **The gendered shift of imprisonment:**

One of the more significant differences between male and female convicts which was shown in Table 6.2, was the shift of women towards the conventional prison – the House of Correction or the Penitentiary, which did not take place for men. This was made more emphatic because of the other options available for male convicts - for instance, to the armed services, to work on the Thames navigation from the hulks moored at various points on the river, and to the Philanthropic Society. Being sent to the hulks was a fate feared by many men, as their appeal papers and letters show. This was a harsh and brutal sentence of a kind not inflicted on women. Many of the women's prison sentences were accompanied by hard labour and gendered discretion was exercised here. Women were not thought capable of the type of physical work handed out to the men. They did not go to the mainstream hulks. For a short while the hulks, 'Heroine' and 'Narcissus', were used as an extension of the General Penitentiary at

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<sup>33</sup> W. Tench, *A Narrative of the Expedition to Botany Bay*, London, 1789; *ibid.* *A Complete Account of the Settlement at Port Jackson in New South Wales*, London 1793; PP. 1812, Vol. II, (341); PP. 1837, Vol. XIX, (518); Smith *Women In Prison*, pp.113-117; Hughes, *The Fatal Shore*; Wilfrid Oldham *Britain's Convicts to the Colonies*, Sydney, 1990; P. Clarke & D. Spender, (eds.), *Lifelines - Australian Women's Letters and Diaries 1788-1840*, St Lenoard's New South Wales, 1992.

Millbank.<sup>34</sup> One of the problems for women in prison was a lack of work by means of which either to earn small amounts to supplement their gaol allowance or to keep occupied. When work was made available, it was of a type thought suitable for women – patchwork items, knitted socks, clothes for the army and navy. From 1810, when the first women were moved from Newgate to Millbank, they were fed a worse diet than the men, which made them more susceptible to ill-health and disease, such as the epidemic of scurvy, dysentery and diarrhoea of 1822-3. This epidemic, affecting women worse than men, led to their evacuation from the prison to the hulks.<sup>35</sup>

Being sent into military or naval service generally appeared to have been welcomed by younger men as an alternative to transportation or imprisonment. They frequently requested this, and their friends and relations saw it as a respectable outcome, with potential for 'saving face'. When the detail of the many forms of punishment is considered, degrees of leniency shown to either men or women are difficult to classify. Different treatment of men and women was intended by those with the ability and power to make decisions about the disposal of convicts, but it was largely the result of practical priorities operating diversely within a broad strategy. Overall, chance must have seemed to operate strongly for these offenders as they continued their journey through the system, as many, sentenced to death, ended up with a prison sentence of a few months, or even a discharge on sureties for good behaviour. Some of the State's logic can be seen. Too many deaths had to be avoided; a gendered policy on transportation was being pursued; men were required in the army and navy; overcrowding in prisons and on

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<sup>34</sup> C. Campbell, *The Intolerable Hulks*, London 1994, pp. 99-100; Smith, *Women in Prison*, p. 87. As part of the evacuation of Millbank Prison because of scurvy, Parliament (4. Geo 4. c.82) authorised removal of female prisoners to two hulks, (Narcissus and Heroine) at Woolwich, in order that they should recover their health. (Other women were sent to the Royal Ophthalmic Hospital in Regent's Park, which was empty at the time). The first went aboard 16 August 1823. The epidemic continued on board; there were also problems of discipline. Pardons were granted to all the women, as soon as homes were found for them. The Home Office corresponded with all the women's relatives and friends to secure places for them. By February 1824, no woman was left on the hulks.

<sup>35</sup> Smith, *Women in Prison*, p.87.

hulks had to be alleviated; good behaviour, and illness as criteria for discharge clearly favoured women.

### **The shadow of the gallows:**

Some of London's convicted felons did not have the doors to freedom or lesser punishments opened to them, and it is important to examine why their journeys ended in death on the gallows. Historians who have considered the impact of capital punishment in the eighteenth and nineteenth centuries have worked with imprecise statistics. Henry Hobhouse of the Home Office reported to the Select Committee on the Criminal Law in 1819 that the statistics he produced were 'very imperfect', even for London and Middlesex. The Old Bailey Clerk of Arraignment, Thomas Shelton, said that records were getting better, but much of what he had produced was 'generality'.<sup>36</sup> There had been the greatest difficulty in producing statistics on the precise crime for which an execution had taken place, and the official statistics must be regarded with caution.<sup>37</sup>

Recently, Gatrell engaged with the statistics of those hanged between 1770 and 1868. We can assume that there was a total of just over 1,200 executions of men and women who had been sentenced for all capital offences at the Old Bailey Sessions during the period studied in this thesis (between 1781 and 1834), an average of 23 a year. These deaths represented about 25% of those executed in the whole of England and Wales. During the eighteenth century, there had been significant annual fluctuations

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<sup>36</sup> *PP.*, 1819, Vol. VIII (585). There are major discrepancies for London and Middlesex if the statistics seen by the Select Committee are compared with names counted in HO77, or in statistical presentations in newspapers.

<sup>37</sup> *Ibid.* JH Capper was unable to explain the difference between his statistics and the Bank of England statistics for 1817, because there was 'some reservation of judgement at the end of the Sessions'. R. W. Rawson, 'An Inquiry into the Statistics of Crime in England and Wales', *The Journal of the Statistical Society*, Vol. 2. 1839, p. 316-345, tries to show that men and women commit different crimes and claimed that no woman had been committed for "robbery in dwelling-houses accompanied by violence" or "administering unlawful oaths". Study of evidence, e.g. in newspapers, shows that, not only were they committed, but were hanged for such crimes.

in the number of executions, but the level was high. Between 1701 and 1750, only five or six people a year had been hanged in London, but as many were hanged there in the 1820s as in the 1790s. Twice as many hanged in London in the thirty years 1801-1830 as hanged in the fifty years 1701-1750.<sup>38</sup> About 20% of those executed in London in the eighteenth and early nineteenth centuries had been tried for murder, and a small additional proportion for attempted murder, for rape, and for sodomy. The majority (about two-thirds) were executed for property crimes – burglary and housebreaking, robbery, stealing horses, sheep or cattle, and a substantial proportion for forgery of various types, uttering forged Bank notes, and for counterfeiting coins. The remainder of those executed had committed piracy, offences at sea, offences against the Post Office, and other types of fraud.<sup>39</sup>

Amongst these executions, the proportion of women hanged was small. Of 1,232 people hanged at Tyburn from 1703 to 1772, it is possible that only 92 were women (7% of the total executed). Of 59 people executed in London from 1827 to 1830, three were women, all for murder – a similarly low proportion.<sup>40</sup> There is no certainty about the exact number or names of the women who hanged, even in the period 1780 to 1830. There are the celebrated cases, which Gatrell exploited at length in his fascinating, provocative and rightly emotional study of the gallows at the centre of English, especially London, life. Such micro-histories help bring to mind the barbarity of hanging. However, what surprises is the obscurity of most of those who hanged in the metropolis, perhaps since most of them, as Linebaugh points out, were the poor of London.<sup>41</sup> This is particularly so in the case of women. Some are a little more celebrated – Eliza Fenning, the poisoner, and Phoebe Harris, Margaret Sullivan, and

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<sup>38</sup> Gatrell, *The Hanging Tree*, 1994, p. 7 and Appendix 2.

<sup>39</sup> HO26, HO77, PRO; however, these official records are not trustworthy; newspaper records of executions in London show a slightly different picture.

<sup>40</sup> Gatrell, *The Hanging Tree*, p. 8.

<sup>41</sup> P. Linebaugh, *The London Hanged*.

Catherine Murphy (alias Christian Bowman), who were staked and burned between 1786 and 1789 for coining offences. Maria Theresa Phippoe alias Mary Benn (1797), and Elizabeth Fricker (1817) were seen as notorious freaks of ferocious womanhood. Ann Hurler, (1804) who forged bank transfers, was given a sympathetic depiction despite her apparent scheming deception, and Esther Hibner, merited many lines in the Complete Newgate Calendar and the newspapers for the murder of a workhouse child in 1829.<sup>42</sup> Otherwise, the majority of poor women were executed with little interest taken by the newspapers in their individual cases.

It has been possible to trace the names of 42 women who hanged in London between 1780 and 1832. Most have been traced in the official records, and some in newspaper reports and in the Complete (or New) Newgate Calendar. In the **Appendix**, at the end of the thesis, I have listed the names of the women whom I have so far traced. Since they are unusual, I have tried to suggest features which might have caused the decision on execution to go against them. It is immediately noticeable that crimes in which their victims were defrauded form the largest group (14) – four for counterfeiting coins, six for uttering forged Bank notes, and four involved in serious fraud, deceit and impersonation. Another large group (12) is for theft – robberies and burglaries - accompanied by violence. There was a distinct group (9) for murder or attempted murder, and finally a group concerning thefts from dwelling houses, where no violence or force was involved, but the thieves were servants (4). There was nothing ‘female’ about any of these crimes. They are the same crimes for which men were executed, although men committed a range of other capital crimes to which women were not attracted. The crimes for which women hanged may have been seen as deserving death

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<sup>42</sup> Fenning: *The Times*, 27 July, 1 August, 3 August 1815; Harris: *The Times*, 22 June, 23 June, 27 June 1786; Sullivan: *St James' Chronicle* 24/26 June, 1788, *The Times*, 24, 25, 26, and 27 June 1788; Murphy/Bowman: *The Times*, 19 March 1789. *Gentlemen's Magazine*, 59/1 1789; Phippoe: *The Times*, 12 December 1797; Fricker: *The Sun*, 5 March 1817, *The Times*, 6 March 1817; Hurler: *The Times*, 8, 9 and 13 February 1804; Hibner: *The Times*, 14 April 1829.

in order to protect society from real danger from women who acted like men. Besides murder, always the worst of crimes, these executed women had attempted to prevent men being able to inherit or keep their property in safety. They had been fraudulent in the male world of trade.<sup>43</sup> They had collapsed trust between a man and his servant.

However, this is not a sufficiently satisfactory explanation, since other women committed the same categories of crime and were not hanged for them. There can be little doubt that the State had an aversion to executing women. Yet, for all the discussion by historians and contemporary commentators on the meaning and effect of the gallows, little has been said about executions of women - as to why they were not common, or, conversely, as to the reason for executing the few. 'An often instinctive chivalry, or if you like embarrassment',<sup>44</sup> sounds like an excuse for avoiding examination of the reluctance to execute women. Nor do suggestions that women posed a lesser threat to order in society, or that the State thought it unwise to execute those who might excite pity provide a satisfying answer either.<sup>45</sup> Gatrell gave this issue extensive thought, moved perhaps too much by the few individual women with whose stories he had become acquainted. Nevertheless, there may at times have been strong sympathetic responses from powerful males to 'the wronged woman, particularly if she was of inestimable age and fetchingly vulnerable to male wiles'. However, Gatrell also considered some stories of less physically attractive women and admits that females could receive no better treatment than men, whether in prison or on the scaffold, sometimes worse.<sup>46</sup> I have found few examples other than those cited by Gatrell where sympathy for executed women was expressed in the newspaper reports. Accounts are

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<sup>43</sup> Oldham, 'On Pleading the Belly', n.162, p.58 points out that coinage offence, involving as many women as men, resulted in no mercy for convicted women throughout the eighteenth-century.

<sup>44</sup> G. R. Elton, 'Crime and the Historian', p.13 in J.S. Cockburn (ed.), *Crime in England 1550-1800*, London, 1977.

<sup>45</sup> Beattie, *Crime and the Courts* pp. 436-9.

<sup>46</sup> Gatrell, *The Hanging Tree*, p. 335-6.

chillingly matter of fact, following stereotyped formula.

Gatrell suggests a watershed at the end of the eighteenth century in attitudes to the execution (and other physical punishment) of women. 'Anxiety about executing women, about burning their bodies... or about whipping them... now tended to be activated by the sense that even at their worst women were creatures to be pitied and protected from themselves, and perhaps to be revered, like all women from whom men were born'.<sup>47</sup> A few well-publicised female executions caused revulsion, and the hanging spectacle sometimes provoked unease. Anxiety grew about extreme punishments for women 'who by being the weaker body, are more liable to error, and less entitled to severity'.<sup>48</sup> However, the public newspaper reporting of the execution of women hardly supports a sense of real anxiety. With a few exceptions, the executions of London women are marked more by silence than by many words. Although Gatrell made extensive use of the few cases of executed women which attracted attention in print, he also admitted that, 'executions take up a few passing lines in pages given over to healthier doings'.<sup>49</sup> My research has shown that the few passing lines are the usual response to hangings in London, whether of male or female. The cursory mentions they are generally given suggest either a matter of fact acceptance, or a need to hide the horror from the public in order to retain the acceptability of the death sentence.<sup>50</sup>

Reports, more often than not, were of the following nature:

The following malefactors (*list of names including one woman, Mary Gardener, a rioter*) were carried in three carts from Newgate to Tyburn where they were all executed according to their sentences. They all behaved very penitent.<sup>51</sup>

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<sup>47</sup> Ibid, p. 337.

<sup>48</sup> *The Times*, 24, 25, 26, 27 June 1788, on execution of Margaret Sullivan for coining.

<sup>49</sup> Gatrell, *The Hanging Tree*, p. 55.

<sup>50</sup> R. McGowen, 'Civilizing Punishment: The End of the Public Execution in England', *Journal of British Studies*, 33, 1994, pp.257-282. The ideas in this article support a view that keeping horror from public sight was a strategy of those who favoured retention of hanging.

<sup>51</sup> *St James's Chronicle*, 21/23 November 1780, which was a copy of the report in the *London Evening Post*, 22 November 1780.

Or the following:

Yesterday morning at 8 o'clock Richard Cowling alias Jones, for personating a seaman and receiving his wages, and Melinda Mapson for robbing the houses of her master, Mr Digham, grocer of New Street, Covent Garden, were executed opposite the Debtors door at Newgate.<sup>52</sup>

Sometimes the woman's name would not be mentioned.<sup>53</sup> Reports often showed more interest in other issues – among them pickpockets operating in the watching crowd,<sup>54</sup> the collapse of a scaffold holding two hundred spectators,<sup>55</sup> seventy spectators crushed to death,<sup>56</sup> reversion to the use of the cart instead of the new drop at the gallows,<sup>57</sup> and the precipitation of the Ordinary from the scaffold when the executioner removed a spring too early.<sup>58</sup> There is a sense in which these reports seemed to be avoiding the main issue. With significant exceptions, such as those explored by Gatrell, executions of men and women seem to be portrayed as inevitable and unexceptional. When this was the tragic end for so few women, the lack of outrage and emotion is extraordinary.

This was a period of contradictory pressures on the decision-makers. On the one hand, new constructions of femininity<sup>59</sup> emphasised women's weaknesses, their specific design and calling to domesticity, wifhood and motherhood, and their moral superiority. On the other hand, those responsible for order in society were dealing with what they saw as an epidemic of crime, in which women were playing a significant part. The judicial system still had to punish, control and rid the nation of those who undermined social order. To support an image of the criminal justice system as a process which worked fairly, some women had to pay the full penalty. The dilemma

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<sup>52</sup> *The Times*, 14 June 1810.

<sup>53</sup> For instance, Jane Vincent and the five men executed with her were not mentioned in *The Morning Chronicle and London Advertiser*, nor in *The Morning Herald and Daily Advertiser* of 7 June 1781

<sup>54</sup> At the execution of Jane Vincent: *Lloyds Evening Post*, 6/8 June 1781; also at Charlotte Goodall's execution, *London Chronicle*, 15/17 October 1782.

<sup>55</sup> At Charlotte Goodall's execution, *London Chronicle*, 15/17 October 1782.

<sup>56</sup> At the execution of Elizabeth Godfrey and two men, *The Times*, 24 February 1807.

<sup>57</sup> At the execution of Ann Hurtle with one man, *The Times*, 8, 9, 13 February 1804.

<sup>58</sup> At the execution of Mary Parnell, *The Times* 14 November 1805.

<sup>59</sup> For example, Barker & Chalus, (eds.) *Gender in Eighteenth-Century England*; Fletcher, *Gender, Sex and Subordination*; Hill, *Women, Work*; Hitchcock, *English Sexualities*; Honeyman, *Women, Gender*; Shoemaker, *Gender in English Society*.

caused by this contradiction was expressed by Lord Ellenborough in 1828: 'Four people ordered for execution, one for forgery, one for burglary, two for beating and robbing a man in a house of ill-fame. There was a woman engaged, who was spared on account of her sex, but she was the most guilty of all.'<sup>60</sup> Dualistic notions about women perpetuated this dilemma. A writer to the *Gentleman's Magazine* in 1795 thought:

Softness, delicacy, benevolence, piety, and, I may add, timidity (the guardian of virtue) are the natural characteristics of women. Such endearing qualities touch the heart of the hero, awe the profligate, and extort respect from the most abandoned; whilst she in whom they are wanting creates only disgust; she appears to be an unnatural and monstrous being, and instead of love and the softer passions, she excites only contempt, and meets but with neglect. No man who sincerely respects the female character would wish to see their amiable qualities and natural sensibility annihilated; and it is with sincere regret that their best friends observe, among the ladies of the present day, a tendency to masculine vice which is of the worst consequence...<sup>61</sup>

The biological and symbolic centrality of the woman's body to execution, by whatever method, is stressed by Naish in her study of judicial killings of women from the fifteenth to twentieth centuries. She suggests that it is the female body itself that poses the problem. 'There is something repugnant about destroying a body which gives life, even when strict equality requires that women should be punished just as men'.<sup>62</sup> It is often proposed that there are deep male fears about the female body which holds ultimate power over the human future and the male's ability to procreate and dominate. A letter to *The Times*, putting arguments against execution for stealing 'a little piece of silver', casually emphasises such fears about killing those who are to be the child-bearers: 'Is it not possible that those nations which condemn to death a young woman of 18 years of age, who might be the mother of five or six children ... should have

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<sup>60</sup> Ellenborough, *Diary*, 154-5, 28 June 1828, quoted in Gatrell, *The Hanging Tree*, p.548.

<sup>61</sup> *Gentleman's Magazine*, Vol. 65, February 1795, pp.102-104.

<sup>62</sup> C. Naish, *Death Comes to the Maiden – Sex and Execution 1431-1933*, London and New York 1991, p. 251.

sufficiently meditated on the tables of the probabilities of human life which they have so learnedly calculated?’<sup>63</sup>

It is possible that there were deep-seated male anxieties about executing, burning and whipping women, and that these may partly account for the discretion which was used to save many women from the gallows. It is all the more difficult to understand why the women who were executed did not merit this discretion. Zedner, for a slightly later period in the nineteenth century, suggests that growing anxieties about the perceived undermining of hierarchical relations caused by industrialisation, the disintegrating effects of urbanisation, and the growing irreligion of the urban poor, were palliated to some degree by setting up ‘the family’ and the idealised role of the woman as mother, with her superior morality.<sup>64</sup> Women seen as fulfilling these roles were irreproachable and untouchable. Women were judged against complex, constructed, notions of ideal womanhood. Labouring and plebeian folk were measured by these ideals which they neither created nor subscribed to. A criminal woman represented a negation of imposed ideal femininity. ‘The angel in the house’ had a mirror image in the plebeian woman - degraded, brutish and immoral. In the latter half of the eighteenth century, the image of the plebeian woman suffered, as the picture of their industriousness and productivity was replaced by one of immorality and criminality through growing unemployment and urbanisation. They were regarded as responsible for swelling the ranks of thieves, beggars and prostitutes. They were no longer deserving of paternalistic sympathy.<sup>65</sup> Maria Theresa Phippoe, executed for murder in London in December 1797, was seen as such a woman. She was described as ‘a ferocious female’, ‘a woman of masculine behaviour and of a daring disposition’. Esther

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<sup>63</sup> *The Times*, London, 30 October 1788.

<sup>64</sup> Zedner, *Women, Crime and Custody*, pp.13-18, 28-30, 62-68.

<sup>65</sup> Clark, *The Struggle for the Breeches*; S. Kingsley-Kent’s synopsis of the 18<sup>th</sup> century in *Gender and Power in Britain 1640-1990*, London, 1999.

Hibner was hanged in April 1829 for murder of her little apprentice girl in a violent and cold-bloodedly cruel way. The judge sentencing her said, 'Although you have been the mother of a child yourself, you saw her (the dead child's) sufferings without any of that feeling which one would imagine could never have been absent from a female breast'. A picture was built up of a woman who was no 'real woman', devoid of physical weakness, moral sensitivity, maternal and gentle disposition.<sup>66</sup>

### **London women hanged for Bank note offences:**

Returning to a narrower focus on one of the crimes specifically considered in this thesis, it may be useful to take a closer look at the five women hanged in the period for Bank note uttering in London and Middlesex.<sup>67</sup> The perceived seriousness of their offences was undoubtedly the primary reason for their executions. Mary Parnell (hanged in 1805), Ann Lawrence (1817), Charlotte Newman (1818), Harriett Skelton (1818), and Sarah Price (1820) leave slight evidence of this tragic end to their lives. Of Mary Parnell, there are merely official registry entries and a brief report of her trial in the Old Bailey Sessions Papers. There are hints here as to why she would not have impressed the Court. She was 'very joking, as if in liquor', her face was 'painted', she had only one eye, and described herself as 'an unfortunate girl'. She was 23 years old, and had a reputable lawyer to defend her. There is no trace of her in the Bank solicitors' post-sentencing correspondence, nor did she appeal to Bank for mercy. Since this case dates from early in the Restriction period, before public unease about so many

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<sup>66</sup> The publication in which these stories are told drew on the accounts of the Ordinaries of Newgate, based on their visits to condemned prisoners and their last moments with them at the scaffold. They also depended on information in the Old Bailey Sessions Papers, chapbooks and broadsides. They became substantial productions, and had different titles e.g. 1824's edition was "Celebrated Trials" and 1818 William Jackson's New and Complete Calendar in 8 volumes. They continued in a moral, didactic tone until the 1830s. Esther Hibner's case embellished in *The Times*, 14 April, 1829.

<sup>67</sup> One woman was hanged for uttering forged Bank notes earlier during the period of Restriction and is outside the scope of this study – Elizabeth Brown in 1798.

prosecutions, transportations and executions, Mary Parnell's life-style and the image of womanhood she projected may have been sufficient, added to the seriousness of the crime, to make her one of the few exceptions to the rule of discretion on grounds of gender.<sup>68</sup>

Ann Lawrence (alias Woodman) worked with a group of men and 'carried on an infamous traffic in forged notes', around the public houses of Whitechapel. They had all been caught through one of the Bank's elaborate entrapments and all were sentenced to death. She was described in a newspaper report of her trial as a young woman, well-dressed, who begged the gentlemen of the jury to recommend her to mercy for the sake of her *seven starving and unprotected babies* (reporter's italics). The men were executed. Ann was pregnant and successfully able to 'plead the belly'. She was present at the men's execution, since one of them, Thomas Cann, was the father of the child she expected. 'Of the parting scenes that between Cann and his wife who was convicted along with him for the same offence, but owing to her pregnancy, not reported, was the most affecting. Seven young children, the offspring of this unfortunate couple, came to the gaol to receive the farewell caresses of their father, but his situation was such as to forbid the interview'. Ann Lawrence did not make any further appeals. Elizabeth Fry and her workers were greatly distressed about her, and Fry's record suggests she was executed a few weeks after the birth of her child. The Bank had invested a good deal in breaking up the gang to which Lawrence belonged, and it may have been her expertise in crime over a long time which allowed her no mercy. The Bank would never have subscribed to a petition on her behalf.<sup>69</sup>

Charlotte Newman, executed in February 1818, was another woman who came

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<sup>68</sup> Mary Parnell's execution in HO26/11, trial in OBSP: July 1805, Case 452.

<sup>69</sup> OBSP, 30 Oct. 1816, Case 1100; *The Times*, London, 6 March 1817; *Memoir of the Life of Elizabeth Fry*. pp. 263, 275, 279.

within the orbit of Elizabeth Fry's concern. Her letters of gratitude (which found their way into public print) to Mrs. Fry shortly before her death are models of calmness, submissiveness, and serenity inculcated by the nurture of Fry and her helpers with their assurance of the boundless mercies of God. Newman wrote an equally pious and moving letter to the Bank of England:

When I was at the Bar my Life was then in your hands and I now feel it more acutely. Let mercy be blended with Justice it is yet in your power to save the Life of an unhappy sufferer. ... How sweet will be the hour of reflection when you can rest upon your Pillow and commune with God and your self that are the means of saving that Life which if taken from any of God's creatures you have not power to give...

It is the more awful to read the solicitors reply: 'I received your letter but cannot interfere on your behalf. The Governors and Directors of the Bank have considered your case, and they also decline to interfere.' Newman had been tried with her male companion, George Mansfield, who was found not guilty.<sup>70</sup> They had been on a tour of London, spending forged notes in wine vaults and liquor houses. Again, her arrest was the culmination of a Bank exercise. A large amount of 'bad' money was found in her apartment. Her husband had been transported for housebreaking.<sup>71</sup> There is enough evidence to understand why Newman should have been selected, or allowed, to hang. Her connections were bad, she was a major utterer, and she was seen to be responsible for leading Mansfield astray.

Harriett Skelton was the subject of energetic, but unavailing, petitioning by Mrs Fry. This case appears to defy reasoning about leniency shown to women. Fry appealed to the Duke of Gloucester, to Lord Sidmouth, the Home Secretary, to the Bank Directors, since she was convinced there were extenuating circumstances.

Harriett Skelton; a very child might have read her countenance, open, confiding, expressing strong feeling, but neither hardened in depravity, nor

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<sup>70</sup> See Chapter 5 for their story.

<sup>71</sup> OBSP: 1 Dec. 1817, Case 53; *Memoir of the Life of Elizabeth Fry* pp.309-310; Freshfields' Papers, F25/5, 219/3 Box 63D, Chest 35, item 9.

capable of cunning; her story bore out this impression. Under the influence of a man she loved, she had passed forged notes; adding one more to the melancholy list of those, who by the finest impulses of our nature, uncontrolled by religion, have been lured to their own destruction.

Skelton appeared to have been on a strange forged note-spending spree which had included purchase of three Twelfth Night cakes, each costing half a guinea, a pound of tea, eighteen shillings worth of flannel, and two pelisses. She said the notes came from her husband or brother. Unfortunately, her brother was a well-known trader in forged notes. Harriet's case aroused interest, and she had many prison visitors – 'dwellers in palaces and lordly halls were to be found in her desolate abode.' She wrote a long letter to the Bank to explain the false opinions passed about her, which she thought led to its lack of sympathy towards her. She had been told there was no hope of a change in her sentence to transportation for life:

as my character is considered as particularly bad and my case very flagrant... Guilty as I am, and deservedly involved in disgrace, I am not guilty to that extent which is supposed.... I never lived in any house of ill fame kept by my brother or anyone else.... Part of my time was employed at my business of doing upholstery work of the house which was furnished by my brother.... I confess that my motive was not the good of the public but to gratify a desire of revenge on the part of my brother whose advice I sincerely regret that I followed.... I hope these few remarks will convince you that I am not so abandoned a character as you suppose.

The view of Harriet Skelton held by Elizabeth Fry and others at Newgate was at variance with the view that Harriet felt the Bank and the judiciary held of her.

She was ordered for execution – the sentence was unlooked for – her deportment in the prison had been good, amenable to regulations, quiet and orderly; some of her companions in guilt were heard to say, that they supposed she was chosen for death, because she was better prepared than the rest of them.<sup>72</sup>

Sarah Price refused the Bank's offer of a plea bargain, pleading not guilty to the capital charge, ensuring that if she were found guilty she could expect no mercy from

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<sup>72</sup> OBSP: Feb. 1818, Case 434; *Memoir of the Life of Elizabeth Fry*, p.312/4; Freshfields' Papers, F25/5, 219/3, Box 63D, Chest 35, item 5.

the prosecutor. She was 43 years old, and her evidence was confused. She said she received the notes from two women who bought a mattress and six chairs from her second-hand goods shop. Then she said that her husband had received them in his wages and unknowingly had given them to her to spend. The report of her execution, in December 1820, stated that she was one woman among five men, and that they were all 'respectable, more so than usual', and their behaviour was exemplary. There was an 'immense crowd' because of the 'great public feeling excited by this extensive exercise of the severity of the law after all that has been said and written on the necessity and propriety of the amelioration of our penal code and more especially as these individuals were none of them old or hardened offenders'. The Sheriffs had tried hard to prevent these executions, but the Secretary of State had rejected the appeals.<sup>73</sup>

These specific stories do not provide us with a clear model of the women who must be executed, other than to confirm the perceived severity of the crime they committed. It is easier to presume why women, in general, did not hang. The suggestions in the trial reports from the Old Bailey, in newspaper reporting, in their appeals, are that female criminals in general were seen as less of a threat to the order of society. 'Humane feelings prevail when their costs in terms of security or comfort are bearable; when they can be productively acted upon; and when they bring emotional and status returns to the 'humane'.'<sup>74</sup> It is perhaps not difficult to be lenient to those whom you do not fear. Yet the powerful were, unsurprisingly, inconsistent and contradictory in their decisions. If the powerful, and those with the opportunity to be 'humane', did not fear women, why did they hang some of them? It is possible that they did indeed fear women who did not behave as women 'should', thus threatening their security and the order of society. If we consider the Bank of England as an institutional powerhouse

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<sup>73</sup> *The Times*, 14 Dec.1820; OBSP: Case 949, Sept. 1820.

<sup>74</sup> Gatrell, *The Hanging Tree*, p.12.

and prosecutor, we see its security protected by its bureaucracy and its outward show of impartiality. A decision, once taken, stood: business could not be conducted otherwise. The women executed as the result of its prosecution found no public expression of humanity from the Bank to save them from the gallows. Its humanity was shown secretly.<sup>75</sup> It is important, therefore, not to over-generalise. The mix of motives in decision-making about criminals was complex. However, the contradictions are not unexpected. If the end of the journey was to be execution, gender played a major role in the final decision, negative or positive. Moreover, the decision could be the result of contradictory assessments. The decision might be that the weak, unfortunate female body which safeguarded the future of the nation, should be saved and reclaimed. On the other hand, a dangerous or 'unwomanly' woman should be disposed of, through fear. This apportionment of the ultimate sanction also provided a means of fulfilling the need to show that justice was being evenly applied to men and women. There is little doubt that lenience was shown to women if the gallows were truly in question, but the decisions are puzzling. Final judicial decisions puzzled observers at the time:

I am shocked by the inequality of punishment. At one time a man <sup>76</sup> is hanged for a crime ... because there are few to be hanged, and it is some time since an example has been made of capital punishment for his particular offence. At another time a man escapes for the same crime ... because it is a heavy calendar, and there are many to be executed. The actual delinquency of the individual is comparatively little taken into consideration. Extraneous circumstances determine his fate.<sup>77</sup>

Others made similar observations, but, as Gatrell points out, at the top of the decision-making tree, with the King in Council, no public sign of disquiet was expressed.

'Secrecy kept the law's private parts decently veiled'.<sup>78</sup>

If the end of the journey was not to be execution, the role of gender was less

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<sup>75</sup> See Chapter 7.

<sup>76</sup> I take the use of the word 'man' here to mean both men and women, as fitting the context.

<sup>77</sup> Ellenborough, *Diary*, 154-5, 28 June 1828, quoted in Gatrell, *The Hanging Tree*, p.548.

<sup>78</sup> Gatrell, *The Hanging Tree*, p. 549.

obvious. The needs of the State dominated when it came to transportation, and the decision to imprison depended on the availability of space in appropriate institutions. Women were probably more likely, proportionately, to be transported, to meet the demand for female services.<sup>79</sup> However, pragmatic considerations came to require that many of them, deemed unsuitable for life and work in New South Wales, should not be sent, and a new prison discipline was needed to contain them. Men were more likely to be used in public works at hard labour from the hulks, or to be dispersed into military service. Later, the numbers of men transported continued to be significant. The decisions on the disposal of men and women convicts was gendered, and made complicated by the political and practical needs of government.

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<sup>79</sup> D. Beddoe, *Welsh Convict Women: a Study of Women Transported from Wales to Australia 1787-1852*, Barry, 1979, supports a view that women were more readily transported.

## Chapter 7

### Petitioning, Pardon And Mitigation

#### **Introduction:**

The twists and turns of the journey through the judicial process continued beyond the first commutations of sentences considered in Chapter 6. Negotiations were pursued which might open a door to freedom, or to a more bearable form of punishment, as men and women waited, in prisons and on hulks, bargaining with their doorkeepers. Most were petitioning to change transportation to imprisonment, or to shorten their time in prison. Some, still protesting innocence of their crime, sought free pardons. The first part of this chapter takes a view beyond the evidence in Chapter 6, to consider how the negotiations and pleadings were conducted between London and Middlesex convicts and the decision-makers around the Secretary of State. What role, if any, did gender play when decisions were taken away from the public setting of the Court? An older, discretionary, form of decision-making still functioned alongside the growing tendency to bureaucratic decision-making (Chapter 6). The Home Office archive<sup>1</sup> contains hundreds of letters and petitions from convicts, negotiating, pleading and seeking lenience from the royal seat of mercy. I will consider the factors and the language which men and women used in their negotiations with their doorkeepers. I will ask whether gender played a part in the cases they presented, and, if so, whether it mattered at a time when discretion exercised by the élite was not the all-pervasive tool it once had been.

The second part of the chapter, by way of contrast with the Home Office

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<sup>1</sup> HO17; PRO.

archive, examines material from the records of the Bank of England – correspondence between the Bank and ‘its’ prisoners as they awaited their sentences to be effected. This uncovers some fascinating views of discretion exercised at this stage of the justice system. The men and women convicted on the Bank’s prosecution wrote to their ‘generous prosecutors’, requesting a multitude of favours: support for their petitions for remission of sentences, money to ease their time in prison or on the journey to the other side of the world, to set a spouse up in business, or to allow their families to join them on the transport ships.<sup>2</sup> This little known aspect of negotiation with decision-makers will be examined to discover the part which gender played in the success of these convicts’ strategies.

### **Londoners, the Home Office and the Appeals System:**

In the late eighteenth and early nineteenth centuries, pardons were granted to the majority of capitally convicted people, generally on condition that they were transported for life.<sup>3</sup> Much has been written about this aspect of the pardoning procedure.<sup>4</sup> However, less has been heard about the more extensive procedure of pardoning and commuting sentences which resulted in so many transportation sentences not being carried out, and in prisoners being moved from one type of punishment to another. This extended system of pardoning and mitigation affected many of the men and women convicted at the Old Bailey.

A major obstacle to seeing the full picture of the journey of London and Middlesex convicts at this stage is the lack of their petitions in the appeals archives until about 1819. The archives used fruitfully by other historians contain appeals generally

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<sup>2</sup> Bank of England, Freshfields’ Papers F25/1:AB218/1 to F25/13:AB223/1.

<sup>3</sup> See Chapter 6.

<sup>4</sup> For instance, Beattie, *Crime and the Courts*; idem. ‘The Royal Pardon’; Gatrell *The Hanging Tree*; Hilton, ‘The Gallows and Mr Peel’.

from outside London, together with the reports of the judges who were requested to pass their opinion on the substance of the appeals. These appeals, of an earlier date, give an understanding of which factors mentioned in the appeals might have achieved a successful result.<sup>5</sup> The proximity of the Old Bailey to the decision-takers, to the Home Secretary, and the King in Council, meant that, usually, the judiciary's views on pleas for pardon and remission were given orally, rather than in written reports. Between 1786 and 1815, it has been estimated that only about twenty non-capital appeal cases a year from metropolitan London were referred to the judiciary.<sup>6</sup> From 1819, an enormous collection of appeals developed, which included a high proportion from London and Middlesex. This growth stemmed partly from the increase in criminal business in the courts following the end of the French wars, and partly from changes within the administration itself – its growing efficiency, order, and bureaucracy.<sup>7</sup> From this time, the Home Office handled hundreds of requests each year. This volume of business makes it difficult to establish a sure view of the result of appeals, in the way it was possible to do for an earlier date and with out-of-London material. The immediate response to petitions was recorded. In many cases, this noted that a decision was deferred. Where the record showed a decision, a further decision taken a few days or weeks later may not be shown.<sup>8</sup>

Well over one-fifth of the petitions in the post-1819 archive came from prisoners convicted at the Old Bailey. The rest came from every part of England, Scotland, and Wales, and a few from Ireland.<sup>9</sup> Appeals on behalf of males dominate the archive. In

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<sup>5</sup> These are mainly HO6, HO42 and HO47 series; PRO.

<sup>6</sup> Devereaux, 'The Criminal Branch of the Home, pp. 285-6, and Table 10.2.

<sup>7</sup> Devereaux, *ibid.*

<sup>8</sup> HO19; PRO.

<sup>9</sup> In my sample of HO17, there were 3553 sets of petitions concerned with 3350 individuals. The sample choice was influenced by J. Chambers, *Criminal Petitions Index 1819-1839 – part 1 HO17/40 – 49, Part 2 HO17/50 – 59*, first published 1999, which located some names of convicts for the three crimes studied in this thesis.

the sample,<sup>10</sup> 91% of appeals related to men (3064 individuals). Although appeals in the sample on behalf of females (286) were only 9% of the national total of male and female petitions, nearly half of the female appeals (134) came from metropolitan London and were 20% of all petitions from metropolitan London.<sup>11</sup> Dossiers for male petitioners, who had easier access to the support of employers and other suitable acquaintances, often contain many appeal letters from a variety of sources. Female petitions were usually no more than one simple letter, written by the prisoner herself, or by her parents or partner. Often a turnkey or other semi-literate gaol servant would earn themselves a little money, obliging a prisoner who had little other help with a crudely written, deferential, letter.

It is not possible to be sure of even the immediate results of most of these appeals. In some cases, the Secretary of State or an under-secretary wrote instructions on the papers, such as: 'The law to take its course', 'Refused', 'To General Penitentiary', or 'Prepare a free (or conditional) pardon'. Often the word written was 'Nil'. One might assume this meant 'refused', but this was not necessarily so, as later papers may show the appeal to have been successful. Often nothing was written, and sometimes: 'Report in Council', with the date of the next King's Council meeting.

An example of the need not to mistake the immediate response for the final outcome is the case of Amy Steele, who had been sentenced to death at the Old Bailey in 1821, aged about fifteen, for a robbery. Her parents appealed, describing her as a child, committing her first offence, a girl who could easily become respectable, and who

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<sup>10</sup> HO17: 25 (Ch-Cm), 34 ((Eh-El), 35/1 and 35/2 (Em-Eo), 36 (Ep-Er), 37 (Es-Ev), 38/1 and 38/2 (Ew-Ez), 39/1 and 39/2 (Fh-Fm), 40/1 and 40/2 (Fn-Fo), 41 (Fq-Fs), 42 (Ft-Fw), 43 (Fx-Fz), 44/1 and 44/2 (Gh-Gl), 45/1 and 445/2 (Gm-Gp part), 46/1 and 46/2 (Part Gp-Gr), 48/1 and 48/2 (Gx-Gz); 49/1 and 49/2 (Hh-Hk), 50 (Hm-Hp), 51/1 and 51/2 (Hq-Hv), 52/1 and 52/2 (Hw-Hz), 53/1 and 53/2 (Ih-In), 54/1 and 54/2 (Io-Ir), 57 (Kh-Kl), 58 (Km-Kn).

<sup>11</sup> Counted from Chambers *Index*.

could produce references from her employers. Two London sheriffs were asked by the Home Office to comment. Sheriff Venables made some contradictory comments: first, the prosecutor had probably been mistaken, since Amy may not have been at the scene of the crime, and a neighbour might prove this; then, since her only alibi had been her mother, he had not been able to admit this evidence in court. He followed this with: 'she is a bad character ... but from the mildness and even feebleness of her manner one would not expect her to be engaged in an outrage of this sort.' Amy had every chance of pardon. She was young, female, reformable, simple, had been employed, and committing her first offence. The facts of the case and its conduct were in doubt. The suggestion of the judge that she was a 'bad character' seemed unsubstantiated. She was conditionally pardoned to life transportation. Continuing to search the records, we find that she did not leave England. Her life sentence was reduced to ten years, to be served in the General Penitentiary at Millbank.<sup>12</sup> In 1824, following her transfer to the hulk 'Narcissus' as a result of disease at Millbank, her name was on the list of the 'last remaining' women granted free pardons and discharged, after she had served only two and half years of her sentence. As a young, simple, girl, with parents to speak up for her, Amy Steele was an obvious choice for mercy. However, her journey through the justice system was hardly predictable. The twists and turns, the opportunities for flexibility and discretion, did not come about solely because she was young and female. Understandings of respectability and reformability played a part, along with legal doubts about the safety of her conviction. Appropriate behaviour in confinement would also

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<sup>12</sup> 56 Geo.3, Ch. 27, No. IX (1816). No. XII allowed time served under sentence of transportation to be reckoned towards discharge. The King might direct anyone under sentence of transportation, or capitally convicted but granted a conditional pardon, once examined by an 'experienced Surgeon or Apothecary and found free from any putrid or infectious distemper', fit to be removed from prison, to be moved to the Penitentiary. If sentenced to 7 years transportation, they should serve 5 in the Penitentiary; if for 14 years, then they should serve 10 years in the Penitentiary; if sentenced to life transportation or conditionally pardoned from the death sentence, they should serve 10 years. Extended to all of United Kingdom by 59 Geo. 3, chapter 24.

have worked in her favour, but in the end, the needs of the State to clear its overcrowded and unsuitable prisons and hulks provided the final open door.<sup>13</sup>

**Factors in appeals for mercy: what men and women said:**

The appeal letters and papers are public transcripts, written by, or on behalf of, the powerless to the powerful. The language is deferential, tactical, often desperate. They are not carefully crafted narratives. They do not tell a story, but are special pleadings, and protestations of good personal characteristics. Most are direct and unsophisticated, and many are semi-literate. They are representative of a strategy much used by the poor as they wrote to the charitable and humane in society.<sup>14</sup> In London, few convicts had, or used, educated or wealthy friends or patrons to present their cases. There are many pleas which, on the face of it, might have softened the hardest heart, and provoked the operation of the 'good mind' in the decision-maker, to allow mercy and amelioration of an appellant's situation. By the early nineteenth century, the decision-makers were no longer choosing an occasional object for mercy, to be spared from the gallows. They were selecting an occasional example of terror. The pardoning system was changing. The needs of the State often over-rode the operation of the 'good mind': sending 'suitable' people to Australia, ridding the country of dangerous elements, managing the overcrowded hulks, the prison ships and the disease-ridden prisons through extensive pardoning of prisoners. To petition was, therefore, almost a matter of course. Support for a petition was not difficult for most prisoners to find. The words of the poor are clearly heard in the petitions, saying what they believed the decision-makers needed to hear.

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<sup>13</sup> HO17/53/Part I/Ih02; HO17/53/ Part II/ Ik8.

<sup>14</sup> D. Andrews, "To the Charitable and Humane": Appeals for Assistance in the Eighteenth-century London Press', pp. 87-107 in H. Cunningham & J. Innes (eds.), *Charity, Philanthropy and Reform from the 1690s to 1850s*, Basingstoke, 1998; T. Hitchcock, P. King, & P. Sharpe (eds.), *Chronicling Poverty: The Voices and Strategies of the English Poor, 1640-1840*, Basingstoke, 1997.

This study deals with a period 30 years later than the one for which Peter King analysed the language of petitions for pardon.<sup>15</sup> Because my focus is on London, the appeals material rarely contains reports from judges. Further, not being sure of the final result of the appeals is a drawback. Nevertheless, to continue the general systematic tone of this research, and to avoid plucking quotations from petitions, an attempt at a similar ‘factors-mentioned’ analysis appeared worthwhile. Dividing the factors by gender has provided some useful, though limited, insights. Such an approach produces evidence of slightly different ways of petitioning between men and women. King claimed that those who made the pardoning decisions were constrained by legal principles and traditions, and based their decisions on universal and widely agreed criteria. He acknowledged that the appeals archive contained complex documents to be treated with care, since they were public transcripts couched in terms that the supplicant thought would be effective, rather than documents purporting to reflect the truth. However, he felt able to use them to make a quantitative approach to understanding the pardoning system. The methodological problems created by the complex and uneven nature of the appeals archives still allowed him to draw a ‘crude map of the pardoning terrain’.<sup>16</sup> That description is also appropriate for this analysis.

Table 7.1 presents the ‘factors mentioned’ in the appeals kept in the Home Office Appeals archive.<sup>17</sup> Since judges’ reports were rarely called on for the Old Bailey appeals, factors unfavourable to the prisoner could not be considered. The important dimension in this analysis is the attempt to compare factors-mentioned separated by the

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<sup>15</sup> King, ‘Decision-makers’; idem. *Crime, Justice and Discretion*. He used papers in HO47 (PRO) for 1787 and 1790.

<sup>16</sup> King, *Crime, Justice and Discretion*, p.301.

<sup>17</sup> HO17 (PRO).

**Table 7.1: Factors mentioned in petitions from Old Bailey convicts**<sup>18</sup>

<b>Factors mentioned</b>	<b>Males</b>	<b>Females</b>
1. Previous good character	49	59
2. Youth	29	25
3. No previous conviction	33	41
4. Post-crime destitution	26	13
4B. Post-crime distress of parents *	26	20
5. Possibility of innocence, malicious prosecution	29	30
6. Drawn in by others	29	23
7. Previous military service	10	0
8. Prisoner or family respectable	59	34
9. Old employer gives good character	33	13
10. Employment available	16	14
11. Pre-crime destitution	16	25
12. Crime not violent	6	1
13. Insane or drunk at time of offence	1	9
14. Old age	0	9
15. Physical illness (include pregnancy)**	0	27
16. Reformability/ reformed***	10	21
17. Mentally handicapped	2	4
18. Others (positive)****	38	24
<b>Total factors mentioned</b>	<b>412</b>	<b>392</b>
<b>Total of petitioners</b>	<b>136</b>	<b>134</b>

Source: HO17 (PRO)

*\*This sub-category is an addition to King's categories, since it featured strongly in both male and female petitions. Many petitioners were young, and their parents petitioned; therefore, a strong showing in such a category is expected.*

*\*\* Pregnancy has been put in this category, although this is not how it should be seen, nor was it so seen by petitioners.*

*\*\*\* Since so many of the petitions spoke of work and behaviour in prison, this has been included as evidence of 'reform'.*

*\*\*\*\* This category overloaded – includes such mentions as 'contrition' and, for men only, assistance to the prosecution in Bank note cases.*

gender of the appellant. The conclusions reached are similar to King's, and similarly challenge analyses which stress the factor of respectability and neglect the issues of poverty and distress. Separating male and female factors produces some interesting differences which can be linked to wider discussions about gender and sentencing.

For men, the factor of greatest importance was 'respectability', mainly the

<sup>18</sup> Because of the discrepancy in the number of male and female petitions, and because I wished to consider only London and Middlesex petitions in order to have a common factor over such a length of time, it was necessary to use female petitions only in most of the archive examined. The sample was: (HO 17) 25, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 51, 52, 53, 54, 58: women only; and 49, 50, 57 both men and women. They relate to cases prosecuted at the Old Bailey from 1817 to 1823.

respectability of their parents and close family. Few of the London and Middlesex petitioners were supported by the great and the good, the gentry or the clergy. The words in letters and petitions were those of urban neighbours, tradespeople, and friends in lowly stations in life. The notion of respectability which prevailed was that of a stable family life, having lived at one address for many years, of parents who brought up their families to fear God and be deferential to authority. The respectability of the petition writers, rather than of the prisoner for whom they appealed, was the important point. On occasions, the Home Office set out to verify the backgrounds of the presenters of the petitions. Where the father of the prisoner was a former soldier, this was emphasised. Respectability was important to women too, although when Mary Ann Bacon's prosecutor and neighbours said 'she has the most respectable character for honesty and industry in servitude', it is not clear whether this was a factor of respectability, or of good character.<sup>19</sup>

The question of whose respectability was at issue was illustrated in the case of Sarah Gilman, who had been capitally sentenced. The Home Office received a letter on her behalf from a gentleman, Richard Bellamy, which read like an extract from a society magazine. Bellamy said nothing at all about Sarah, but related:

her parents lived with Lord Sydmouth and his sister, Mrs. Goodenough, and were his servants for eight years while he was Speaker of the House of Commons; her mother, when widowed, went to Cheltenham with Mrs. Goodenough and Miss Addington (who married Judge Bragger). Mrs. Goodenough and Mrs Gilman had very friendly talks. I believe her (mother) to be a very honest and deserving woman. Another reason is that the sister has been in my service for 18 years.<sup>20</sup>

Views on respectability varied. Elizabeth Emma Guy's gaoler described her as 'a loose character', but her supporters said she was the daughter of a master builder,

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<sup>19</sup> HO17/35/Eo1. For the 'elastic' quality of 'respectability', see King, *Crime, Justice and Discretion*, pp. 308-9.

<sup>20</sup> HO17/25, Ch27; papers marked 'Report requested' which may have been an optimistic sign. The report is not with the papers.

who entitled himself 'esquire'. She had been deserted by her husband, left in great distress, had a previously unblemished character, and used to move 'in circles of the utmost respectability in Derbyshire'.<sup>21</sup> Eliza Smith's mother wrote to tell the Home Secretary that she – the mother – was the daughter of a Mr Powers of Niagara, 'who lost £5000 in property at the conflagration of that Town by the War with the United States in the Year 1812. And also Three Vessels lent to Commodore Brisbane in the Year 1778'. Moreover, she said, Eliza was a girl of unblemished character, whose state of health required a mother's care; but the gaoler had written on the petition: "Prostitute, married, one child".<sup>22</sup>

For females, the main factor mentioned was previous good character, with a claim that it was their first offence. Men were more likely than women to have their former employers give them a good character reference. Women's employers (often the mistress of the house in which they worked) sometimes gave good references, even when the prisoner was convicted of theft from the house. Women's petitions often tell of their shame following the offence. They had, they said, told no-one what had happened, ending up in court without friends or character witnesses. They certainly would not tell their mistress if the crime had been committed beyond the confines of the house. Mary Allen, 60 years old, who all her life had worked as a respectable ladies' maid and housekeeper, was out of work, ill and in extreme want when she stole from her lodgings. She said she was ashamed and had not told her friends. She therefore had no 'character' at her trial.<sup>23</sup> Sarah Leggatt, sentenced to transportation for a similar offence, said that her mother had respectable friends who would have spoken for her at her trial, but she was too ashamed to ask. Despite those respectable friends of her

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<sup>21</sup> HO17/40/Fn11; papers marked 'Nil'.

<sup>22</sup> HO17/37/Es57; papers marked 'Nil'.

<sup>23</sup> HO17/45/Fx32. Her papers marked 'Nil'.

mother, including her prosecutor and the chaplain to the Spanish embassy, speaking for her good character, respectable family, and her delicate health in their petition, her papers were marked 'refused'.<sup>24</sup> Ann Shuttleworth, a nursery maid, said she was so full of shame, sorrow and remorse, her reputation 'for ever blasted', that she had pleaded guilty to stealing from her employer. That employer made an impassioned plea for her, saying he never intended to get her transported. He had thought she would go to prison for a first offence, and there her character could be 'reclaimed'.<sup>25</sup> Men did not appear to experience shame in the same way as women, or, at least, they did not mention it in petitions.

Often, the impression was given, for males and females, that offenders were misguided, unfortunate, but essentially gentle and public-spirited individuals, lacking much agency of their own. Parental appeals dominate the London cases. Even when the prisoner was a young or even middle-aged adult, parents strove to emphasise youth, good upbringing, a mistaken prosecution, an ill done to their offspring, and frequently a sense of disappointment after all their efforts of good parenting. An example of exasperated parenthood was James Farquhar's 'poor, distracted, broken-hearted widowed' mother. James was young, his sentence already commuted from death to life transportation for stealing handkerchiefs. The Newgate gaoler knew him; he had been in the gaol before. His mother pleaded for him to be sent to the Penitentiary, for she had:

toiled both early and late to bring up this undutiful child in the paths of rectitude and virtue which at an evil hour was departed from... he will bring down my poor grey hairs in sorrow to the grave. O God, give me strength to bear so severe a trial.

However, a mother's pleading could not over-ride the eminent suitability of a young man for life in the Australia, and his papers were re-marked 'transport'.<sup>26</sup>

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<sup>24</sup> HO17/44/Part II/ G15.

<sup>25</sup> HO17/45/Part II/Gn48; her papers were first marked 'Nil', but a month later 'To Penitentiary'.

<sup>26</sup> HO17/57/K132.

As Table 7.1. shows, one of the marked differences between men and women was the frequency with which physical symptoms were mentioned. Obviously pregnancy was a female prerogative, but that was rarely, if ever, a factor taken into account for discretion. Judging from the lack of preparation made for women about to give birth in prison and on ships, this significant event in a convict woman's life was of little interest to men of power and influence. However, the ill health of women was a frequently mentioned factor, which men did not use. This may say much about the realities of the lives of plebeian women, or about their willingness to discuss their state of health. It is also noticeable that women tended to be age conscious, calling themselves old or well-on in years, whether they were in their seventies or as young as thirty-eight. The phenomenon of women being able to talk or write more of their problems, what troubled them, to be less guarded on personal issues is marked in the appeals papers – something noted in modern criminological research.<sup>27</sup> However, it saved a considerable number of women from transportation.

Petitioners on behalf of women frequently asserted that they would be reclaimed or reformed if they were allowed to go to the Penitentiary rather than endure a harsher sentence. This fitted with a general stereotypical view of women's behaviour. Women convicts, when petitioning on their own behalf, took a practical view of reform. Many had little children. They asked not to go to New South Wales, since, they argued, it would be better if they stayed in England to look after and be responsible for them. This they could do from the Penitentiary. They could be 'useful' to those who ran the prison and earn their keep. Many mentioned the work they already had done while serving their sentences so far - cooking, sewing, and as wardswomen, and teachers.

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<sup>27</sup> Daly, *Gender, Crime and Punishment*.

Mary Hart's mother made an ambitious plea as to the reformability of her 15 year old 'Gall' who was 'farley duped by the Other Gall that was with her', and was 'raley sorrey for hir past transgrations', a 'sincer Penetant', who 'will for the feuter become a member of his Church, a frind of Sober Secoitey A Comfourt to hir poor widowless mother and A Criditt unto hirselse'.<sup>28</sup> Female reformability, frequently mentioned by petitioners themselves, was commented upon by officials and officers. A combination of female gender, and youth featured in the cases of three girls – Mary Hughes, aged 11, Mary Louch, 15, and Sarah Lander, 18. Their gaoler's written comment was: 'dishonest and loose', and in respect of Hughes 'Bad, but only 11 years old'. The judge felt differently:

The two eldest are soldiers' and sailors' prostitutes, living a very wretched and disorderly life, and ought to be removed from their relations and present haunts as I think their youth may induce a hope that they may reform, and their appearance may lead one to imagine that they may become respectable wives and mothers *alio sub sole*. The youngest may be reformed by education and good habits forced on her at the Penitentiary. But I believe that a short imprisonment and then turning her loose ... will be to her anything but mercy.<sup>29</sup>

Men and women equally blamed others for their plight. Men were as likely to blame women, as women were to blame men. Some women blamed their husbands. Ann Lutman's successful appeal told of how she 'was lead into Error by the bad counsel and participation of her husband'.<sup>30</sup> Martha Lucas insisted that she uttered forged Bank notes, for which she was sentenced to death, 'at the instigation only of her husband,

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<sup>28</sup> HO17/49/Pt1/ Hh9.

<sup>29</sup> HO17/43/Fy.

<sup>30</sup> HO17/25/Cm41.

George, who pleaded guilty to the lesser offence and is now on the 'Retribution'.<sup>31</sup>

Mary Mitchell, on the point of sailing on a life transportation sentence, asserted that her husband was the cause of her offending. He had ill-used and deserted her and their 11 year old child: 'no one transaction of her life could ever give cause for, or justify such a mode of procedure equally unfeeling as a husband, as a Father and unbecoming as a man.' (*petitioner's underlining*).<sup>32</sup>

A successful petition on behalf of Sarah Hooker was the only one seen among all the women's petitions which alluded to marital coercion in the committing of the offence. Sarah's mother and sister told how her husband got her out of bed at 3 a.m. to help him bring into the house some property he had stolen. He then absconded. Sarah stood trial and was sentenced to 14 years transportation. Her husband was in the habit of 'brutally ill-using and threatening his wife... she was compelled through fear to do whatever he required. Yet the natural feeling evinced by a wife towards her husband prevented her from giving him into the hands of Justice.' The trial judge had not been impressed by this plea. It was only when her husband was found to have been tried later for the same offence and capitally convicted, that he backed Sarah's appeal. The Home Secretary called for his full report. Her papers were then marked, 'Free pardon prepared 24 October 1832'. When Sarah herself had earlier petitioned on her own behalf, before her mother, sister and the judge had weighed in, her petition had been marked "Nil". She had offered 'deepest contrition', and said she had been led into the offence by a bad husband's threats. She used the whole gamut of factors which might

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<sup>31</sup> HO17/34/Eh27. Martha Lucas was so sure she would not be found guilty that she refused the Bank of England's plea offer, pleaded not guilty to the capital offence at the end of 1819 and failed. Her capital sentence commuted to life transportation, she became ill on the point of departure in April 1820, petitioned to have her sentenced reduced with no response, remained in Newgate, financially supported by the Bank until January 1822, then, without their support, earning her keep as a wardswoman. Her petition in early 1824 (referred to here) went unheard, but when the Newgate gaoler made his return of females who worked in the gaol (HO17/44/Gk322), she was given a good reference ('becoming and orderly') which resulted in '14 May 1824 reduce Lucas to 14 years – Peel Law'.

<sup>32</sup> HO 17/45/2/HP39 (this set of papers appears wrongly indexed in the PRO).

work in her favour: she had never offended before, she supported her aged mother and was concerned what would happen to her, she would reform, she had previously had a good character. It was only when the Old Bailey judge reported his views on her husband's role in the case that the decision turned in her favour. This demonstrated the need to put the right argument, get the right support and to be persistent.

Women who blamed their men were matched by men who blamed their women. John Hiatt, 'who entered into a marriage before the years of maturity to a female of bad character was through her persuasions and her acquaintance led to fraud.'<sup>33</sup> John Boyce married an 'unfortunate woman', was accused of robbing a client she had brought home and it was all her fault.<sup>34</sup> William Garton's supporters insisted that he had not pursued a criminal course until he married his current wife, who 'turned out to be a most wicked and base woman and it was through her influence that he was prompted', and that 'she is now living in whoredom and insensible and unconcerned about the awful situation of her unfortunate husband and it was solely through the Influence of this wretched woman' that he was led into crime. These words were strongly pencil-marked in the margins by a Home Office official as if some importance might have been attached to it, but William Garton was not successful, and was hanged.<sup>35</sup>

Nevertheless, the overwhelming relationship of men and women, spouses and partners, was mutually supportive, out of economic necessity, and often from affection and friendship. This makes many of the petitions moving to read. Although such sentiments might have had little effect on the outcome, their lack of formulaic repetition of demands for discretion presents a genuine picture of the dreadful situation in which these unfortunate people found themselves. Economic responsibility for the family was

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<sup>33</sup> HO17/50/Hp39.

<sup>34</sup> HO17/50/Ho6.

<sup>35</sup> HO17/49, pt 1/Hh6.

frequently shared between the partners. Mary McCarthy, aged 44, awaiting a 14 year transportation sentence for receiving stolen money, had a 'poor old disconsolate husband' lacking the use of his limbs. They had ten living children, five of whom were under ten years of age, and Mary was yet again in an advanced state of pregnancy. She was the family's breadwinner.<sup>36</sup> Mary Smith, aged 45, was already on board ship for a seven-year transportation sentence for stealing a child's clothes. She wrote desperately on three occasions, explaining that she had had fifteen children, eight of whom were alive, three of them under seven and that they were all entirely dependent on her since her husband of 27 years was sick and infirm and unable to provide for them.<sup>37</sup> Jane Taylor, serving a one-year sentence for manslaughter, had seven children under 14 dependent on her, as her husband was ill.<sup>38</sup> None of these petitions received a positive response.

The gender card implicit in motherhood and daughterhood was frequently played, but was matched equally by the obligations of fatherhood and sonhood. To lack a father's care was considered a serious matter for children of any age. Aged parents depended on a son's care and earnings. The importance of the mother to the family was a strong petitioning factor, as was the importance of a daughter to her mother. We hear of a family 'in great want of a tender mother'; of infants 'at an age when a mother's parental affection is needed', 'a daughter who needs a mother'. Margaret Smith's petition spoke of the 'filial feelings of an affectionate daughter to her aged mother who has seen better days' and of 'mutual utility if they are able to console each other'.<sup>39</sup>

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<sup>36</sup> HO17/36/Ep1.

<sup>37</sup> HO17/36/EP49.

<sup>38</sup> HO17/36/Er7.

<sup>39</sup> HO17/42/Fv48.

Husbands appealed for their wives – ‘affectionate partners and mothers’. They could sound more like aggrieved and disappointed parents. Ann Perrin’s husband begged that his wife of 29 years should not be sent away from her six children, called her ‘my unfortunate and erring partner’. Ann, ‘decoyed’ by an ‘evil association’ had been stopping away from home and her wifely duties, and had been tempted to steal from a shop.<sup>40</sup> Sarah Martin’s husband of 25 years sounded disappointed and peevish. Sarah had gone to see their daughter at Knightsbridge and stayed until midnight. She got into conversation with a medical student in the Strand on her way home, and was charged with picking his pocket after he had taken her for a drink. Her husband said, ‘I know her well, and a small amount (of alcoholic drink) can make her intoxicated’. He maintained she was innocent of robbery, but guilty of idle conversation and drinking when she should have been at home. He finished by pointing out it had been a lesson to her and she would not be doing anything like that again.<sup>41</sup>

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<sup>40</sup> HO17/38/Pt2/Ez45.

<sup>41</sup> HO17/48/Pt 2/Gx37.

### **Complex responses to petitions:**

The discretionary pardoning process was based on a complex interplay of attitudes and interests. By the 1830s, the practical needs of the State played a highly significant role, affecting the way in which discretion was exercised. Towards the end of the eighteenth century, it might still have been appropriate to see the operation of the 'good mind and the bad mind' influencing those with the power to make decisions. Henry Fielding had argued that the 'good mind' of the decision-maker – that prevalent tendency to be affected by stories of destitution, misery, necessity, and youth - was repugnant since it led to the wish to mitigate sentences to a dangerous degree. Reason should overcome this 'good mind', because only severity, through the operation of the 'bad mind' would deter others from committing crimes.<sup>42</sup>

It is difficult to know how successful were those who appealed, on their own initiative, directly to the Home Secretary in the first instance, and who were not, at that point, part of any automatic pardoning deal. It is also almost impossible to know the reason for the responses made to their petitions. Of the 134 women in Table 7.1, there is reasonably clear evidence that 32 of them were 'successful'. Of the 136 men, there are 19 cases where success appears certain. There is every reason to believe that there was a much higher success rate than this for both men and women in this process, but the records require further lengthy scrutiny to establish this.

The 'successful' men used a wide range of factors in their appeals, most frequently good character, youth and pre- and post-crime destitution. The 'successful' women used the factors of good character and youth. However, where things differed significantly for the successful women was in the category of physical illness (this

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<sup>42</sup> Argued and expanded in King, *Crime, Justice and Discretion*, pp 325-333.

appears to be the reason for seven of the 32 mitigations of sentence); and in the category of reformed/reformable behaviour and good work in prison, together with a large amount of their sentence already served (eight of the 32 mitigations achieved). These were the very factors which formed the criteria for 'automatic' pardoning of women in particular.

These factors were also the basis for decisions about men, although men were not so frequently said to be unwell. Women's ill health was a distinctive factor which worked to their advantage in their final exit from the last suite of rooms of the justice system. When sixteen-year-old Elizabeth Stevenson appealed against her sentence of transportation, her parents described her as sickly, delicate and needing their care. Her papers were marked, 'But is she fit for transportation?' The reply to this question resulted in a second marking, 'Refused'.<sup>43</sup> It is interesting that men did not try to appeal on these grounds. It is, therefore, likely that gender played a strong, but indirect, role in judicial discretion at this point in the justice system. The 'good mind' of the doorkeepers may have been triggered by the playing of a gendered card. However, we see, in the early years of the nineteenth-century, a change in the way judicial discretion operated, with individual deserts and discretionary preferences overtaken by the needs of State.

### **Discretion and compassion from the Bank of England:**

The fascinating story of how the Bank of England made compassionate and generous payments to 'its' prisoners to mitigate the effects of their sentences is relatively unknown. The exercise of the 'good mind' of this great prosecutor provides a remarkable example of the exercise of gender-based paternalism, untouched by the needs of State, and hidden from view by the autonomy of an autocratic, wealthy,

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<sup>43</sup> HO17/Gi9.

institution, who brushed aside questioning of its motives and policies. As they waited in prison for their sentences of transportation to be put into effect, men and women convicted of Bank note offences wrote copiously to their prosecutors and their prosecutors' solicitors.<sup>44</sup> The collection of their letters provides a contrasting picture of how a mighty institution dealt with its criminal business in a cool, organised, pragmatic, yet entirely discretionary, way. However much the Bank came under pressure from the weight of currency forgery business, or from the opprobrium heaped on it for the extent and severity of its prosecution enterprise, it maintained a careful, reasoned policy towards 'its' convicts. This policy changed from time to time, depending on the progress of the note forgery story and the escalating cost of prosecution. However, it was an extraordinary mix of cold, arrogant distance and calculated, yet profligate, compassion, with a deeply gendered texture. Unlike the Home Office records, the Bank records provide an indication of the reasons for the responses to appeals and petitions.

Appeals and petitions for mercy and charity poured in to the Bank from prisons and hulks all over England and Wales, couched in both formal and informal terms. Some came directly to the Governors, and were read at the meetings of the Committee for Law Suits. Of even greater interest are the letters amongst the solicitors' papers in the Bank archives. Some of these were read at the Committee meetings, but most were not, being handled directly by the solicitors. In all cases, there is annotated evidence of how each request was dealt with.<sup>45</sup> The 'correspondence' between the convicts, especially the female convicts who were multi-letter writers, and their 'generous prosecutors'<sup>46</sup> built up an unexpected relationship, giving financial and moral hope to

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<sup>44</sup> Slinn, *A History of Freshfields*, describes the association between the Bank of England and its solicitors, Winter/Kaye/Freshfields, from 1743 to 1983.

<sup>45</sup> Bank of England: F25 Prison Correspondence 1781-1844 (F25/1 to F25/9: prisons and hulks in and around London; F25/10 to F25/13: prisons and hulks elsewhere).

<sup>46</sup> Popular term, first used by Ann Haynes alias Foss, Newgate, 22 Oct 1804, her first letter: F25/1: AB218/1, Box 63, Chest 22, item 23.

those spending many months in grim prison conditions, awaiting a terrifying voyage into the unknown. Most letters came from men and women in the London area. This confirms 'know-how' and networks within Newgate, especially on the Women's Side, and the ease with which letters could be delivered by hand to the Bank's solicitors around the corner from the prison. A few special cases aside, it was only when women from the provincial prisons met up with the women from London as they went to the transport ships, that they realised they had missed the opportunity for a beneficial relationship with their prosecutors.

The Bank's response to the requests, petitions and appeals from convicted prisoners was deliberate and rational. To those, male or female, who were condemned to die, it would make only the cold response, that it was not its business to interfere. Nor would it support others petitioning the Home Secretary or monarch. Having gone through the expensive and difficult process of prosecuting capitally those it believed to be a serious threat to the nation's, and its own, security, it then stood back, justified about the outcome. On the other hand, the Bank showed tolerance towards those who were going to be removed from the country. It had done its duty in prosecuting, even offering the chance of a guilty plea to the non-capital offence of possession, which allowed it to assume an appearance of generosity from the start of the relationship. The relative status of the indebted, convicted prisoner and the benevolent offended party was clear in most of the correspondence. Letters frequently commenced with profuse and grateful thanks for lives saved and merciful humanity shown. Unless constrained from time to time by the Governors' concern at the immense cost of conducting forgery prosecutions, the solicitors were willing to respond with generosity to women convicts

while they remained in prison and when they went on board the transport ships, almost as if they did not know the value of the payments they made. The Bank responded favourably to requests from women, and unfavourably to requests from men. It is little wonder that, pro rata, petitioning and corresponding was a female activity in London.

**Table 7.2** shows the numbers of women and men who wrote to the Bank from prison, with a comparison of the London and provincial numbers.<sup>47</sup> Of the London-based prisoners who petitioned or wrote to the Bank, 92% of the potential total of women did so, and 26% of the potential total of men.

**Table 7.2: Petitions, appeals, and begging letters from convicted Bank note convicts 1804-1833**

	<b><u>Men</u></b>	<b><u>Women</u></b>
<b><u>Sent to Bank solicitors: From London</u></b>	136 (in 130 separate items)	159 (in 194 separate items)
<b>: From outside London</b>	175	41
<b><u>Sent direct to Committee for Law Suits (from all areas)</u></b>	39	1
<b><u>Totals</u></b>	<b>350</b>	<b>201</b>

*Source: Bank of England: BECLS and Freshfields' Prison Correspondence*

When men and women engaged with the Bank in letters and petitions, they asked for different things. This may have been because their needs were different, or because they knew how to be successful at invoking favours – or both. They may have come, over time, to understand which ploy would be successful. On the other hand, in the unhappy circumstances in which these men and women found themselves, any strategy

<sup>47</sup> Although the Bank archives were purged some years ago, the Freshfields' Prison Correspondence appears intact. Letters/ names appended to petitions can be identified for almost every woman sentenced for Bank note crimes in London. There are only 13 missing names (2 executed, 2 sentenced to death, one untraceable after trial, one died in prison; 2 moved quickly to the General Penitentiary; one sentenced at an early date before the petitioning from Newgate got under way. The remaining six were sentenced to transportation, and so far, no further trace of them has been found).

was worth trying. **Table 7.3** gives a breakdown of strategies used in the London correspondence and petitions. One person may have used more than one type of request in one letter. Individual women tended to write multiple letters, even at times to upbraid the Bank for not paying the promised pecuniary relief on time or for long enough.

**Table 7.3: Subjects of petition and letter requests from London Bank note convicts to the Bank of England 1804-1833**

<b>Subject</b>	<b>Men</b>	<b>Women</b>
<b>To give information and thereby secure advantage</b>	56	6
<b>Pecuniary relief/assistance</b>	42	146
<b>Mitigation of sentence (death or 14 years transportation)</b>	19	0
<b>Spouse and children to accompany to NSW</b>	11	0
<b>Return own money taken on arrest</b>	6	0
<b>Pecuniary relief for the family</b>	5	0
<b>To arrange their own means of transportation</b>	4	0
<b>To delay transportation</b>	4	1
<b>To hasten transportation</b>	3	1
<b>Make contact with friends</b>	2	0

*Sources: Bank of England: BECLS, and Freshfields Prison correspondence,*

Pecuniary relief was what the women most desired, few of them ever protesting their innocence or complaining that sentencing had been too harsh. Pecuniary relief was what they got in abundance. Men had other strategies. Many appear to have been relatively independent financially, which few of the women were. At least half of the men wanted to secure advantages for themselves by informing on other forgers and utterers of Bank notes. The Bank often took up their offers, but did not always come up with the benefits. Naturally, men asked for direct pecuniary relief for themselves as well. It was the easiest request to make. They knew that the women were doing well from such requests. However, they stood little or no chance of success. This was made clear in 1818, when eleven men in Newgate wrote to the Bank. They were about to be dispatched to a transport ship. Amongst them were the husband and brother of Clarissa

Downs, a successful letter writer, also in Newgate. They asked for 'that Donation which we understand as generally been bestowed to the unfortunate culprits who have been convicted by your honourable Company'. Their petition, read at the meeting of the Committee for Law Suits, was annotated 'These are Male'. No payment was made, no reply offered.<sup>48</sup>

The earliest recorded request from a woman for pecuniary assistance came from Mary Burn, in June 1806, 'supplicating an allowance for her subsistence'. The Committee for Law Suits ordered her to be paid 'half a guinea a week until she is sent away'.<sup>49</sup> This generous amount of money<sup>50</sup> became the 'standard' weekly payment to women petitioning in the early years of forgery prosecutions, perhaps before anyone realised just how long convicts would be confined, awaiting a space on a transport ship. From 1810, it dropped to seven shillings. From 1813 until 1822, when the Bank intended to cease the practice,<sup>51</sup> payments were five shillings a week for childless women, seven shillings and sixpence for women with one child, and sometimes ten shillings and six pence for those with more than one child. Until about 1824, nearly all women were given £5 each on embarkation for New South Wales. This applied equally to the women from provincial gaols if they applied, having met up with the women from London and learnt what might be on offer.

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<sup>48</sup> Petition from John Hearn, William Benham, John Riley, Thomas Watson, George Downs, John Rogers, James Butler, John Hill, William Downs, Thomas Smith and Richard Radford: Freshfields' papers, F25/6, AB220/1, Box 63E, Chest 36, item 21.

<sup>49</sup> BECLS: AB363/3:M5/307, 26 June 1806.

<sup>50</sup> All monetary values from S. Millard, 'Equivalent Contemporary Values of the Pound: a historical series 1270 to 2001', Bank of England, 2001.

<sup>51</sup> The Restriction period ended in 1821. The Bank of England did not plan to continue its previous level of prosecution and, concerned at the vast expense of the prosecution enterprise, curtailed expenses, decreasing rewards, and signing its retained inspectors and unofficial police. The batch of women it was then paying in prison was not due to sail until January 1822; the Bank agreed to pay until then. (BECLS M5/325:AB369/3, 12 March, 26 Sept, 14 Nov and 19 Dec 1821). The last record of payment of relief to a woman in prison is in September 1824, (BECLS M5/327:AB370/2, 1 Sept 1824.)

What provoked this generosity to female prisoners, when the crimes of which they had been convicted often related to small amounts of money, and had already cost the Bank so much in rewards, staff and informers' salaries and legal costs? The Bank records suggest genuine compassion on the part of powerful financiers and lawyers, perhaps a sense of guilt at the effectiveness of the prosecution machine. The minutes of the Committee for Law Suits show that the Bank had little idea, in 1804, of the huge amount of prosecution business it was going to handle over the next 20 years, nor of the effect of a plea bargaining system, which was to leave so many men and women waiting for ships to take them to New South Wales. Only the work of the Committee revealed to the Gentlemen of the Bank the extent of the prosecution effort, and the nature of the people they had caught in the net. For the most part, they had caught, not the forgers themselves, but poor people, engaged in what they must have thought was petty crime. The significant number of women, many of whom were very poor, was also not what had been expected.

For most of the time, when petitions came thick and fast, the Committee or the solicitors sent inspectors and other visitors to Newgate to report back on the genuineness of the requests – whether prisoners were truly in distress, without friends, pregnant, had recently given birth, ill, and so on. Sometimes they accepted the views of the notorious Brown, keeper of Newgate, with his jaundiced attitude to the women he was holding. Sometimes a Bank representative would check Brown's views, with kinder results. There were signs that these representatives of the Bank were concerned at the conditions which many of the women endured in their long waits in prison.<sup>52</sup> The

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<sup>52</sup> BECLS, M5/318:AB367/2, 26 Sept 1816; M5/321:AB368/2, 29 Oct 1818, 25 Feb 1819; M5/322:AB368/3, 28 April 1819; M5/323:AB369/1, 9 Feb, 1, 8, 15 March 1820; M5/324:AB369/2, 11 Oct 1820.

fact that the relief payments to the women while in prison were not automatic allows us to understand something of the discretion used by the Bank, and why this was so openly gendered.

Larger payments were made to a few women during their wait in prison and on embarkation, and it is reasonable to assume that these were for information and assistance given to the Bank. This means that it is likely that the smaller, yet generous, payments paid over long periods, were not in return for any assistance. Amongst a group of four 'Bank women' going on board the *William Pitt* in June 1806 was Ann McCarthy. The Bank wished to give the Captain some money for the three others, but, for Ann, there was a payment of £15. This was to be used by the Captain to buy items for the comfort of McCarthy and her child, with the remainder to be given to her on arrival at 'Botany Bay', since she had conducted herself with propriety since her conviction. The captain was also requested to give her protection. Ann McCarthy's three letters to the Bank from prison make it obvious that she had been informing. She was desperate to get on the transport ship to:

avoid reflection which unthinking and ill-natured people cast on me... The noble gentlemen can understand the anxiety which persons experience in a prison especially when they keep themselves select from the Lower Orders of Society. ... they are saying I caused the death of the men who suffered the sentence of the law last Thursday and they say that when I get on the ship I shall be treated with the greatest severity and likewise abroad. I was indiscreet but I do not know the men, so when your man comes will he speak for me to Mr Kirby and stop their ill usage of me.<sup>53</sup>

Other letters from the few women informers contain expressions of similar fears which reveal what they had been doing for the money they received.

When money was paid weekly to women, the reasons given for doing so were distress, hunger, little children to support, lack of clothing, no husband or friends to give

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<sup>53</sup> Freshfields' papers F25/1, AB218/1, Box 63, item 22.

support, no-one to visit them. Men were not so likely to be in this condition, or so the Gentlemen of the Bank believed. Jane Williams was a profuse writer on her own and others' behalf, organising petitions and thank-you letters, since she was able to write herself. Her letters sum up what the relationship with the Bank came to mean to many of the women. Jane started writing when she was committed to Newgate before her trial in August 1818, complaining that she had only bread and water, requesting the Bank send her 'the smallest trifle'. Her next letter, in October 1818, after her conviction, thanked the Bank, and asked for more, since she observed their 'charity extended to some of my fellow prisoners'. This letter was marked: 'Mr Christmas to give her 5/- and to report further as to her situation'. Relief was slower coming than Jane and several others anticipated, so she wrote again at the beginning of November 1818. This letter was marked to show she had indeed received money. In February 1819, with two others, she wrote to thank the Bank for what it was doing for them, but informed the gentlemen that they were getting in arrears with their payments, and sent them an accurate account of what had been received. In April 1819, Jane wrote for 'the Bank Prisoners in Newgate':

We for the last time beg leave to Address you and return you Our Sincere Thanks for the Charity extended towards us which has been the means of supporting Ourselves During our long and tedious Confinement and Farther Entreating your Charity to be Extended towards us on our leaving our Native Country for Ever so that we may be enabled to Go with Some Degree of Comfort During our long and perilous voyage as we are ordered for Embarkation on Wednesday or Thursday morning. Honorable Gentlemen we beg leave to Subscribe Ourselves with Humble respect your Obliged and Humble Servants and Prisoners.

Not content with this, Jane with seven other women, had a final claim on the Bank's charity, writing a few days later as they left Newgate that, 'We have contracted a few debts in prison – please allow us The Usual Stipend.'<sup>54</sup>

Such relationships - of humble supplicant and charitable donor - were a normal part of the life of some poor women. The words and sentiments used, and the donor's check on the truth of the claims was a standard ritual. This strategy of supplication, rewarded by a generous response, was perhaps to be expected. Charity from the rich to the poor was seen by many not as mercy but as justice. Charitable compassion was a mark of the donor's power as well as a responsibility. There were contrary views - that charity of this kind was feeding poverty rather than aiding the poor. One of Elizabeth Fry's assistants directly confronted the Bank with such views. However, although we might see this relationship between the Bank and its female prisoners as a natural relationship, it was hardly usual in its setting of the prosecution of a serious felony, costing the institution a huge amount of money and bringing it under public ridicule, and where people's lives had been put at risk. Nor was it a publicised relationship, other than through the prison networks. It brought the Bank no acclaim. Further, the highly gendered response, whereby men were largely excluded from this 'charity', suggests that this was not a 'normal' response to distress and poverty.<sup>55</sup>

There were women to whom the Bank refused relief, even the frequently paid money for the voyage. A few women, whose husbands were still in the country, but

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<sup>54</sup> Freshfields' papers F25/5, AB219/3, Box 63D, chest 11: F25/6, Box 63F chests 22 and 23; F25/7, AB220/2, Box 63F, chest 38, item 21.

<sup>55</sup> Andrews, 'To the Charitable and Humane' pp. 87-107; idem: 'Noblesse Oblige: Female Charity in the Age of Sentiment', pp.275-300 in J. Brewer & S. Staves (eds.) *Early Modern Conceptions of Property*, London & New York, 1994; Hitchcock, King and Sharpe (eds.), *Chronicling Poverty*; letter from Mrs. Pryor 6 Feb. 1821, Freshfields' papers, F25/9, AB221/1, Box 63H, chest 41, item 37/5.

incarcerated, awaiting transportation themselves, were refused until the men sailed. The Bank must have felt that it was the man's responsibility to support his wife, despite their imprisonment.<sup>56</sup> Some women, who had been notorious, persistent, major forged note utterers, were refused, as were those who continued the trade in prison, such as Elizabeth Hayselden and Ann Taylor. The Bank was desperate to get rid of these women, petitioning the Home Secretary to bring forward the order for them to join their ship. Elizabeth persisted in petitioning, referring to 'my Added Error which has hitherto excluded me from your usual charity'. Hayselden and Taylor were not even paid the money for the voyage.<sup>57</sup> The Bank did not wish to make payments to Hannah Polley, whose case resulted in censure of the Bank from the Prince Regent for its attempt to manipulate the court by getting her to plead guilty to a capital charge, promising life transportation in return. The judge had refused to be manipulated and she had been sentenced to death. Polley wrote many times and, after being in Newgate, a 'gloomy Weary prison', for 14 months, described herself as an aged woman (she was 51) in poor health, whose husband was in the poor house. The Bank relented and sent £2 to the keeper to buy food for her.<sup>58</sup> Similar refusals were experienced by women who did not take the Bank's offer of a plea bargain, although they invariably received money for the voyage.

When there was concern about legal costs in 1820, the Bank became more careful about its charity. A group of seven women, claiming severe distress, petitioned for relief. The Bank responded by requesting an investigation of their situations.

Brown, the Newgate Keeper, reported: 'that they were all women of the worst

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<sup>56</sup> Freshfields' papers, F25/2, AB218/2, Box 63A, chest 31.

<sup>57</sup> Freshfields' papers, F25/3, AB219/1, Box 63B, chests 33, 34, 35.

<sup>58</sup> Freshfields' papers, F25/6, AB 220/1, Box 63E, Chest 36, item 15; F25/7, AB220/2, Box 63F, chest 37, item 37/6.

description, unworthy of the Bank's bounty, and to give them anything would be a kind of encouragement, that they are all employed at work and received a proportion of their earnings every Saturday.' Relief was refused.<sup>59</sup> Another four women made the same request, and the Bank investigator reported that all had jobs and some had earnings every Saturday. Moreover, they had no children except one, Mary Heard, who had an infant of five months, and although her journeyman husband came to visit her, she was to be paid five shillings a week, the others nothing.<sup>60</sup>

Throughout 1820, there was a sprinkling of women who were described as 'not fit objects', or who were said to have lied about their distressed situations. We can appreciate the influence of the perceptions of the middling and professional classes about the behaviour they expected from women-folk. There were others on whom Glover, the Bank investigator, reported, who were deserving of help. For instance, Lydia Hogan, with one child with her in prison, merited five shillings a week. Elizabeth Brown, in great distress and with two children, was paid 7/6 a week, whereas Sarah Payley, with no child was refused.<sup>61</sup> The pattern continued – from about 1813 - of not paying women without children, women with friends visiting who could give a little support, those who gave a false account of their situation, 'bad characters', and those who continued criminal activities. Nevertheless, all but those in this last category received £5 on sailing.

By the end of 1821, because the period of Restriction had been ended, the Bank hoped that the need for its charity would also end, but transportation ships were still taking a long time to make ready to sail. Four of its female prisoners were still in Newgate, all of whom had been receiving weekly either 2/6 or 5/- for over a year. The

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<sup>59</sup> BECLS: AB369/1, M5/323, 1 & 8 March 1820.

<sup>60</sup> BECLS: AB369/1, M5/323, 15 March 1820.

<sup>61</sup> BECLS: AB369/2, M5/324, 28 June 1820.

Committee resolved that this assistance should cease from January 1822, despite the fact that the women were certain to be in Newgate for another six months. It refused all new requests from women in Newgate. It still paid £5 on their joining the ship, but made it sound as if it was a special favour. For instance, when Maria Williams, about to be transported for life at the end of 1824, prayed for relief, the Committee, pointing out that she was unmarried, and without children, still said it considered her 'a fit object for Relief on account of her having conducted herself with so much propriety since her trial'.<sup>62</sup>

The men to whom the Bank gave support or payments were few, underlining how gendered was this discretion. Far from seeing male convicts as distressed, poor, ill, and deserted, as they saw the women, they saw them as independent, self-sufficient, with enough means or prison work to get them by. Payments were not normally made to them, either in prison or on hulks, or when they embarked for New South Wales. It is instructive to consider the few men who received payments. Nearly all were engineered in response to the assistance they gave, leading to apprehension of other forgers and utterers, but most of the payments went to the men's wives and families.

Jonathan Forbes, the first man to petition, was paid half a guinea a week from March 1807. No reason was recorded. This may have still been a time when the Bank was unaware of how costly the prosecution business was to be.<sup>63</sup> Michael Gerain, who helped the Bank to bring capital charges against his elderly wife, received five shillings a week for 2 years.<sup>64</sup> The result of John Sly's informing was a reluctant one-off payment of £5 while he was on the 'Zealand' hulk. Sly had married Elizabeth Flamston, another Bank prisoner, while he was briefly in Newgate. Elizabeth had their baby there, and in

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<sup>62</sup> BECLS, AB370/2, M5/327, 1 Sept. 1824.

<sup>63</sup> BECLS, AB 363/3, M5/307, 5 March 1807.

<sup>64</sup> BECLS, AB364/2, M5/309, 12 May 1810; AB 365/2, M5/312, 10 June 1812.

response to a joint petition for necessary articles for their voyage, they received a payment of £10.<sup>65</sup> William Henningham informed from Newgate, and requested relief for the distress of himself, his wife and children. He was awarded seven shillings a week, and his wife, who was not implicated in the forgery business, was paid £5.<sup>66</sup> Charles Games, a substantial informer, obtained permission from the Home Secretary to take his wife and children with him on the ship to New South Wales, and, ostensibly for this reason, the Bank paid him £10 on his departure at the end of 1813.<sup>67</sup> Richard Walker petitioned for his mistress, Mary Glover, who was paralysed with rheumatism and gout. There were several payments of £5 to Mary, and other prisoners alleged that the couple was being maintained by the Bank for the steady stream of information forthcoming.<sup>68</sup> A handful of other men can be added to this list, but most who applied were ignored.

Some remarkably generous payments were made to a few of the widows of executed men, or to wives whose husbands had departed on transport ships. One can speculate that this was in return for their husbands' assistance at some earlier stage. The cunning plans of Henry Dale, hatched while awaiting his trial at the Old Bailey, failed to entrap those he informed on. However, his intention to inform was the reason that the Bank paid out when his wife, Ann, wrote to say that Henry had sailed, and she, with her two infants, was in distress, and needed £5 for a mangle to earn money doing laundry work.<sup>69</sup> Daniel Davies' widow, Maria, wrote to the Bank to say that she wanted to support her three children by taking a chandler's shop, and the Bank ordered its solicitor

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<sup>65</sup> BECLS: AB364/2, M5/309, 27 Sept 1809, 8 Nov 1809, 14 Feb 1810; Freshfields papers 25/1, AB218/1, Box 63, Chests 24 and 25.

<sup>66</sup> BECLS: AB365/1, M5/311, 19 Feb 1812; Freshfields papers F25/1, AB218/1, Box 63, Chest 29.

<sup>67</sup> BECLS: AB 366/1, M5/314, 1 Dec 1813 (mistakenly called George); Freshfields papers, F25/2, AB218/2, Box 63A, Chest 31.

<sup>68</sup> BECLS: AB366/1, M5/314, 22 Dec 1813; Freshfields papers, F25/2, AB218/2, Box 63A, Chest 30.

<sup>69</sup> BECLS: AB 366/1, M5/314, 20 April 1814.

to give her £25.<sup>70</sup> Edward Harland's widow got her solicitor to request assistance from the Bank, citing the extreme distress of herself and her children, and that she was in bad health with an incurable condition. The Bank paid her £20.<sup>71</sup> Samuel Gilbert's wife, Mary, said she had parted with all her clothing and everything she possessed to maintain her four small children after her husband had sailed for New South Wales. She wanted to be set up to go into service to support them. The Bank surpassed itself, and sent her £25.<sup>72</sup>

Although few discretionary payments were made to men, none at all were paid out after 1819 – at least, none were recorded. This coincides with the more searching attitude to women's requests. The divergence of response from the Bank to men and women is manifest. It saw women prisoners as a different class from the men, and treated them differently. The greater physical needs of women, their lack of support, their childcare responsibilities, and their lesser ability to earn money from work while in prison may just have been a matter of fact. Women are likely to have started from a point of greater need when they committed their crimes, although not all of them were in a state of deep distress. Some were reasonably educated, could read and write, and showed signs of being worldly-wise, able to make the best of the situation they found themselves in. Here, outside the public space of the criminal justice system, a great institution of the State, run by men of the professional classes, wedded to a particular view of womanhood, showed care, generosity and compassion to the unfortunate. It seems to have been attempting to make amends for the way the women had been prosecuted and punished. The approach was highly gendered and in favour of the women. It is difficult to see what return came to the Bank for this discretion, other than

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<sup>70</sup> BECLS: AB 365/2, M5/312, 9 Sept. 1812.

<sup>71</sup> BECLS: AB366/2, M5/315, 12 April 1815.

<sup>72</sup> BECLS: AB 366/3, M5/316, 29 Feb. 1816

the satisfaction of being benevolent, philanthropic, and receiving grateful thanks from a collection of poor, sometimes clever, often manipulative, women.

**Conclusion: Political strategies and paternalistic charity:**

The two locations of petitioning looked at in this chapter – the appeals which went to the Home Secretary's office, and the appeals which went to the Bank of England - demonstrate that discretion, particularly discretion provoked by gendered considerations, worked in different ways. This is not a surprising conclusion, since decisions taken by powerful men and institutions vary in motivation and execution depending on what is needed to keep those men and institutions comfortable and in power at any given time. In Chapter 6, where the more bureaucratic aspects of remission of sentencing were considered, it was shown how large numbers of men and women were released from their sentences through a developing automatic pardon procedure. A policy of reducing numbers in prisons and hulks favoured males, since it was particularly amongst them that the pressure for space was greater. The unsuitability of prison accommodation and the more severe effects of epidemic disease amongst women resulted also in the release of a significant number of women. At the same time, it was open to any prisoner to make his or her own appeal for pardon or mitigation in the time-honoured way, making that appeal to the 'good mind' of the Home Office decision-makers. We have also seen that there was a tendency for men and women to couch their appeals in ways slightly different, although not remarkably different, from one another. Many were successful - evidence that the State was sanguine enough about adding to the numbers of those pardoned and set free or prevented from sailing to Australia, where they would be a burden on the new colony. To be merciful in this way contributed to the general need to reduce prison populations.

This does not mean that a bureaucratically driven system of decision-making could not make its responses to destitution, age, gender, respectability and reformability, holding these issues as its basic decision-making criteria. The evidence provided in this Chapter shows how all these criteria could determine the response of the State, when men and women used their own language to try to trigger a merciful response. Although the evidence is neither complete nor conclusive, it is apparent that decisions operated in favour of females, largely because of their state of health and their good behaviour in the part of their sentence already served. Their poor health was a major issue in the decision whether to transport them. Here political decisions were important. Healthy women were needed in Australia to breed the next generation, and the complaints of the administrators of New South Wales about the unhealthy and unsuitable convicts exported there had to be taken seriously. Any discretionary response with gender at its heart was submerged in decisions which had the needs of the State at their heart.

The highly gendered discretion exercised by the Bank of England provides a dramatic contrast to the State appeals system. The Bank no longer had to be constrained by political decisions as it had been in the early stages of the judicial process, when it had to decide who to prosecute and how to manage the prosecution exercise. The institution acted in a way which was entirely compatible with the paternalistic outlook of the middling and professional classes. There was no pressing need to act as it did. However, it expended their charity on women in desperate circumstances, in need, ill, caring for babies and little children, unable to support themselves, with insufficient food and clothing. It paid out more to women with children. It withheld largesse from women who had refused its offer of a plea bargain, who continued to flout the law in prison, who lied, who were able to earn money in prison, and those who had husbands still in the country whom the Bank thought should

be supporting them. Men should support themselves, and the Bank would only pay, generously, the wives and families of a few selected men in return for information. The female prisoners manipulated the Bank's willingness to be charitable. At the same time, the Bank set the agenda, demanding a particular kind of behaviour from the women, demonstrating the essential link between paternalism and power.

## **Chapter 8: Conclusion: Gendered Behaviour, Underlying Patriarchal**

### **Notions And State Pragmatism**

#### **Introduction:**

This thesis has explored some of the experiences of the men and women of London and Middlesex whose activities brought them before the Courts for three capital property crimes. Questions have been asked about how they carried out their offences, who they were, what they stole and how they stole, how each category of crime differed from the others, and how the decision-makers responded to them. They have been followed through each of the stages of the criminal justice system, from apprehension to final punishment. The purpose of this scrutiny was to discover the nature and extent of the influence of gender in the encounters of these offenders with the criminal justice system, and the decisions taken about them, and to find reasons for the different ways in which men and women journeyed through the system.

I have tried to remain with the challenge posed by Innes and Styles, following some of the directions they believed might be fruitful for research – such as the need to be systematic, to use qualitative analysis, to pay attention to the ways in which different forms of illegal appropriation were undertaken and organised, to consider what was stolen, how it was stolen and what was done with the stolen property, and to locate such study within the history of law enforcement.<sup>1</sup>

The complexities which have been encountered in this exploration are summed up in King's graphic description. Offenders

found themselves propelled on an often bewildering journey along a route which can best be compared to a corridor of connected rooms or stage sets. From each room one door led onwards towards eventual criminalization, conviction, and punishment, but every room had other exits. Each had doors indicating legally acceptable ways in which the accused could get

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<sup>1</sup> Innes & Styles, 'The Crime Wave'.

away from the arms of the law. Each room was also populated by a different and socially diverse group of men and women, whose assumptions, actions, and interactions, both with each other and with the accused determined whether or not he or she was shown to an exit or thrust on up the corridor.<sup>2</sup>

It is hardly surprising, in such a journey, that the effect of gender emerges in complex and uneven ways. It was rare to uncover any overt explanation for the discretionary effect of gender, and when the forces affecting judicial decisions were openly discussed or written down, gender was not one of them. This research shows that gender was a strong force at work in judicial decisions, but pulling in different ways at different points in the system. Decisions were being made in a society fundamentally organised and ordered in a gendered way. However, such decisions were not consistent. How men and women acted, and how they were judged and processed through the system, was gendered at all stages, but at no stage was the effect entirely predictable. Females were not always favoured, nor were they always disfavoured. Contemporary notions about masculinity and femininity exerted varying pulls. At the same time, the needs of the State had to be met, and the public perception of specific crimes had to be acknowledged. One of the strongest propositions emerging from this thesis is that the criminal act was gendered before it came within range of the justice system. This in itself might be sufficient explanation for the apparent lenience shown to female defendants, certainly for the different ways in which they might be treated

This concluding chapter, after reflection on the complexities and uncertainties revealed in the search for the operation of gendered discretion, considers briefly the diverse effects of continuity and change in the criminal justice environment and in the lives of those judged by it. Then the statistical evidence, which has been researched and presented in this thesis, is reviewed in order to provide the boundaries for subsequent discussion. That quantitative evidence is then observed through the filter of three main

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<sup>2</sup> King, *Crime, Justice and Discretion*, pp.1-2.

themes. The first theme explores the proposition that what was done, or not done, by offenders was already gendered before the encounter with the justice system. This necessarily influenced the decision-makers choices, and verdicts, sentences and final outcomes for offenders. The second theme is that of decision-making in a society where gender was a basic organising category.<sup>3</sup> This is an important theme for any study located within the criminal justice system, since the law itself enshrined the precepts at the heart of a patriarchal society.<sup>4</sup> The third theme proposes that one of the more significant factors in the State's judicial decision-making system, especially towards the end of the process, was the need to disperse the 'criminal' population to particular places, in specific ways, at different times; this too had a gendered component.

### **Gender and justice: complexities and uncertainties:**

Statistical evidence gives us reason to assert that women were more leniently treated than men at all stages of the criminal justice system, particularly at sentencing. We have perhaps become so used to statements of this kind from historians and criminologists that we have over-looked how puzzling such a finding is. However, if this is as far as we look, we may mismeasure justice, since we cannot know the disparities lying behind judicial decisions. We are left knowing that gender plays a large part in informing the decision-makers, but not how or why. This thesis has focussed on disparities and differences – in activity, in story, in judicial decisions, in strategies and responses. This focus has required oscillation between uncovering new sets of statistics, and using narrative modes of description and reasoning. Both the quantitative and

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<sup>3</sup> J.Wallach Scott, 'Gender: A Useful Category of Historical Analysis' (first published 1989) in idem. *Gender and the Politics of History*, Revised edition, New York, 1999, p.30.

<sup>4</sup> See Chapter 1 for the definition of patriarchy used in this thesis. Also P. Lawson, 'Patriarchy, Crime, and the Courts: the Criminality of Women in Late Tudor and early Stuart England', pp.16-57 in Smith, May, & Devereaux, *Criminal Justice in the Old World and the New*; (a rare attempt by a historian to tackle the effects of patriarchy and paternalism in the criminal justice system).

qualitative approaches are necessary in understanding the disparities in the lives and activities of men and women, and in the judicial responses to them.

It has not been easy to draw conclusions, either from quantitative or qualitative material, about the nature and extent of the role of gender. Even when modern researchers were able to question magistrates' sentencing rationale, and the effect of gender on their thinking about crime, offenders, and sentencing, their findings begged many questions. Even so, such research provides hints about the operation of gendered attitudes, concluding that differences in the sentencing of men and women were not a consequence of anything as simple as deliberate discrimination:

If that [deliberate gendered discrimination] were true one would expect the statistical exercise to show women consistently receiving different sentences to men. But they do not. For example, they stood an equal chance of going to prison for a first violent offence, whereas among repeat offenders, women were less likely to go to prison. And among drug offenders, women recidivists were as likely as men to be imprisoned, but first timers were not ... Sentencing decisions are the outcome of the interactive effect of a number of factors. The most important of these is the nature of the offence. However, the offender's circumstances, the way the other participants in the courtroom portray the offence and the offender, the offender's appearance and behaviour in court ... Together these factors shape the court's perception of an offender as essentially troubled or troublesome, and this in turn determines whether help or punishment is at the heart of the court's response.<sup>5</sup>

This thesis reaches a similar overall conclusion. In many different ways, sometimes slight and puzzling, sometimes covert and indirect, sometimes overt and direct, decisions were prompted or affected by notions about gender. My focus on only three capital property crimes, held systematically through as much of the criminal justice system as possible, has highlighted the importance of attention to the detail and the distinctiveness of each criminal activity, each verdict, each sentence, each act of pardon, and commutation. Attention to detail is necessary, since each of these activities resists

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<sup>5</sup> Hedderman & Gelsthorpe, *Understanding*, p.56.

uniform classification and quantification. Even so, such examination and analysis can only yield hints and suggestions which might explain why men and women were treated differently by the justice system, and how or whether the gender card was played.

Historians who have worked in this area carried out some of the burdensome task of classification and quantification.<sup>6</sup> Their labours show that justice and discretion have a gendered face. They have shown, in general, that women were often more leniently treated by the Courts and the judicial system, but mostly they have not been able to suggest sustainable arguments for why this should be so. We are provided with suggestions that women were seen as less of a threat to order in society, since they were less violent, inherently less criminal, less active, less professional, the helpers of men; or that, in accordance with some constructions of femininity and masculinity, women were the weaker vessel, vulnerable, and easily led astray, and to be helped rather than harmed; or that they were reformable and pliable, so certain types of punishment were more suitable. These suggestions depend on over-generalised patriarchal notions of womanhood and femininity. The narrower focus of this thesis on three specific crimes, and the longer view taken through the whole of the justice system, show that difference of treatment by gender is likely to result from differences in behaviour, in definitions of and attitudes to a specific crime, and in State policies.

### **Continuity in the experiences of the poor:**

Since a systematic approach has been taken in this thesis, it may be thought that a chronological view which attends to issues of continuity and change has been missing. The short period of the 1780s to the 1830s is often seen as a time of significant change

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<sup>6</sup> In particular, Beattie, 'The Criminality of Women'; idem, *Crime and the Courts*; King, 'Female Offenders', 'Gender, Crime and Justice'; Lawson, 'Patriarchy, Crime and the Courts'; and to a more limited extent, Walker, 'Women, Theft'; C. Wiener, 'Sex Roles and Crime'; Emsley, *Crime and Society*; J.A. Sharpe, *Crime in Early Modern England 1550-1750*, Harlow, 1984.

and upheaval in most areas of English life: a time of social and political change, changes in trade, industry and work patterns, in medicine and science, and, most pertinently, in administrative functions.<sup>7</sup> Yet it was still the final period of the 'old regime' before the main repeal of the 'Bloody Code' and the introduction of professional preventative policing.<sup>8</sup> The core of the 'golden age' of discretionary justice in England remained,<sup>9</sup> but was changing in nature.

The constant theme of anxiety about the perceived lawlessness of the lower and (by definition) poorer classes took on a new intensity in the late eighteenth century as the ruling classes felt their understanding of order being threatened. Crime and the criminal carried their fears about social change itself, encompassing all those reluctant to take on disciplined and controlled work, and those who dissented or were excluded from the consensual norms of society. From the 1780s, criminal activity came to be seen more as an 'important problem', rather than as the outcome of personal depravity. Sensibilities were touched. Changes in the penal regime were discussed and implemented. Prosecutors, judges and juries were gradually becoming more reluctant about the death penalty for many offences. The loss of the ability to transport convicts to America necessitated hard thinking about suitable replacement secondary punishments. Crime began to be seen in materialist terms, rather than as the result of sin; and as a social issue arising from the squalor of the growing great cities. The fear of revolution, following events in America and France, introduced urgency to debates on the increasing insubordination and presumed politicization of the poor.<sup>10</sup>

Those who were instrumental in reinforcing social discipline in an increasingly

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<sup>7</sup> See Introduction for discussion and references.

<sup>8</sup> Styles, 'The Emergence of the Police'; Phillips 'A New Engine of Power and Authority'.

<sup>9</sup> King, *Crime, Justice and Discretion*, passim; Brewer and Styles, eds., *An Ungovernable People*, pp. 11-20. Specific developments in the administration of criminal justice in Devereaux, 'The Criminal Branch of the Home Office; Hilton 'The Gallows and Mr Peel'.

<sup>10</sup> Phillips, 'A New Engine of Authority; Ignatieff, *A Just Measure of Pain*.

divided society, and those who saw how such reform would defend the order they desired, would have been conscious of the changes going on in the justice and penal systems. How far the poor were similarly conscious of change, or consented to or resented it, is less sure. Were we to compare the experiences of a London shoplifter of the 1790s with those of one of the 1820s, continuity in her life, needs and attitudes, is more likely to be the keynote, rather than change. Some of the men and women considered in this thesis belonged among 'the labouring poor', although many more of them were to be found amongst the even less articulate minorities, who, by definition leave few records of their own. For this reason, many historians of the labouring and working classes have avoided engagement with the full range of the plebeian majority.<sup>11</sup> Historians of women seem to have even greater difficulties finding the words of poor women, and their work on 'the working class' tends to be about more articulate subjects.<sup>12</sup>

Life on the margins would have changed little, particularly for poor women. Continuity in their work opportunities, their way of economic survival and their standard of living is striking over very long periods.<sup>13</sup> As recent research is showing, there are many sources, albeit sometimes problematical, where the voices of the common people can be heard.<sup>14</sup> The appeal petitions and letters considered in this thesis and the correspondence of the 'Bank of England prisoners' are valuable examples of the words of the poor. They can help us understand the experience of poverty, exclusion and

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<sup>11</sup> See Introduction to Hitchcock, King, Sharpe, eds., *Chronicling Poverty*, for discussion of the use of sources for the lives of the English poor, the failure of historians to engage with the less articulate, to subject them to quantitative analysis or to deal with collective consciousness, and to portray the poor as passive, using elite comment.

<sup>12</sup> For instance, A. Clark, *The Struggle for the Breeches: Gender and the Making of the British Working Class*, Berkeley, 1995, whilst clearly understanding the heterogeneous nature of a 'working class', still uses evidence about the more politicised, respectable, employed part of the labouring class.

<sup>13</sup> See Introduction for further discussion.

<sup>14</sup> See Introduction to Hitchcock, King and Sharpe, *Chronicling Poverty*, and Gatrell's use of convict petitions, ballads and broadsides in *The Hanging Tree*.

marginalisation; and the strong sense of a customary right to relief, from the rich to the poor. Overall, when their voices are heard through these documents, the continuities of their lives come through strongly.

### **Overview of the quantitative framework:**

In the first place, the sample of evidence from the petty sessions and quarter sessions courts of London and Middlesex (Chapter 2) suggested that women were about a quarter of those appearing for crimes and misdemeanours.<sup>15</sup> It shows that much larger proportions of women than men were discharged by these lower courts. However, examination of the charges shows that men and women appeared in court for different types of activity. Women also appeared for a more limited range of unacceptable behaviours. This is as significant as the fact that they were involved in less serious thefts, or were less persistent or troublesome offenders.<sup>16</sup> Their advantage (if such it was) derived not from the fact that they were women, but from a perception of gendered behaviour which made the 'doorkeepers', at these early stages of the criminal justice system, see women as less of a threat, and their behaviour as more in keeping with what women might be expected to do. In general, the law was designed to control the unwanted activities of men, rather than women. In addition, the examination of the records of the Bank of England about decisions at this early stage of the justice process shows that women were a quarter of those passed to the Bank from the magistrates for consideration of prosecution on indictment. When the Bank sifted these cases, it decided to act no further in relation to a higher proportion of women than men. When

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<sup>15</sup> Beattie, 'Criminality of Women', pp. 80-116, and *Crime and the Courts*, pp. 237-243 found females made up a quarter of property offenders dealt with in all level of courts in urban Surrey; the proportion was much lower in rural Surrey and Sussex. A similar urban/rural difference is confirmed by King, *Crime, Justice and Discretion*, p.196/7.

<sup>16</sup> Shoemaker, *Prosecution*, pp. 212-213.

the Bank cases went before grand juries, few decisions of 'no true bill' were made, but where they were, they were more in favour of women, particularly in London.

Then, at the next stage of the legal process, when shoplifting and pickpocketing cases were tried on indictment at the Old Bailey, women were the defendants more frequently than men in the years studied. I have shown that decisions in pickpocketing and shoplifting cases showed different features. Not guilty verdicts went more in women's favour in both crimes, but much more so in the case of pickpocketing. Death sentences were passed equally on men and women shoplifters and pickpockets, although it must have been common knowledge that it was unlikely that any would be carried out. Where partial verdicts were returned, men were more likely than women to be sentenced to transportation for seven years, much more likely in the case of pickpockets. On the other hand, women were more likely to be sentenced to imprisonment than men. However, importantly, trials for offences against the Bank of England showed different decision-making patterns. Few men or women were found not guilty. The predominant plea-bargaining system determined sentencing. Men and women chose equally to refuse the offer of plea bargaining, and, when they did so, women were more likely to be found not guilty than men. In sentencing, both capitally and for transportation for fourteen years, the balance of men and women was about equal. The study of the statistics at this stage of the judicial process for these three crimes shows that, although women gained the advantage in decisions at some points, this was not an advantage which operated consistently.

At the next stage of the journey, the point at which we look to see if the sentences passed were effected, we find that none of the death sentences for pickpocketing was carried out, and only two men were hanged for shoplifting - men

with an unusually violent record.<sup>17</sup> For Bank note crime, however, I have shown that the picture was different. Over half of the males sentenced to death were executed. Nearly a quarter of the women so sentenced were executed.

Where death sentences for all three offences were commuted at this first stage of the pardon and remission process, men and women were equally likely to be selected for the 'secondary' punishment of transportation. More women than men were selected for the secondary punishment of imprisonment. Since other secondary punishments were available for men, such as service in the armed forces, and forced labour on the Thames navigation, there was little difference in the quality of intended punishment for the men and the women who had been sentenced to death.

However, when it came to carrying out a death sentence, a very small proportion of women finally met this fate. The final outcome for all those sentenced for the three crimes studied in this thesis cannot be ascertained. The first award of a commutation of sentence or a conditional pardon was, in very many cases, not the end of the story. As most of those sentenced to death were not executed, so large numbers who had been sentenced or pardoned to transportation did not leave the country. Many prison sentences were shortened, sometimes drastically. The appeals archives provided examples of this, and where it was possible to follow the names of London convicts through the records, punishments were found to be diluted as the offender progressed through different 'rooms' of the system.

### **The focus on three property crimes:**

Overall, this quantitative framework shows that, in crimes where women appeared in significant numbers, the effect of gender in judicial decisions worked in their

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<sup>17</sup> My choice of these two crimes tends to predict this outcome – other crimes, such as burglary and highway robbery resulted in a higher rate of executions.

favour overall, but inconsistently and unevenly. In order to penetrate the reasons for the decisions, it was necessary to look more closely at the offenders' stories emerging at and after trial, and at the environment in which their prosecutors or other decision-makers operated. In order to do this, it was crucial to focus on three property crimes rather than on many, and to follow the decision-making processes, so far as possible, from their apparent beginning, to their apparent end. Systematic qualitative attention has been paid to the ways in which three rather different types of illegal appropriation were undertaken and organised, the effects which these differences may have had on verdicts and sentencing, following, as far as possible, each offender through the whole complex of rooms of the criminal justice system.

As Kermode and Walker suggested:

It is becoming increasingly apparent that qualitative material can tell us far more about the activities and attitudes of ordinary people than can aggregates of litigation alone... the reconstruction of recorded words and actions is an important preliminary to deciphering the encoded social, cultural and individual meanings which informed court actions.<sup>18</sup>

Attention to the detail of shoplifting and pickpocketing cases has revealed a different, women's, world: in shops, where rustling, swirling gowns and cloaks, and suddenly enlarged bellies hid appropriated goods; and where unremarkable wives and mothers bought tea, sugar, and ham for the family's sustenance, using forged bank notes; on the night streets, back alleys and dark lodgings, where women of all shades of talent and beauty variously negotiated with unwise men and divested them of their possessions.

This approach also allows a view of varying public perceptions of the three crimes. Private stealing was always viewed as a mean sort of crime. However, despite the complaints of shopkeepers, and newspaper reports, which suggested that shoplifting was a common activity in any town of reasonable size, few prosecutions were brought

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<sup>18</sup> Kermode & Walker, *Women, Crime and the Courts*, p.9.

to Court from the time it became a capital offence in 1699. The overwhelming majority of cases were brought in London, but these represented the tip of a large iceberg.

Prosecutions were not good for business. They required expenditure of much time and trouble, with the likelihood of failure in court. In London, by the early nineteenth century, shopkeepers were reluctant to prosecute under the capital statute.<sup>19</sup> Shoplifting was seen as a petty offence. Most offenders were casual, occasional, small-time operators. Some may have been 'in the habitual practice of it', but many 'were not persons who are regular traders in thieving, but are persons in better circumstances, especially the women.'<sup>20</sup> Although there was a prevalent view that some women were regular shoplifters, it was not seen as a dangerous, organised crime, involving gangs, although, as the Old Bailey records show, women often operated in pairs. Overall, it was not a crime that frightened the public or the courts sufficiently for them to pursue use of the death penalty.<sup>21</sup>

Similarly, pickpocketing was an activity much talked about and written about in the newspapers. Both common and difficult to prevent, pickpocketing was not often pursued in court, largely for technical reasons surrounding proving the case (See Chapter 4). Most of the men who suffered losses at the hands of women on the London streets did not take the matter further, for obvious reasons. It was mainly women, however, who, in London, were left to face prosecution, but judges sometimes made clear that they had little sympathy with the male prosecutors of these women.<sup>22</sup> Sometimes bystanders preferred to administer their own rough justice to a pickpocket in the street.<sup>23</sup>

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<sup>19</sup> *PP.*, 1819, Vol. VIII, (585).

<sup>20</sup> *Ibid.*

<sup>21</sup> Beattie, *Crime and the Courts*, pp.179-80.

<sup>22</sup> *Ibid.* p.180-1.

<sup>23</sup> As in *OBSP*: Dec. 1780, Case 28 v Philip Sutton described in Chapter 4.

Criminal activity around forged Bank of England notes was perceived differently. Prosecutions during the period of the Restriction were numerous, and the numbers of men and women hanged were significant. It was an offence that was seen to strike at the heart of the commercial economy, and those in authority, such as Members of Parliament, were easily persuaded to uphold and press for the death penalty. Public feeling was sometimes ambivalent about this crime in the early decades of the nineteenth century. There was revulsion at the attack it represented on the well-being of the nation, but, at the same time, there was antipathy towards the Bank of England for its failure to produce satisfactory bank notes, for its failure to reinstate payment in gold, and for its arrogant attitude to the prerogative of the judiciary. The public mood swung at times between 1797 and 1834, depending on the numbers of prosecutions. In 1823, Parliament was told that ‘in the course of the last ten years, no capital punishment had so excited so much odium, and rendered the administration of public justice so unpopular as that in the cases of forgery’.<sup>24</sup> Different perceptions about different categories of crime may also explain diverse verdicts and sentences, adding further complexity to decision-making.

The three themes referred to at the start of this Chapter now need to be brought into play – the gendered nature of criminal activities before their appearance in the judicial system, decision making in a society organised by gendered categories, and the pragmatic needs of the State.

### **1. The criminal activity already gendered before prosecution:**

The first, and perhaps most significant, theme sets up the proposition that these

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<sup>24</sup> *Parliamentary Debates* 1823, Vol. IX (new series), 412, Sir James Mackintosh.

criminal activities were gendered before the offender entered the justice system. The narratives which have emerged have, in many cases, although by no means all, highlighted the differences in the ways that men and women behaved in committing their illegal acts. This understanding provokes the obvious question as to whether differences in court verdicts and sentences resulted from the decision-makers' responses to the different behaviours they heard about at the trial. Differences were clearest in pickpocketing cases. It has been shown that, during this period, the numbers of female defendants were greater than the numbers of men and that, among the women, a particular life-style and way of operating on the streets of the metropolis predominated. In shoplifting cases, although the differences in the ways of carrying out activities were not as great as in pickpocketing, the presence of so many women, in a women's world, suggests that considerations of different behaviours would influence judicial decisions. Similar distinctions were not apparent in Bank note crime in London and Middlesex. London was not a centre of mechanical forging activity – a largely male activity in other parts of the country – and the men and women of London and Middlesex were similarly involved - in selling, uttering and possession. The number of women in court charged with these crimes was proportionately smaller than in the other two crimes. This fact alone may have produced different decisions particularly if there was a 'not guilty' plea which allowed the jury to hear the prosecutor's and the prisoner's stories.

However, it is important not to see women, or men, as homogenous categories. Their social and legal status also affected the making of decisions. It would not be useful to base explanations of differentials – either of motivation, behaviour, or of court decisions – only on the sex of offenders. The narratives of these cases certainly do not show women as passive and men as assertive. There is no evidence of assumptions that women were less criminally dangerous, the accomplices of men, stealing items of less

value, less violently, and thus receiving more generous treatment from the courts. The stories presented in court, and the words of the convicts later in their journey, show that, not only did some women receive more severe treatment, but that they were not more likely to work with men, steal less valuable items or behave in a more becoming fashion than men. However, they were likely to have operated in a different way on many occasions, and to such an extent, that their crimes could be seen to be different from men's. Examination in this thesis of who the women were, what they stole, and exactly how they went about infringing the law has demonstrated the gendered differences in the committing of these three crimes.

Difference in treatment may commence with the roles and status of these men and women in their society, roles which were, in themselves, gendered. If we now amalgamate what has been learnt from the Home Office records<sup>25</sup> and the stories told at the Old Bailey in relation to the crimes studied, we obtain a partial view of the males involved in the trials. This view provides a catalogue of the expected activities of London males, in trades and crafts of various kinds. The indiscriminate term 'labourer' was often used, but there were handfuls of those who earned a living at sea, weavers, shoemakers, watchmakers and jewellers, butchers, tailors – and parish paupers. To these can be added others, sole recorded representatives of other lesser trades and occupations.<sup>26</sup> There were a few examples of men whose means may have been more substantial: a farmer, an attorney, some clerks and a few men of independent means.

The usual difficulty is experienced in establishing female occupations from the same sources. The official records rarely gave a description, other than a sporadic entry as to their marital status. The Old Bailey court reports provided more information about

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<sup>25</sup> HO26: 1-11 Criminal Registers (PRO). Only from 1791 to 1805 was information given about occupations of males, and sporadically about the status of females.

<sup>26</sup> Carpenter, chairmaker, breeches-maker, sawyer, coachman, fishmonger, wheelsmith, silversmith, painter and paper hanger, potter, watchman, gentleman's servant, printer, soldier, gardener, hairdresser, goldsmith, chimney sweep, blacksmith, feathermaker, copperplate-maker.

their occupations and life-cycles. Apart from the explicit descriptions of the trade in sexual services – the full or part-time occupation of the majority of female pickpockets - other female offenders represented the expected range of mantua-makers, staymakers, potscourers, washerwomen, fruit and watercress-sellers, market traders and housemaids, in and out of work. If property offences were committed by men on the breadline, the financial needs of female offenders were even more pressing.<sup>27</sup>

It is not possible to be sure to what extent destitution was the motivation for crime on the part of many of the defendants, since they said little directly about this in their trial defences. Later, in the letters of appeal on their behalf, seeking pardon or commutation of sentence, poverty as a motivation for the offence was more frequently mentioned by women (see Table 7.1). Many women were the focus of the economic survival of a family. Urban women had particular difficulties in holding their family economies together in the bad years of the economic cycle. For single women, with or without children, the problem would have been particularly acute. One of the marks of the relationship of property offences with female poverty is the tendency for the age of female offenders to be slightly higher than their male counterparts.

**Table 8.1.** confirms this tendency. It brings together the recorded ages of all those involved in trials for the three crimes.<sup>28</sup> It shows that both male and female activity was focussed at the two earliest age bands, below the age of 31. However, within these bands, there were differences between males and females, and between the three different criminal activities. Males predominated as pickpockets and shoplifters in the youngest category (up to 20 years of age). A third of all male pickpockets, and half of all male shoplifters were in this category; it also covered a third of male forged note

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<sup>27</sup> King, 'Female Offenders', for which he used 1791-1793 Criminal Registers, HO26: 1-2, PRO. A fifth of all Old Bailey trials for property offences in these years which involved females, and two-fifths of these which involved a work context, involved alleged sexual transactions for money (p.78).

<sup>28</sup> Ages of offenders were more frequently given in the official records than occupation, but that information for the years covered in this thesis is incomplete. HO26, 1-33 Criminal Registers (PRO).

handlers. Only one fifth of female pickpockets appear in this youngest category, confirming the crime's connection with a more mature group of women working around the London streets. Only a third of female shoplifters were in this young band.

**Table 8.1. Ages of men and women convicted of pickpocketing, shoplifting and forged Bank of England note offences, Old Bailey, 1791-1833<sup>29</sup>**

<b>Age</b>	<b>Pick-pocketing</b>			<b>Shop-lifting</b>			<b>Forged note crimes</b>			<b>Total all three</b>
	<b>Males</b>	<b>Females</b>	<b>Total</b>	<b>Males</b>	<b>Females</b>	<b>Total</b>	<b>Males</b>	<b>Females</b>	<b>Total</b>	
<b>Up to and incl 20</b>	12 (36%)	4 (18%)	16 (29%)	74 (51%)	35 (32%)	109 (43%)	170 (34%)	44 (37%)	214 (34%)	339 (36%)
<b>21 to 30</b>	12 (36%)	8 (36%)	20 (36%)	40 (28%)	39 (35%)	79 (31%)	202 (40%)	38 (32%)	240 (39%)	339 (36%)
<b>31 to 40</b>	6 (18%)	8 (36%)	14 (25%)	16 (11%)	22 (20%)	38 (15%)	75 (15%)	24 (20%)	99 (16%)	151 (16%)
<b>41 to 50</b>	-	2 (9%)	2 (4%)	7 (5%)	6 (5%)	13 (5%)	36 (7%)	10 (8%)	46 (7%)	61 (7%)
<b>51 to 60</b>	3 (9%)	-	3 (5%)	6 (4%)	7 (6%)	13 (5%)	12 (2%)	3 (2%)	15 (2%)	31 (3%)
<b>60+</b>	-	-	-	2 (1%)	1 (1%)	3 (1%)	6 (1%)	1 (1%)	7 (1%)	10 (1%)
<b>Total</b>	<b>33</b> 99%	<b>22</b> 99%	<b>55</b> 99%	<b>145</b> 100%	<b>110</b> 99%	<b>225</b> 99%	<b>501</b> 99%	<b>120</b> 100%	<b>621</b> 99%	<b>931</b> 99%

*Source: HO 26/1-33 Criminal Registers (PRO)*

In the age group 21-30, proportions of both men and women were significant – about a third for both. However, it is in the age group 31 to 40 where confirmation is provided of the connection of criminal activity with poverty and the varying needs of the female life cycle - with family responsibilities combined with the difficulty of obtaining and maintaining paid employment. In all three crimes, female activity extended into this later age group to a much greater extent than men's – 36% in pickpocketing (men 18%), 20% in shoplifting (11% men), and 20% in Bank note crime (15% men).

<sup>29</sup> For the years dealt with in this study – See Introduction for specific details

Women, whether single or married, experienced the greatest economic stresses in trying to provide for their dependants in their thirties and early forties.<sup>30</sup> Urban women had particular difficulties, lacking the ability which many rural women had to exploit customary rights which eased economic difficulties. The relative predominance of female offenders which is shown in Table 8.1. in the 30 to 40 age group bears out this general reflection. The work in which significant numbers of women were involved - servants, potscourers, charwomen, and washerwomen, market traders, for instance - allowed them access to goods which they could easily pawn through the city's well-developed network for receipt of stolen goods. Both factors - family responsibilities and marginal work situations - are also marks of the continuity in the lives of poor women. The 1820s showed little difference from the 1780s in this respect, and both show strong similarities with periods of very recent history, where women predominate in the older age groups of offenders and are more widely spread over the whole age distribution.<sup>31</sup>

My sample in the records of the petty and quarter sessions hearings in London showed striking differences in male and female activity. At the City of London petty sessions courts, women made up a third of those coming before the magistrates. However, nearly half of those women were there ostensibly on charges of being drunk and/or disorderly compared with only 11% of the men. They were charged with being "Women of the Town and great Nuisances to the neighbourhood", noisy, using indecent language, disorderly and "abandoned", wandering abroad as prostitutes. The main charges against the men were assault and petty theft. They were charged with a much wider variety of unacceptable and illegal activities. The differences in the male and female worlds were highlighted here. It is not at all surprising that nearly 70% of all

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<sup>30</sup> King, 'Female Offenders' p.82.

<sup>31</sup> D. Farrington, 'Age and Crime', *Crime and Justice: a Review of Research*, 8, 1986, pp. 189-250.

women before these courts were discharged, with or without a reprimand.<sup>32</sup> We are not dealing here with lenience on grounds of gender, but with such extreme differences of behaviour by gender to which there could not have been an equal judicial response.

The samples from the Middlesex sessions of the peace gave information on similar patterns, proportions and types of male and female behaviour, although because of the particular selection of offences tried there, differences between men and women were not as significant as at petty sessions. Nor was the proportion of women at Quarter Sessions as high as at the petty sessions (20%), and it was noticeable that the range of male illegal activity remained much wider than women's.

In London, shoplifting was perceived as a largely female crime.<sup>33</sup> The figures in this study confirm this, with females predominating in the trial figures, particularly in times of war.<sup>34</sup> The study further confirms that pickpocketing, as seen by the court in London, was also a female dominated crime.<sup>35</sup> Hence, juries were used to seeing females in court for these offences. Yet, they found many more females than males not guilty of the charges. The chance to exit through an open door from the house of the criminal justice system was given to 29% of female shoplifters, and 50% of female pickpockets, compared with 16% and 30% respectively of men. Whatever the motivation of juries, they were presented in court with stories which described gendered worlds of different male and female activity. It is not surprising that they distinguished, consciously or subconsciously, between men and women, in making the first crucial decision about guilt. As so often, women were seen to have committed more trivial, less threatening, offences. They were seen to be struggling with economic demands, more

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<sup>32</sup> T. Henderson, *Disorderly Women*; D.D.Gray "'Lewd Women" and "Canny Wenches": Bedfordshire Women before the Courts 1807-1821', BA dissertation University College Northampton, 1999. Gray is currently engaged in doctoral research, involving detailed study of the London petty sessions records which should throw more light on these issues.

<sup>33</sup> *PP.*, 1819, Vol. VIII, (585); Beattie, 'Crime and Inequality'.

<sup>34</sup> Chapter 3, Table 3.1.

<sup>35</sup> Chapter 4, Table 4.1; cf. Beattie, *Crime and the Courts*, pp. 91, 180.

'troubled' than directly undermining public order. Once the jury had decided that a defendant was guilty, distinctions between males and females were not as clear. For shoplifters, a fully guilty verdict, resulting in an automatic death sentence, was applied equally to males and females.<sup>36</sup> For pickpockets, such a verdict was rare, and rarer for women than for men.<sup>37</sup>

Crimes prosecuted by the Bank of England provide a useful counter-balance to this tale of difference between men and women, both in their criminal behaviour and in the responses to it. They confirm the importance of looking at specific categories of crime in order to give better definition to broad statements about lenience in the sentencing of women. Public perception of forged currency crime contrasted with a growing tendency to see private stealing as more and more of a trivial offence, when considered against its prescribed end at the gallows. However, juries did not hear many accounts of uttering, selling and possession of forged Bank notes because of the massive plea bargaining system in effect. Verdicts and sentencing were thus out of the hands of the court and in the hands of the prosecutor. Discretion operated only later, when appeals were handled and petitions made for relief. So far as this group of offences was concerned, in the London metropolis, men and women operated in similar ways, in shops, public houses, streets and coaches in uttering and selling notes, and possessing them secreted in the chimneys and wainscoting of their lodgings, and the verdicts and sentences against them did not vary as greatly as those for the other offences.<sup>38</sup>

In shoplifting cases, witnesses recalled women hiding their booty under cloaks – a significantly female form of attire – cloaks being lifted or flung aside to reveal stolen goods, cloaks rustling suspiciously, bulging shapes under cloaks, cloaks tangling

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<sup>36</sup> Chapter 3, Table 3.2.

<sup>37</sup> Chapter 4, Table 4.2.

<sup>38</sup> Chapter 5.

together or being passed over the face. A picture is presented of a female world of flowing clothes, rustling skirts, concealing movements and adjustments of dress; a world where shopkeepers reached under petticoats and prodded padded bosoms to reveal swathes of textiles in secret hiding places. The men's shoplifting world was perhaps more open, direct and prosaic, lifting their takings on to their shoulders, tucking it under their arms, or dropping it into their hats.<sup>39</sup> It is likely that such different worlds and ways of operating affected juries' responses and verdicts.

Juries were likely to have been interested in the type and value of goods which shoplifters stole. Women were not liable to steal goods of lower value. They were charged with stealing mainly in the value range above ten shillings and below five pounds, not a trivial amount. It is possible, of course, that women stealing items valued at less than ten shillings did not reach the Old Bailey; they may have been discharged by magistrates, tried for simple (non-capital) larceny, or their victims may have been unwilling to prosecute. Men stole mainly in the range below ten shillings' value, but significantly in the range above five pounds. The jury would have seen high value theft as a more serious offence. The only shoplifting convicts on which the sentence of death appears to have been carried out were male members of a gang who stole highly valued jewellery.<sup>40</sup> There were more significant differences in what men and women stole, and the gendered meanings of the items. Household and clothing textiles, and small items of clothing were the most popular goods for both sexes to steal. Women had a greater propensity than men to steal in these categories. They stole goods of which they had knowledge, in shops which they might be expected to frequent, and for which they had the means and networks of disposal. They preferred items which could be made into

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<sup>39</sup> Chapter 3, Table 3.9.

<sup>40</sup> John Rabbits and William Brown hanged on 5 Feb. 1794, HO26/3, PRO.

clothing, sold on market stalls or taken to pawnbrokers.<sup>41</sup> Some historians have dismissed female theft of textile and clothing as a petty crime, born of need only to clothe herself or her family, or just because she liked to be ostentatious. However, the high value of the massive yardages or types of clothing stolen, belies such a view. Both were valuable commodities and could fetch a thief a good income.<sup>42</sup>

Distinctive male and female behaviour was even more in evidence amongst those appearing in court for the offence of pickpocketing. It may be a gross oversimplification to say that the vast majority of the women were prostitutes. Nevertheless, most carried out their thieving as an adjunct to the offer of sexual activity or other 'treats', or they were working on the streets of London in the dark hours. The court records show that 76% of female pickpockets could be described in this way, whether it was a full-time way or earning a living, or whether a make-way, or literal 'moonlighting'. Others were in trades which were typical of the marginal, insecure world inhabited by urban women. The male spread of trades and occupations was much wider, although generally typical of the less skilled, less articulate in the population. This difference in occupation is remarkably clearly underlined in the place and time at which these private thefts took place. The material in Table 4.7 begs the question as to whether the same offence was being committed by men and women. We might conclude that it was not, and hence we should not expect any parity of treatment at trial. The enclosed, private, and dark places in which women successfully operated are in almost total contrast to the busy, public, day-haunts of the male pickpocket.

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<sup>41</sup> Chapter 3, Table 3.7.

<sup>42</sup> Kermode, 'Women, Theft', pp. 88-99; Weatherill, 'Consumer Behaviour', p.298.

## 2. Decision-making in a patriarchal environment:

The profoundly gendered and patriarchal nature of the law of England, discussed in Chapter 1, provides the second filter through which judicial decisions should be seen. Men's defence of their power and possessions – whether land, capital, goods, chattels, wives and children was justified by, and enshrined in, the law. In practice, such a seemingly monolithic and logical structure was breached and qualified many times over. The understanding behind it was multi-layered and its impact was uneven. Women of property found many ways of evading and ameliorating the legal structure to their own advantage.<sup>43</sup> For plebeian men and women, this property-based edifice had little practical relevance. In relation to the criminal law, and serious property crimes, the civil concept of *feme covert* was of limited application. If the circumstances were right, a married woman could attempt to use the excuse of marital coercion in abatement of the offence. This was infrequently appropriate and rarely successful.<sup>44</sup> Men and women did not often operate together in the crimes studied here, with the exception of Bank note crimes. If married couples did operate together, it was unlikely that the woman would be found to act both under the 'influence and compulsive force' of her husband, and within his sight. Nevertheless, the mere existence of these doctrines is suggestive of a deeper wish to protect women from full application of the criminal law. Patriarchal notions, resulting in paternalism or 'judicial chivalry'<sup>45</sup> could, and did, work in women's favour in criminal law courts.

As this study has shown, it is difficult to settle on a point of attack on

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<sup>43</sup> See, for instance, Finn, 'Women, Consumption'; Bonfield, *Marriage Settlements*; Staves, *Married Women's Separate Property*; Erickson, *Women and Property*.

<sup>44</sup> King, *Crime, Justice and Discretion*, p.285, suggests that between 1750 and 1800 'a considerable number of Essex wives' obtained acquittal on the strength of the judges understanding of this principle. Examination of the detail of the cases would be needed to establish whether this might be the result of application of principle, or whether defences were successfully mounted, or that decisions were made on the strength of paternalist feeling.

<sup>45</sup> Daly, 'Rethinking Judicial Paternalism', p.10 and *passim*.

the question of the meaning of judicial attitudes towards women. Are they an exercise of superficial deferential behaviours and social courtesies (which might be called judicial chivalry), or of power relationships, reflecting women's social and legal inferiority, resulting from their weakness and their need to be supported and protected? It seems inappropriate to equate paternalism with lenient judgements (towards women and children). It could have been seen as more effective to sentence more harshly, in order to ensure their protection, and to bring greater benefit to the proper ordering of society in the longer term. Such judicial protection might, however, have been contingent upon females observing behaviour appropriate to the norms set by a patriarchal society – to be weak, poor, deferential, and caring for dependants. On the other hand, should a female demonstrate lack of these 'feminine' traits, she could receive harsh treatment.

If the cases of Charlotte Newman and Jane Harrison, prosecuted by the Bank of England are compared, the contrast is stark between Newman, an 'unfortunate woman', who was to die on the gallows,<sup>46</sup> and the 'interesting looking', twenty-year old Harrison, housekeeper to a leading player in forged note selling, twice prosecuted capitally by the Bank, twice found not guilty.<sup>47</sup> The reasons for the juries' contrasting verdicts must have lain in their perceptions of the two women as they stood before them. Newman was lame, had been married to an already transported housebreaker, was known to be a major trader in forged notes, and had lured her accomplice (George Mansfield, whom the jury found not guilty) away from his pregnant wife to live with her. Her behaviour and appearance did not commend itself to the men of the jury for its femininity, and the extent of her crime and her previous associations would have prompted them to find her guilty. On the other hand, Harrison was young, pleaded becomingly in court of her innocence, a servant led astray by a powerful master. The newspaper reports described

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<sup>46</sup> OBSP: 1817-18, case 53; BECLS M5/319, AB367/3, 13 Nov. 1817, 14 Dec. 1817: HO26 PRO.

<sup>47</sup> OBSP: 1819-20, Cases 641 and 651.

her as 'interesting looking' – no doubt pretty and sexually wholesome. In all, the evidence shows her youth, proper femininity, deference and weakness. It is perhaps permissible to use this type of contrast as evidence of gendered attitudes to crime, although it has also to be admitted that most of the stories told do not provide evidence which is as clear as this.

It is noticeable, amongst the few women who were executed in this period, that a significant number of them had been violent, abusive, and operating in a 'masculine' manner. The contrasting definitions - 'troubled' and 'troublesome'<sup>48</sup> are often applied to deviant female behaviour by decision-makers in today's courts. These definitions may assist in explaining much of the paternalistic decision-making in cases in this study. Placing female law-breakers in one or other category provides a way of categorising and judging their behaviour, which otherwise the decision-makers, and the system they operate within, cannot fully comprehend nor engage with.

If patriarchy describes a relationship between men and women (and children) which implies male power and control and female dependence, it will, as all relational dimensions, operate in a variety of different ways. It will not keep women in unvarying subordination or oppression. Nor does it necessarily function to shape and control the behaviour of women. In respect of the criminal justice system, patriarchal law is as likely, more likely perhaps, to shape and control the behaviour of men, since that is better understood by the male law-makers and decision-takers, and more greatly feared. Women frequently collude and co-operate with the patriarchal system, and this aspect of their agency contributes to the strength of patriarchy.<sup>49</sup> The language of female appeals and, in particular, the deferential language and the expression of an inferior relationship

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<sup>48</sup> Hedderman & Gelsthorpe, *Understanding*.

<sup>49</sup> *Idem*. p.18. My argument is the opposite of Lawson's who argues that the law shapes female behaviour.

of female 'Bank prisoners' with their prosecutors bears this out beyond doubt.

Responses from the decision-makers often - though not always – acknowledged the effectiveness of these gendered appeals. The response of the Bank of England to women who demonstrated their destitution, their responsibilities for child care, the lack of men to support them, the unavailability of work in prison, their contrite and reformed natures, was deeply paternalistic. Women who continued their criminal activities in prison, unreformed, uncontrite, who lied, who had not accepted previous offers of merciful dealing, or who were of doubtful sexual morals, were ignored, along with most of the male convicts who were expected, as was proper for men, to fend for themselves, with work, money and food.<sup>50</sup>

Shifts and changes in patriarchal attitudes, and their operation in private and public spheres, have been seen as critical in this period.<sup>51</sup> Many historians have seen the period as a time of crisis in men's control over women. They relate this to new thinking and knowledge about gender, and sexual difference emerging in medical and philosophical circles. Investigation of women's bodies resulted in assertions of their inferiority. Cartesian thought about the separation of body and mind encouraged understandings of separation between men and women in a way that older humoral theory had not done. With distinct anatomy and physiology, governed by feeling, not reason, and with distinct moral qualities, women were distinct separate creatures who must inhabit a different world.<sup>52</sup>

It is unlikely that changing constructions of masculinity and femininity, or discourse on men's domination of the public sphere and women's retreat to the privacy

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<sup>50</sup> Chapter 7.

<sup>51</sup> S. Walby, 'Women's Employment'.

<sup>52</sup> For example, Hitchcock, *English Sexualities*; Hitchcock and Cohen, *English Masculinities*; Barker and Chalus, *Gender*; Barker-Benfield, *Culture of Sensibility*; LeGates 'Cult of Womanhood'; Von den Steinen, 'Discovery of Women'; Jones ed., *Women in the Eighteenth Century*; Fletcher, *Gender, Sex*; Shoemaker, *Gender in English Society*.

of the home, would have been a concern of plebeian life. 'Putting separate spheres into practice was a class privilege denied to working men and women'<sup>53</sup> – and certainly to out of work men and women. Plebeian men had little power, except over their women. Women had to get out in to the town to earn a living. London was a place in which men and women, plebeian and working class, jostled for space. Sharing of crowded space makes the separation of public and private impossible. There was no comfortable private world of home to retreat to, and men and women sought refuge in the pleasures of public life, in public houses and spirit cellars. Plebeian women often shocked observers of the middling sort with their enjoyment of public life, so different from the increasing seclusion of ladies in the private world of the home. Although in their language of judicial appeal, they used definitions of respectability which differed greatly from those of the middling sort, they were still much less free than plebeian men, since their respectability was more fragile, based on sexual reputation, rather than skill.<sup>54</sup> The poor did not accept paternalistic offerings on the donor's own terms. They might show deference, they might couch their requests in the right terms to get what they wanted, but the deference was mainly an illusion. 'They know each other, recognise each other, they are fellow travellers through a life which is impervious to most of their choices'.<sup>55</sup> The distance between polite and plebeian cultures was immense. The workings of the criminal justice system, a terrifying institution of the patriarchal state, did not favour the poor, male or female.

Yet, the story of the property offenders who passed through its various rooms demonstrates that the journey could be negotiated. The powerless and the powerful negotiated, the young with the old, and, perhaps most successfully, the female with the

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<sup>53</sup> A. Clark, *Struggle for the Breeches*.

<sup>54</sup> A. Clark, *idem*, pp. 35-38.

<sup>55</sup> J. Berger, 1966, comment on painting by L.S. Lowry, *The Lowry Building*, Salford.

male. Although convicts did not usually come from a class where the language of patriarchy, of public and private, or of masculinity and femininity, had conscious purchase, yet they understood the rules and, in many cases, secured benefits for themselves which made their punishments shorter, or more tolerable.

There was no obvious reluctance to punish women, but there was obvious reluctance to bring them to the gallows. It is strange that contemporaries did not remark in public on this, or comment profusely on the hanging of women. Only a rare record comments that a reprieve from hanging has been granted because of a woman's sex.<sup>56</sup> Although deeply involved with the emotional and psychological issues, Gatrell found only fragmentary evidence of discussion on the inappropriateness of hanging women. Lord Ellenborough's diary references, although they mention a woman 'spared on account of her sex, but she was the most guilty of all', are more concerned with the inequality of treatment of felons in general, rather than women in particular.<sup>57</sup> The reluctance to execute women cannot be placed entirely at the door of a patriarchal mode of thinking, nor be attributed to paternalistic and chivalrous concerns. The strategic needs of the State to maintain the acceptability and legitimacy of the death penalty would have been brought into disrepute by the sight of too many female bodies on the gallows.

There was public outrage at the burning of women in the 1780s, but this seems to have been mainly because it was seen as an unjust punishment, more severe than for men in similar coining (treason) cases.<sup>58</sup> Gatrell's claim, that the specific campaigns around the executions of a few attractive, 'wronged' women mobilised 'opinion' most effectively against 'harsh law', is difficult to substantiate. Had this been so, there would

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<sup>56</sup> I found none in my sample in HO 17. See King, *Crime, Justice and Discretion*, p. 282, and note 55.

<sup>57</sup> Ellenborough, *Diary*, 154-5 (28 June 1828) quoted in Gatrell, *The Hanging Tree*, p.548.

<sup>58</sup> e.g. *Universal Daily Register*, 22, 23, & 27 June, 1786 re: Phoebe Harris, and 24, 25 & 27 June, 1788 re: Margaret Sullivan.

surely be more evidence of this in public debate and record. The claim that 'the critique of the law was mobilised less through reasoned argument about legal systems than through identification with the plights of women wrongly condemned, around whom luxuriant sentiment and sentimentality might flow' seems to rely too much on two sensational stories of female execution which excited interest.<sup>59</sup>

Understandings and images of the body have an important part to play in understanding executions - deliberate, controlled, and violent deaths. Any specific interest in female executions, slight though the record is, perhaps confirms the erotic interest of the observer in the female body. Concern for modesty and decency did not mask the fact that women were seen as sexual objects. The power of the female body is a fundamental challenge to patriarchy. This was acknowledged in the stays of execution granted to pregnant women. 'There is something repugnant about destroying a body which gives life.'<sup>60</sup> However, it is difficult to understand decisions to execute some women. Why was paternalism, and judicial chivalry, unable to save them? A 'projective' theory of punishment may apply, whereby those tendencies most feared in ourselves are projected on to the offender. She is punished not so much because of what she has done, but because she represents the 'unthinkable' possibility that the rest of us might do the same. Some of the executed women were murderers, violent robbers, burglars and rioters, just like the men who were executed. If women are 'people', just like men, and can do what men do, the law, which exists to control men, can equally and deservedly be used to control them.

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<sup>59</sup> Gatrell, *The Hanging Tree*, pp. 369-360, re: Sarah Lloyd and Eliza Fenning.

<sup>60</sup> Naish, *Death Comes to the Maiden*.

### **3. The pragmatic and political needs of the State:**

The third filter through which I have seen the journey of the three groups of offenders through the justice system is that of the needs of the State. The development and implementation of penal policy in these years was, not surprisingly, a piecemeal and pragmatic business. The needs of the State were often the over-riding factor in decision-making, whatever the criminal activity, whatever the verdict, sentence or appeal of the convict, and whatever his or her gender.

For instance, the debate about the use and purpose of transportation during the whole of this period exemplified the changing needs of the State. Shifting language was used to characterise it. Sometimes it was seen as deterrence, sometimes as an opportunity for the exercise of mercy, sometimes it was seen to offer the possibility of reform, sometimes a way of suitably peopling a new colony and frequently as a means of ridding English society of undesirable citizens. These varying views had their effect on the number and gender of those shipped to Australia. In the early decades of the nineteenth century, as examination of the appeals system shows, decisions were increasingly being made for political and pragmatic reasons. The Secretary of State and his servants at the Home Office sought to prop up a collapsing capital code as a deterrent to crime, yet attempting not to alienate the growing numbers who wanted reform. They were not driven by humanity but by the need to make it appear that the State had crime under control. In promoting transportation in 1824 as a deterrent form of punishment, Peel spoke against the background of views that life in Australia was so developed that transportation would be an inducement to crime. He was able to justify both his transportation policy, and the high rate of pardons and discharges from prisons because of the pressures on capital punishment and the overcrowded gaols in London.<sup>61</sup>

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<sup>61</sup> Devereaux, 'Transportation, Penal Practices'

The attempts in this period to establish a national penitentiary system were driven by the same pragmatism. The 'temporary' expedient of the hulks had been an obvious practical means of meeting immediate pressures, particularly in London, and a policy of hard labour for strong men (women and weak men were excluded) had gone with it.<sup>62</sup> Expedience continued throughout the period to dominate the way in which male and female convicts were disposed of. When needs for resources in the armed forces were pressing, many more men served their sentences in the army and navy, than in the hulks or in prison.<sup>63</sup> This is not to suggest that the period of the 1780s to 1830s was different in nature from previous periods. Decisions made by governments are frequently based solely on the need to relieve administrative dilemmas.<sup>64</sup>

However, during these years, as the Home Office archive demonstrates, the operation of a significant system of 'automatic' pardons was required in order to find an administrative solution to difficult, if not dangerous, situations and to cope with the overload in various places of confinement – hulks, prison ships and prisons. The need for individually exercised discretion was minimised. Prison and penitentiary keepers had only to calculate the length of time a prisoner had served, verify reasonably good behaviour, and a home or a job for the released convict to go to. Hulk superintendents had a quota of two per cent of prisoners who could be released each quarter. If specified bureaucratic norms were fulfilled, a free pardon resulted. Sick and injured prisoners could also be given free pardons or conditional pardons which saw them removed to the Penitentiary or hospital.<sup>65</sup> Individual discretion is never absent from a State's justice system, but at this point in England it was becoming a less significant instrument.

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<sup>62</sup> Devereaux, 'In Place of Death'

<sup>63</sup> *Idem.* p. 424, Table 1.

<sup>64</sup> For instance, *idem.* p. 414, and note 37, on the large numbers of pardons issued in early 1776. These were not discretionary or based on considered responses to appeals to the King, but were solely to relieve an acute administrative problem, and were dealt with administratively and bureaucratically.

<sup>65</sup> Chapter 7.

Nor does a bureaucratic system operate in an ungendered way. It is apparent that more women than men achieved pardon, a shorter sentence, or service in the Penitentiary, on grounds of dreadful ill-health, much of which seems to have been traced to child-bearing, or long-term illness and disease which had never been treated. Their lesser ability to earn wages in prison meant that they would have been less likely to look after themselves, or indulge in activity which might have improved their lot. Many fewer men were invalided out of the hulks because of illness. Those who were seem to have been moved as the result of injury. Some of these injuries may have been from the harsh work they were required to do, but more seem like the result of fights on board ship.<sup>66</sup> Fewer jobs for women in prison would mean that they did not score so highly in calculations of good behaviour, although many prison keepers and superintendents remarked on their reformed demeanour. The prison keepers' reports show, however, that it was difficult for them to fulfil the criterion of having a job to go to. When disease and overcrowding at Millbank Penitentiary meant that women had to be held on two prison ships, seventeen of them on board the 'Narcissus' were pardoned in May 1824, fourteen of whom were severely ill. At the same time, twenty-one were pardoned from the 'Heroine'. Although the pardon papers were marked 'have friends to receive them', and although Home Office personnel carried out a remarkable exercise in tracing people to take care of them, releases did not begin until three months later, and some on the list were not suitably placed until 5 years later.<sup>67</sup>

We cannot be certain of the final outcome of the journey through the criminal justice system for many of the men and women convicted of shoplifting, pickpocketing and forged note crimes in London and Middlesex. However, this study shows

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<sup>66</sup> For instance, bulk pardons in HO17 Kh30.

<sup>67</sup> HO17, 44 Part I, Gk 27A, GK27B.

particularly clearly the frequent significant differences in male and female behaviour in the carrying out of illegal activities. I conclude that this would have influenced verdicts and sentences. I also argue that paternalism and judicial chivalry, as an outcome of a patriarchally organised society, had an obvious effect on decisions and the exercise of discretion, usually to the benefit of women. This effect was not consistent and could disfavour women. Even when judicial decisions were taken bureaucratically and administratively, women could still be dealt with differently, because of their life experiences as women. Discretion, informed directly or indirectly by the gender of the offender, operated at many different levels and strengths of consciousness, and at varying levels of deliberate policy.

## APPENDIX

### Women executed in London 1780-1832 (So far as possible to trace: See Chapter 6)

<u>Name</u>	<u>Year</u>	<u>Crime</u>	<u>Features</u>
Mary Roberts	1780	Riot	
Charlotte Gardner	1780	Riot	Ragged black woman
Mary Gardener	1780	Riot	Lord Mansfield's house, woman of St Giles, wore "my lady's" clothes, physically violent, verbally feisty
Margaret McLocklin	1780	Assault, steal watch	Forced male victim into house, locked him up, beat him, had a knife.
Ann Martin, alias Harris, alias Lansdale	1781	3 cases of stealing in dwelling	Huge amounts stolen. Servant of one day stole, moved on, did same twice more.
Jane Vincent	1781	Stealing in dwelling	A guinea, two gold rings from mistress
Charlotte Goodall	1782	Stealing in dwelling	Vast amounts stolen
Mary Rawlins	1782	Assault/theft in dwelling	Victim ill, elderly, taken advantage of
Frances Warren	1783	??	HO77 lists execution, no other trace
Mary Moody	1784	Stealing in dwelling	Huge amounts from Lord Teynham – she was left in charge of house when family away five months
Elizabeth Taylor	1785	Burglary in dwelling (a jewellers shop)	Huge haul; resisted arrest at Bow Fair; "there were fifty thieves trying to rescue her"
Phoebe Harris	1786	Coining	Hanged and burned at stake
Margaret Sullivan	1788	Coining	Hanged and burned at stake
Catherine Murphy (alias Christian Bowman)	1789	Coining	Hanged and burned at stake
Mary Peters	1789	Assault/ wounding with knife	Assault on man
Isabella Steward	1791	Stealing in dwelling	Large sum of money from master's sister in law visiting house; false "character", frequently "in liquor", staying out late
Mary Finlayson	1795	Assault, robbery on King's highway	Took money while male held victim - cursed, swore, drunk, vulgar to constable
Mary Fitzgerald	1796	??	HO77 lists execution, no other trace
Mary Nott	1796	Murder	Of French émigré Count
Eleanor Hughes	1796	Murder	Of Russian in her lodging house
Sarah Chandler	1796	Breaking/entering, stealing, jewellers shop	Immense value of haul; jeweller's servant, dressed in men's clothes
Maria Theresa Phippoe alias Mary Benn	1797	Murder	Female friend
Elizabeth Brown	1798	Utter forged bank notes	
Ann Warner (alias Sarah Willis)	1798	Coining	
Ann Hurlé	1804	Forged letter of attorney	Complex scheme with many lies to cheat man's family of their inheritance
Mary Parnell	1805	Utter forged bank notes	"Unfortunate" one eyed, "painted" woman
Elizabeth Godfrey	1807	Murder	
Margaret Barrington alias Crimes	1809	Impersonation to receive prize money	Impersonated seaman's wife

## APPENDIX

### **Women executed in London 1780-1832** (So far as possible to trace: See Chapter 6)

Melinda Mapson	1810	Burglary in dwelling house	Had done same in several houses where she was servant
Catherine Foster	1812	False oath to gain letters of admin.	
Eliza Fenning	1815	Murder	
Elizabeth Fricker	1817	Burglary	Violent, servant, leads young man astray
Sarah Perry	1817	Murder	
Ann Lawrence, alias Woodman, alias Cann	1817	Utter forged bank notes	Member of major selling gang
Mary Ann James	1818	Fraud	
Charlotte Newman	1818	Utter forged bank notes	Brother major seller; believed to work with him & live in house of ill repute
Harriett Skelton	1818	Utter forged bank notes	Husband transported housebreaker
Sarah Price	1820	Utter forged bank notes	
Ann Norris	1821	Robbery on a person	In Newgate before
Ann Chapman	1829	Attempted murder	Of child
Esther Hibner	1829	Murder	Starving child to death
Elizabeth Ross alias Cook	1832	Murder	

*Sources: OBSP; HO77 and HO26 (PRO); Complete Newgate Calendar; The Times, London Chronicle, Sun, London Evening Post, Morning Chronicle and London Advertiser, Morning Herald and Daily Advertiser, St James Chronicle, Lloyds Evening Post, E. Johnson's British Gazette and Sunday Monitor, Gentleman's Magazine, BECLS and Freshfields' Solicitors' papers*

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- 1.2. Official publications
- 1.3. Journals and newspapers
- 1.4. Printed sources

## **2. SECONDARY SOURCES**

- 2.1. Published sources
- 2.2. Unpublished work

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