ABSTRACT

CHILD TESTIMONY AND THE LEGAL DEFINITION OF CHILDHOOD IN EIGHTEENTH-CENTURY LONDON

by Audrea Michelle Bullock

This thesis examines the status of children under eighteenth-century English law. It is divided into three sections: legal treatises, felonious court cases with child victims, and felonious cases with juvenile defendants. It identifies significant differences between the legal treatment of children in eighteenth-century philosophical legal treatises and actual court treatment. It also suggests that children maintained significantly fewer rights than adults under the English system. Though children were theoretically included in all English laws, they could not testify in court and were more likely to be convicted of criminal offences than their adult counterparts.

CHILD TESTIMONY AND THE LEGAL DEFINITION OF CHILDHOOD IN EIGHTEENTH-CENTURY LONDON

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INTRODUCTION

> If their Minds are well disposed, and principle with inward Civility, a great part of the roughness, which sticks to the out-side for want of better teaching, Time and Observation will rub off, as they grow up, if they are bred in good Company; but if in ill, all the Rules in the World, all the Correction imaginable, will not be able to polish them.
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> --John Locke, *Some Thoughts Concerning Education* (1693)

> Children become, while little, our delights,
> When they grow bigger, they begin to fright's.
> Their sinful Nature prompts them to rebel,
> And to delight in Paths that lead to Hell.
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> --John Bunyan, *Book for Boys and Girls* (1686)

On February 28, 1722, eleven-year-old James Lanman was found guilty and sentenced to death for stealing a silver snuff box the value of 20 shillings from Simon Hansel's shop in London.[1] In a similar case from February 1766, Owen Cheslyn stole a metal watch, valued at 21 shillings, from James Bargrove's shop. In Cheslyn's case, the court "acquitted without going into the evidence, on account of his youth, being but 10 years of age."[2] The disparate sentences the court meted out in these two cases tried in the Old Bailey Court in London imply an ambivalent attitude of the English legal system toward youths and their ability to commit crimes. Legal scholars have noted an ambiguity in the court's treatment of children as both criminals and victims in the eighteenth century.[3] This ambiguity has been demonstrated by discontinuities in the court's treatment of children as victims and defendants. Scholars, however, have failed to examine any continuities in juvenile treatment, such as repeated patterns of conviction rates or punishment for juveniles.

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[1] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, 17 June 2003), February 1722, trial of Samuel Armstrong , alias Welshman (t17220228-19).

[2] *Old Bailey Proceedings* , February 1766, Owen Cheslyn (t17660219-8).

[3] Holly Brewer, "Age of Reason? Children, Testimony, and Consent in Early America," in *The Many Legalities of Early America*. ed. Christopher L. Tomlins and Bruce H. Mann (Chapel Hill: University of North Carolina Press, 2001); Julie Gammon, "'A Denial of Innocence': Female Juvenile Victims of Rape and the English Legal System in the Eighteenth Century," in *Childhood in Question: Children, Parents and the State*, ed. Anthony Fletcher and Stephen Hussey (Manchester: Manchester University Press, 1999).

The eighteenth-century revision of the concept of the juvenile includes both ambiguities and consistencies in the court interpretation throughout the period. The continuities that exist in eighteenth-century English law surround the idea of knowing the "nature of oath" and ability to commit criminal actions. Very young children were prevented from either ability; however, the court consistently credited children above ten years with the ability to tell right from wrong. That they possessed this ability allowed children to be convicted of felonious crimes but never granted children full adult status as far as testimony. Because contemporary legal theorists left much of the cognitive ability of children to the court, individual judges played an important role in determining legal treatment in both cases where children were defendants or victims. As defendants, the judges punished children more frequently than adults. As victims, the court failed to convict child attackers in the same rate as perpetrators with adult victims. This ambiguity of legal treatment of juveniles became more pronounced in the latter half of the eighteenth century with drastic increases in the number of juvenile defendants processed and found guilty by the court. This unequal treatment of juveniles reflected English social structures where class and age customs often placed children in very low levels of the hierarchical system.

What are children?

Scholars have failed to develop a consensus for the definition of childhood because it is always characterized in cultural and economic contexts. Many scholars have argued that between the eighteenth and the twentieth centuries, an idealized, sheltered childhood came to be accepted more widely by society.[4] Eighteenth-century children were expected to be useful from an early age, often in the context of agriculture or craft work, daily indoor and outdoor chores, and some forms of domestic outwork.[5] William Defoe noted in 1724 that in Taunton and the villages surrounding it there was not a single child over five years of age who could not earn his own bread in the cloth

[4] Anna Davin, "What is a child?" *Childhood in question : children, parents and the state*, Ed. Anthony Fletcher and Stephen Hussey, (Manchester : Manchester University Press, 1999), 15-37.
[5] J.H. Plumb, "The New World of Children in Eighteenth-Century England," *Past and Present*. 0: 67 (1975), 64-95.

trade.[6] This range of employment opportunities for children was exceptional. Most children employed themselves in a succession of poorly paid but essential odd jobs, including stone-picking, bird-scaring, the collection of mushrooms or berries, and minor agricultural work that added value to the family economic unit.[7]

The most obvious way to identify a child is physical: children are for a number of years smaller than adults and without sexual characteristics. With the decline of menarche from 20 to the current average of 11 years, it is no wonder that the concept of childhood has been changing over time.[8] Age has also been a popular method of identifying childhood. Age differentiated both politically and socially at all levels of society throughout English history. Paul Griffiths discusses the semantics associated with the terms "boys," "girls," "maids," "child," "youth" and "infant" in the courts of early modern England. Griffiths sample from Norwich Mayor's Court and Court of Christ's Hospital in London identifies the term 'boy' with the age range six to 18 years, 'girl' with 10 to 24 years, and 'child' with the age ranges between less than one year to 21 years.[9] This implies a socially agreed upon concept of childhood, but contestation about the age range of a child continued.

In the eighteenth century, youth was widely held to be a preparative period in which individuals acquired the ability to participate in the adult world of work, commerce, marriage, and parental responsibility. Youth was also the period in which children could develop the arts of thievery and crime. The fear of juvenile delinquents counterbalanced the newly developing affection for children illustrated in children's literature and youth's increased importance in art. In the 1700s, English artists began to demonstrate their idealization of children and their concern for juvenile crime throughout didactic and literary works, imagery, and crime reporting in newspapers.

A number of sensational juvenile crimes, such as the often reported 1766 case involving three girls, "the eldest of them, who is under fifteen Years of Age," accused of

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[6] Daniel Defoe. *Tour through the Whole Island of Great Britain*. Ed. Pat Rogers.. (London: Webb & Bower, 1989), v.1, 266
[7] Derek Jarrett, *England in the Age of Hogarth*. (London: Hart-Davis, 1974), 64.
[8] Plumb, 85.
[9] Griffiths, 24-25.

murdering a fourth girl and dumping her body in a ditch outside London, can be found throughout the newspapers of the eighteenth century.[10] In addition, authorities were distressed by gangs of juveniles in urban areas engaged in petty crimes. In 1765, a group of four boys arrested for pick pocketing admitted to being members of a "club of boys" kept by a professional thief.[11] The focus on thieves' kitchens[12] and notorious juvenile crimes illustrates the concern for juvenile delinquency propagated in the popular press.

Though the popular press continued to draw attention to juvenile deviant behavior, art illustrated a dichotomy between innocent children and criminal juveniles. Though portraiture became more popular and more prominent among eighteenth-century newly developing middle class, artists began to record portraits of children in greater percentages than in the seventeenth century. This demonstrates a changing attitude toward the importance of children. These portraits generally depict the children in family scenes or performing activities, such as playing, reading, and sketching.[13] Even with the view of children as innocent victims, many artists continued to depict children as distinctly unchildlike. These images suggest a vision of the child as something less than the playful, good-natured, innocent youth. Some images are humorous, including works such as Sir Joshua Reynolds's *Yong Fortune Teller* that show children mimicking the ways of adulthood. The most revealing of these pictures look at children in a sinister or sexually suggestive light, including the potential, and actual, sexual exploitation of children at the hands of adults. Sir Joshua Reynolds' painting, *The Infant Academy* provides both an example of a sexually suggestive image of children and an image that portrays children as adult-like.[14]

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[10] *Pope's Bath Chronicle*. 16 January 1766; *Pope's Bath Chronicle*. 13 February 1766; *The London Times*. 21 April 1785, 3; *The London Times*. 25 April 1785, 2; *The London Times*. 6 October 1785, 3; *Pope's Bath Chronicle*. 27 February, 1766; *The Virginia Gazette*. 16 July 1772. 2.

[11] Annual Register 1765, quoted in Bayne-Powell, 147.

[12] Groups of young criminals general headed by a professional thief. The name developed from the use of urban kitchens as bases by these organized gangs of criminals.

[13] Plumb, 67.

[14] *The New Child: British Art and the Origins of Modern Childhood*. Available at http://www.bampfa.berkeley.edu/exhibits/newchild/

Old Bailey Court Cases

Legal treatment reflected many of these contemporary popular culture ideas of childhood. Criminal cases involving children often were incorporated into popular entertainment. Beginning in the 1670s, trials at the Old Bailey became the subject of a continuing series that appeared under a variety of titles but adopted the title which it became known throughout the eighteenth century: *The Proceedings of the King's Commission of the Peace and Oyer and Terminer, and Gaol Delivery of Newgate, held for the City of London and County of Middlesex, at Justice-Hall in the Old Bailey…* Like older popular literature on the exploits of notorious criminals in chapbooks, broadsides, and ballads, the early Sessions Papers concentrated on the trials that would be likely to attract an audience and continued similar formats of the older criminal literature. The *Sessions Papers*' early popularity gave way to the regular publication of the reports by the 1680s. With regulation by the court alderman in the late seventeenth century, the *Sessions Papers* began to record most cases tried before the Old Bailey court systematically revealing the numbers of individuals convicted and acquitted, the range of punishments imposed on the guilty, and some demographic information on the defendants. Overtime, the Sessions Papers became more complete and quasi-official in their publication though the more sensational cases received a disproportionate space in the interest of selling copies. Crimes included crimes against property and actions of highwaymen, street robbers, burglars, and thieves of various kinds.

Though described as "the best accounts we shall ever have of what transpired in ordinary English criminal courts before the later eighteenth century," the *Proceedings'* documents contain problems that mar their value as a historical source.[15] These problems center around the representative nature of the records. The *Proceedings* fall short of recording all criminal trials and held at the Old Bailey court. Early editions failed to include a number of trials. This incompleteness proves a significant limitation

[15] John Langbein, "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources", *University of Chicago Law Review* 50:1 (1983), 1-36

to the material. Even with these considerations, the *Proceedings* provide an important source for criminal history especially considering the rarity of these records.

This thesis draws a sample of 640 criminal cases involving juveniles aged seventeen years and younger from the Old Bailey Proceedings Online Project, a recently digitized and indexed database of trial records from the Old Bailey Court in London. This project, funded by grants from the Arts and Humanities Research Board (Resource Enhancement Scheme) and the New Opportunities Fund (Digitisation of Learning Materials Fund), at the University of Hertfordshire and the University of Sheffield, compiled all surviving editions of the *Old Bailey Proceedings* from 1674 to 1834. The sample drawn included those trials explicitly listing ages under seventeen years or text referring to the defendant or victim as a child, such as "infant," "boy," or "girl." This thesis compares the treatment of children in these court cases to their treatment in contemporary eighteenth-century legal treatises. This comparison examines both continuities and discontinuities in children's status under English justice in cases involving the juvenile as criminal and as victim. The text is broken into four chapters. Chapter one surveys literature on children as historical subjects. The second chapter surveys eighteenth-century legal treatises, offering a philosophical approach to court treatment of children. Chapters three and four examine actual cases from the Old Bailey. Chapter three focuses on the juvenile as victims and the last chapter centers on the juvenile delinquent.

PART ONE: FROM THE HISTORY OF CHILDHOOD TO CHILDREN'S HISTORY: HISTORIOGRAPHY SINCE 1960

For the past forty years, scholars of the history of childhood have often identified the seventeenth and eighteenth centuries as the period when the concept of childhood as an "age of innocence" first emerged in Western thought. Historians have chronicled these changing attitudes in European art and literature. They have cited changes both within the family, as parents displayed increasing affection for their children, and in the popular perceptions of childhood, which began to recognize distinctions between infants, children and adults. These scholars have identified decreases in child mortality and increasing economic conditions as the main forces behind these changes.[1] This chapter traces the development of the history of children through its inception in the social constructivist theory of the 1960s, to the sentimental approach of psycho-analytical history of the 1970s, and finally to the focus on actual children and agency in the 1990s. Since the 1990s, scholarship has redirected its focus from the concept of childhood to the individual experiences of children, replacing the history of childhood with the history of children.

The growth of postmodern ideology and numbers of leftists and traditionally marginalized groups entering the historical profession in the 1960s and 1970s created a climate that encouraged the development of a number of historical sub-fields previously ignored by the historical community.[2] These sub-fields, including women's studies, African-American studies, and Jewish studies, have had success in developing into a recognized scholarly community. In particular, women 's studies has achieved "visible and influential presence" transforming itself into gender studies. In turn, it

[1] Anne Higonnet, *Picture of Innocence: The History and Crisis of Ideal Childhood*. (London: Thames and Hudson Ltd, 1998); Edward Shorter. *The Making of the Modern Family*. (New York: Basic Books, 1977); Karin Calvert, *Children in the House: The Material Culture of Early Childhood, 1600-1900*. (Boston: Boston University Press, 1992); Linda Pollock, *Forgotten Children: Parent-Child Relations from 1500-1900*, (Cambridge: Cambridge University Press, 1983).

[2] Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession*, (Cambridge: Cambridge University Press, 1988), 469-503.

produced several splinter sub-fields, including family studies, queer theory, and history of children.[3]

Emerging out of the fields of gender and family studies, the history of children maintains only a relatively minor role in the historical profession. Due mainly to the lack of written historical evidence by youths, children's history has been relegated either to highly theoretical work, such psychohistory, or to legal studies where state-collected evidence is available for juvenile cases. Most historians of children focus on the development of the "concept" of childhood that stresses its social construction. Other work in this field focuses on the history of parental relationships with children, heavily focused on the adult side of the relationship. Evidence for children as subjects or agents in history has proved problematic. Only recently have historians used what evidence exists in reaction against the constructionist ideology that has dominated the field.

Childhood: a Socially Constructed Concept

Social construction theories reject the notion of an objective knowledge of 'truths' waiting to be discovered. Instead, individuals recognize a particular piece of philosophy or scientific theory as 'true' only if it corresponds to the descriptions of truth created by the elite, intellectual and political authorities of the day, or by the prevailing ideologues of knowledge. Historians who approached the history of children with social construction theories focus on the ways individuals think about and use categories to structure their experience and analysis of the world.

The most influential work in the history of children, *Centuries of Childhood* (1962) by Philippe Ariès, relies on Emile Durkheim's attention to social structure in suggesting that the cultural construct of age and aging developed out of socio-economic conditions. Though relying mainly on French evidence, Ariès extrapolates his conclusions to include all of "Western" society. In this work, he identified the increasing separation of children from adults between the tenth to the nineteenth century. Arguing that "in the

[3] Joan W. Scott, "Women's History," in *New Perspectives on Historical Writing*. ed. Peter Burke, (University Park, PA: Polity Press, 2001), 43.

tenth century, artists were unable to depict a child except as a man on a smaller scale," the author suggests that childhood is a very new concept that did not exist during the middle ages.[4] This lack of distinction, however, did not necessitate the ill-treatment of children or a more generous treatment. To the contrary, Ariès argues that once it was appreciated that children were different from adults, they were subjected to a stricter method of rearing and more severe punishments. For the author, the engine of change in the perception of youths was the implementation of universal education.

This socially constructivist approach of Ariès has reappeared in recent historiography. Employing a Marxist and constructivist theory, Eric Hopkins' book, *Childhood Transformed* (1994), attempts to provide a general history of working-class childhood in nineteenth-century England by surveying major legislative and institutional changes and focusing on mining, agriculture and factory work.[5] Agreeing with Ariès' view of cultural construction and the role of education, Hopkins posits a "transformation" of working-class childhood during the nineteenth century as schooling gradually replaced work. According to Hopkins, education provided the government with a "civilizing" process for societal control over misbehaving youths and children and provided these children with the tools for economic and social advancement. Though another recent historian of childhood, C. John Sommerville, departs from Ariès' thesis regarding the role of education in the nineteenth century as the main contributor to the discovery of childhood, he still maintains the idea of childhood as a socially structured phenomenon. Sommerville argues in *Discovery of Childhood in Puritan England* (1992) for the development of the modern ideals of childhood in the Puritan religious movement and the didactic literature precipitated by the movement.[6]

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[4] Phillippe Ariès, *Centuries of Childhood: A Social History of Family Life*, Robert Baldick, trans. (New York: Vintage Books, 1962), 16.
[5] Eric Hopkins, *Childhood Transformed: Working-Class Children in Nineteenth-Century England*, (Manchester and New York: Manchester University Press, 1994).
[6] C. John Sommerville, *The Discovery of Childhood in Puritan England*, (Athens : University of Georgia Press, 1992).

Other historians have combined a socially constructionist argument with biological determinism. In *Children and Childhood in Western Society since 1500* (1995), Hugh Cunningham distinguishes between the biological child and the concept of childhood as a shifting set of ideas. He suggests a continuity of the treatment of children from the medieval to the early modern period. In the eighteenth century, the development of enlightenment literature of John Locke and Jean-Jacques Rousseau signified a change in the conceptualization and treatment of children. Cunningham suggests a transformation "from a prime focus on the spiritual health of the child to a concern for the development of the individual child."[7] Focusing largely on an English-centered account of the rise and spread of the Romantic conception of childhood, Cunningham's work is heavily weighted with post-1800 data.

Psychohistory and the Sentiments Approach

Similar to constructivism in identifying an increasing separation of the concepts of children and adults, psychohistory and the sentiments approach redirected history of childhood to focus on psychological construction of the concept of childhood. Beginning in the 1960s, the field of psychohistory developed out of multidisciplinary group of psychologists and historians attempting to interpret children's history using psychological or psychoanalytical methods. This approach attempts to examine the causes of historical events rather than effects.[8] Arguing that economic, political and sociological factors relate to psychological factors, historians of this genre suggest that traditional fields of historical studies tend to ignore or downplay the psychology of human history. Psychohistory analyzes the personality of the historical actor in convergence with the institutions, events, ideas and values of a period. Lloyd deMause maintains that psychohistory has a double burden of proof: It has to conform not only to the usual standards of historical research, but it also must be psychologically sound.[9]

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[7] Hugh Cunningham, *Children and Childhood in Western Society Since 1500*, (Harlow, Essex: Pearson Education Ltd., 1995), 62.
[8]Rudolph Binion, "Doing Psychohistory," *Psychohistory* 5 (1979): 313-324.
[9] Lloyd DeMause, "The Independence of Psychohistory." *Psychohistory* 3 (1975) 163-183.

In the introduction to *The History of Childhood* (1974), deMause posits that "The further back in history one goes the lower the level of childcare, and the more likely children are to be killed, abandoned, beaten, terrorized and sexually abused."[10] The author posits that "changes in personality occurred because of successive generations of parent-child interactions" and that each generation of parents regresses to the psychic age of their children and work through their own childhood conflicts.[11] Over the centuries, this repetition results in an increasing closeness between parent and child. DeMause sees a linear timeline where in the earliest times parents handled anxiety over children with infanticide, abandonment and indifference. DeMause posits that this parent-child relationship is the "central force for change in history" rather than economics or technology.[12]

Similarly, Lawrence Stone in *The Family, Sex and Marriage in England* (1977) argues that family history mirrors the emotional and intellectual life of the past rather than economic and demographic formulations. Stone states that the strengthening of the bond in family members is perhaps "the most important change in *mentalité* to have occurred in the Early Modern period, indeed possibly in the last thousand years of Western history."[13] The author also sees a historical transformation where families moved from emotional ambivalence to affection and the interest in the individual. Combining economic conditions with the psychological approach, Stone suggests that changes in family life have been both functional and psychological.

In *The Making of the Modern Family* (1976), Edward Shorter posits that industrialization coincided with the development of the nuclear family. Using an essentially economic determinist view, he suggests that "traditional" families in the early modern period included an extended social network of the community, while the related linear family existed merely as an economic unit. [14] Arguing that as the relative

[10] Lloyd deMause. *The History of Childhood*. (New York: The Psychohistory Press, 1974), 1.
[11] Ibid, 3.
[12] DeMause. *The History of Childhood*, 1-75.
[13] Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800*. (New York: Harper and Row, 1977), 151.
[14] Edward Shorter, *The Making of the Modern Family*. (New York: Basic Books, 1977).

income of a family member increased so to did their authority in decision making, Shorter posits that women and children became significant contributors to the family economic unit and much more valuable to the nuclear family. With this increased value, women and children developed more authority within the family to make economic decisions. Shorter even suggests that "Good mothering is an invention of modernization."[15] In his view, children, before the seventeenth century, were held in low esteem, often not regarded as human. This low status continued until the economic viability of children increased due to decreases in mortality and their value as contributors to the family unit increased.

Influenced by the French *Annales* School and incorporating several approaches to historical work, including social psychology, historical demography, and cultural anthropology, John Demos in *A Little Commonwealth* (1970) attempts to reconstruct experiences of children in Plymouth, Massachusetts, in the 1630s in his demographic study of the colony. Falling into the genre of New Social History, Demos' work has greatly influenced the history of children. Arguing for history "rewritten from the bottom up," Demos attempts to illustrate the Pilgrims' sentiments, including their perceptions, ideals, and hopes, by employing non-narrative data, such as vital statistics, property deeds, and settlement records.[16] Applying the psychologist, Erik Erikson's "life cycles" model to his study of the Puritan family, Demos discusses Puritan child-rearing and formation practices, especially the traumatic character formation commencing during the second year and culminating in a "tight cluster of anxieties about aggression."[17]

Demos speculates that crowding in homes combined with the culture's attack upon a child's will created these anxieties. He also contends that the seventeenth century involved little emotional crisis in the transformation from childhood to adulthood. Although criticizing Ariès for failing to "reconstruct" children's lives based

[15] Ibid., 168.
[16] John Demos, *A little commonwealth; family life in Plymouth Colony*. (New York, Oxford University Press, 1970), 7.
[17] John Demos. *A Little Commonwealth*, 134-7.

on physical artifacts, such as space in homes, utensils, furniture, clothing, Demos provides additional evidence for Ariès thesis about the lack of the "concept" of childhood in earlier times, support for the sentiments approach to history, and an example for future historians in the reconstruction of children's lives.

The sentimental approach to children's history continues to maintain a significant presence in children's history. Recent research by Lynn Abrams and Elizabeth Foyster persist in this psychological approach to reconstructing the historical lives of children.[18] For example, the Abrams essay on Scottish welfare suggests that historians have been reluctant to historicize childhood experience. She calls for the use of methodologies utilized by social-welfare practitioners and child psychologists in history "to reach beyond a functional understanding of the impact of welfare policy on those who lived it."[19] These methods allow historians to expand the social constructive approach beyond sociology to incorporate additional social science methods.

The New History of Childhood: Subjects, Agents and Actuality

In the twentieth century, anthropology and sociology contributed new ideas to history and opened the way to the history of cultures. The adherents of the "new social history" sought to replace the previous emphasis of most historians on political history with a range of social and economic concerns. The most influential social historians have been members of the French *Annales* school, such as Marc Bloch and Fernand Braudel, who focused primarily on medieval and early modern European history. Since the mid-eighties, historians of children have incorporated the methodologies of new social historians, including their focus on compiling large datasets and their emphasis on agency.

[18] Lynn Abrams, "Lost Childhoods: Recovering Children's Experience of Welfare in Modern Scotland," in *Childhood in Question: Children, Parents and the State.* Anthony Fletcher and Stephen Hussey, ed. (New York: Manchester University Press, 1999), 152-173.; Elizabeth A. Foyster, "Silent Witnesses? Children and the Breakdown of Domestic and Social Order in Early Modern England," in *Childhood in Question: Children, Parents and the State.* Anthony Fletcher and Stephen Hussey, ed. (New York: Manchester University Press, 1999), 57-74.
[19] Abrums, "Lost Childhoods," 152.

Linda Pollock's *Forgotten Children* (1983) develops what she terms the "actuality of parent-child relations."[20] Using British and American diaries and autobiographies, Pollock disagrees with authors, such as Ariès, Shorter and deMause, who theorize a transition from parental indifference to children to higher quality childcare in the course of modernization. Instead, she proposes the continuity of modern concepts of childhood and childrearing practices. Showing problems with the use of evidence in the work of Ariès, Stone, Shorter and deMause, Pollock scolds historians of childhood for ignoring sociobiology and anthropology where consistent positive parenting has been documented. Disagreeing with earlier authors, Pollock suggests that very few changes in parental care and child life from previous periods have occurred. Instead she suggests the continuity in the emotional connection between parent and child. Despite this suggestion, she continues Ariès and other scholars' argument that those changes outside of the parental relationship that affected children resulted from changes in medical, social and economic conditions.

In diary sources from the seventeenth and eighteenth centuries, Pollock reports positive parent-child relationships and an existing conceptualization of children as different from adults. She states that "the 16th-century writers studied did appreciate that children were different from adults and were also aware of the ways in which children were different—the latter passed through certain recognisable developmental stages; they played; they required discipline, education and protection."[21] Pollock argues that "in the diaries children were seen as developing organisms."[22] Because of recordings of teething, first utterances, and play, the author suggests adult diaries provide a more realistic depiction of contemporary childhood ideology than art or literature.

[20] Linda Pollock. *Forgotten Children*. Cambridge: (Cambridge University Press, 1983), 22.
[21] Linda Pollock, *Forgotten Children*. (Cambridge: Cambridge University Press, 1983), 268.
[22] ibid., 97.

In other anthropological works, such as those by John Newson and Sally Crawford, the continuity of the concept of childhood also is stressed. [23] For example, Crawford's *Childhood in Anglo-Saxon England* (1999),[24] the world of the Anglo-Saxon child is teased out through a careful study of the archaeological evidence of excavated cemeteries and settlement sites as well as the more limited documentary sources. Crawford demonstrates that the concept of childhood in Anglo-Saxon England. This concept does not necessarily coincide with contemporary definitions of childhood. Crawford suggests a more sociological approach to defining childhood within the context of a particular society. Using evidence from heliography, descriptions of the lives of saints, and archeology, she illustrates that parents and caretakers cared and were concerned for children in sickness, death, and other aspects of their lives. Additionally, Crawford illustrates the ambiguity of the transformation from child to adult status in the Anglo-Saxon period.

Other historians have combined Ariès' constructivist approach of the concept of childhood with children's actual experiences. Jacqueline Reinier, in *From Virtue to Character* (1996), attempts to analyze both adults' beliefs about children and children's actual experiences between the American Revolution and the Civil War. Four out of seven of her chapters summarize adult perceptions of childrearing, including Enlightenment and Republican ideology focusing on the idea of "malleable child" and the instillation of "internalized restraint" and "character."[25] Her remaining chapters examine children's experiences at work, in school, and in slavery. Though the nature of her sources, diaries other accounts of children's experiences, tends to skew her analysis toward literate children, Reinier attempts to highlight gender and racial differences among children.

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[23] John Newson, *Seven Years Old in the Home Environment.* (London : G. Allen & Unwin, 1976); Sally Crawford, *Childhood in Anglo-Saxon England.* (Gloucestershire, United Kingdom: Sutton Publishing Ltd., 1999).
[24] Sally Crawford, *Childhood in Anglo-Saxon England*, (Gloucestershire, United Kingdom: Sutton Publishing Ltd., 1999).
[25] Jacqueline Reinier. *From Virtue to Character: American Childhood, 1775-1850. Twayne's History of American Childhood Series.* (New York: Twayne of Macmillan, 1996), xi, 2.

In reaction to the strict social constructivist ideology that dominated the early development of children's history, recent scholars have redirected their focus toward subjectivity and agency of children. These scholars, including Elliot West, Paula Petrik, James Marten, and Paul Griffiths, suggest the active role children play in family relations, economics, and legal battles.[26] This active role, however, does not imply that children maintained absolute control over their lives. These authors recognize the physical weakness and limited cognitive ability of children as well as their role in society.

In *Small Worlds* (1992), Elliot West and Paula Petrik suggest that previous scholarship that has "considered the young as objects and motivators of adult's actions" fails to acknowledge children's own motivations, goals, and acts. The authors propose viewing children "more in the active than in the passive voice."[27] In the introduction of their edited collection of essays, West and Petrik maintain the differences between the culture and the cognitive abilities of adults and children prove problematic in historical studies. These differences led to interpretive issues requiring researchers to "look even more carefully than usual (24)" at non-traditional sources, including photographs, toys, fairytales, and children's texts.

In *Youth and Authority* (1996), Paul Griffiths surveys the attitudes and activities of young people, examining their reaction to authority and to society's concept of the "ideal place" for children and youth in the social order of seventeenth-century England. Griffiths examines a diverse array of topics including juvenile delinquency, masculinity, sexual behavior and courtship, clothing, catechizing, office-holding, and church seating plans that reveal much about the nature of youth culture, religious commitment, master/servant relations, and "masterless" young people in the seventeenth century. His book challenges the usual depiction of children, showing that they had a creative

[26] Paul Griffiths. *Youth and Authority: Formative Experiences in England, 1560-1640*. (Oxford: Clarendon Press, 1996); Elliot West, ed. *Growing Up with the Country: Childhood on the Far Western Frontier*, (Albuquerque: University of New Mexico Press, 1989); Elliott West and Paula Petrik. *Small Worlds: Children and Adolescents in America, 1850-1950*, (Lawrence: University Press of Kansas, 1992); James Marten., *The Children's Civil War*. (Chapel Hill: University of North Carolina Press, 1998).
[27] Elliot West and Paula Petrik, *Small World*, 2.

presence, an identity, and a historical significance.[28] Griffiths argues that young people contributed to their own maturation, combining the world of hospitality and play. Griffiths posits that youth was a compromise between the demands of the governors and children's own preferences.

A number of legal scholars have followed Griffiths' lead in reconstructing children's lives by employing legal documents. These historians combine the new history of childhood approach with the older social construction approach in an attempt to identify reasons for the development of and changes in the legal definition of the juvenile. Many legal scholars focus on the legal "concept" of the juvenile delinquent, while others assert a political rationale for redefining age distinctions. The majority of this work examines juveniles as delinquents, therefore children who stepped outside the boundaries of acceptable behavior.

Since no systematic statistics on juvenile offenders were published before the mid-1830s, few historians have constructed theories regarding the extent and rise of crimes committed by children before this period. Instead, most scholars focus on the late eighteenth and nineteenth centuries. A number of historians argue that the late 1700 and the 1800s was pivotal in the treatment and concept of juvenile criminals and suggest a re-categorization of the juvenile and the laying of the modern juvenile justice foundations during this period.[29] These scholars highlight the key features of the new treatment of juveniles including the concepts of punishment and rehabilitation, the separation of juveniles from adults at all stages of the criminal justice system, and the removal of the child from debilitating domestic environments.[30]

Peter King and John Noel have suggested that before English law stipulated unique treatment for juveniles in the early nineteenth century, youths above seven or eight years old were largely treated similarly to adults and that juvenile crime only

[28] Paul Griffiths, *Youth and Authority: Formative Experiences in England, 1560-1640*, (Oxford: Clarendon Press, 1996), 23-5.
[29] Predominately Peter King, Joan Noel, and Heather Sore.
[30] Ibid., 116-165.

became popularly perceived as a significant problem late in the eighteenth century.[31] They suggest that in the eighteenth century delinquents were rarely indicted in the courts and that contemporaries did not regard them as a particularly "threatening problem."[32] In *Artful Dodgers: Youth and Crime in Early Nineteenth-Century London* (1999), Heather Shore also identified the nineteenth century as a period of redefinition of juvenile punishment but suggests legal precedents and popular movements beginning in the late seventeenth century.[33] Griffiths posits that children have long maintained a differential status under English law. He identifies children in the sixteenth century who maintained a special status in various court processes.[34]

Though extensively examining juvenile criminals throughout these periods, these authors fail to examine court treatment of child victims.

A few legal scholars attempt to correct this oversight. Most notably, Julie Gammon and Holly Brewer illustrate ambiguity in the court's acceptance of children's testimony. Gammon, examining English cases involving juvenile rape victims, suggests that ambiguity of the concept of children retarded the court's ability to prosecute child rapists.[35] Brewer, in her investigation of early American court records, combines both cases involving juveniles as victims and cases of children's legal consent. The ramifications of the new interpretations of age restrictions and legal precedents went

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[31] Peter King, "The Rise of Juvenile Delinquency in England 1780-1840." *Past and Present*. 160 (1998), 115-134; Peter King and 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*. 14 (1993), 17-41.

[32] Peter King and J. Noel "The Origins of 'the Problem of Juvenile Delinquency.", 116.

[33] Heather Shore, *Artful Dodgers: Youth and Crime in Early Nineteenth-Century London*. (Suffolk: The Boydell Press, 1999); Heather Shore. "Re-inventing the Juvenile Delinquent in Britain and Europe." in *Becoming Delinquent: British and European Youth, 1650-1950*. Heather Shore and Pamela Cox, ed. (Hampshire: Ashgate Publishing Limited, 2002). 1-23.

[34] Griffiths, Paul. *Youth and Authority: Formative Experiences in England, 1550-1640*. (Oxford: Charedon Press, 1996); Paul Griffiths, "Juvenile Delinquency in Time," in *Becoming Delinquent: British and European Youth, 1650-1950*. Heather Shore and Pamela Cox, ed. (Hampshire: Ashgate Publishing Limited, 2002), 23-40.

[35] Julie Gammon, "'A Denial of Innocence,'" in *Childhood in Question : Children, Parents and the State*, ed. Anthony Fletcher and Stephen Hussey, (Manchester : Manchester University Press, 1999), 74-95.

beyond protection of individual children; Brewer argues that redefining age restrictions changed both personal legal rights and political power in the new Republic.[36]

Conclusion

Since the development of children's history in the mid-1960s, the field has moved from its original focus on social constructivist theory exemplified in Ariès' thesis, to the psycho-historical approach, and finally to its recent emphasis on actual experiences and agency of children. From the 1960s to the 1970s, social constructivists identified changes in the treatment of children from the early modern period to present. They suggested the development of the concept of childhood occurred in the eighteenth century. Psychohistory expanded this concept of childhood into the realm of the sentiments. Emphasizing changing parental relationships, these historians argued that prior to the eighteenth century parents often neglected and sexually abused their children. Recent historians stress continuity in childhood experiences and attempt to rewrite the historical narrative with the inclusion of children as active participants illustrating their economic and social contribution to society. Legal historians have combined both the social construction approach and the emphasis on case examples in exploring both the experiences of youth and the concept of childhood through legal records. Yet, the scholarship has failed to examine differences and similarities between victims and defendants in criminal cases.

[36] Holly Brewer, "Age of Reason? Children, Testimony, and Consent in Early America," in *The Many Legalities of Early America*, ed. Christopher L. Tomlins and Bruce H. Mann, (Chapel Hill : Published for the Omohundro Institute of Early American History and Culture, Williamsburg, Virginia, by the University of North Carolina Press, 2001), 293-332.

PART TWO: SEVENTEENTH- AND EIGHTEENTH-CENTURY INFANCY LAWS AND JURISTS

Eighteenth-century English Common Law maintained "a very great and tender Consideration for Persons naturally disabled, and especially for Minors."[1] Though a 1782 royal decree commanded that the youth or the agedness of the convicted individual to be taken into account, statutory law failed to distinguish fully between children and adults until the mid-nineteenth century.[2] The inconsistent nature of common law, combined with lack of statutory support and reform-minded Enlightenment principles, led to the publication of a number of texts written by leading legal authorities designed to clarify common law by absorbing legal proofs and procedure. These books discussed the common law itself through presentation of the causes of actions and issues, followed by a presentation of either the elements of legal pleading and procedure or the maxims of the common law.[3] Legal scholars have argued that notable jurists, such as Edward Coke, Matthew Hale, William Blackstone and Edward Hyde East, comprised a broad movement to rationalize, clarify and reform English law in the seventeenth and eighteenth centuries.[4] This movement began in the seventeenth century from the theoretical debate about the nature and roots of political authority.

This chapter will examine treatment of juveniles in a number of these legal texts including: Michael Dalton's *The Country Justice* (1690); the anonymous work, *The Infant's Lawyer* (1697); William Hawkins' *A Treatise of the Pleas of the Crown* (1724-26); Sir Mathew Hale's *The History of the Pleas of the Crown* (1736); and William Blackstone's *Commentaries on the Laws of England* (1765-1769). These treatises suggest that the legal status of juveniles remained ambiguous and that much legal discretion on the treatment

[1] *The Infants Lawyer: Or, the Laws (Both Ancient and Modern) Relating to Infants*, (London: 1697), 1A, *Early English books*, 1641-1700 (Microfilm) (Ann Arbor: University Microfilms International, 1984).
[2] John Beattie, *Crime and the Courts in England, 1600-1800*, (Oxford: Oxford University Press, 1986), 440.
[3] Lisa A Perry, "Legal Argument in Eighteenth-Century England: Clearing the Bar." 12th NCA/AFA Conference on Argumentation, Alta UT, August 1999.
[4] Holly Brewer, "Age of Reason?: Children, Testimony, and Consent in Early America," in *The Many Legalities of Early America*, Christopher L. Tomlins and Bruce H. Mann, eds. (University of North Carolina Press: Chapel Hill, 2001), 294.

of children both as victims and as criminals was left to the court throughout the eighteenth century.

Consistently throughout these legal treatises, scholars identify infancy as "an Age of Impotence, Weakness and Disability," an age where individuals were considered incapable of managing their "Concerns with Discretion and for their better profit and Advantage."[5] Jurists placed children into legal categories similar to *feme coverts* (women) where they received special consideration under the law. These considerations included the differential treatment of juveniles accused of felonies and misdemeanors, modified punishments for those convicted of such offences, the ability to testify in court, and special considerations for property law. Both William Blackstone and Mathew Hale argue that young children fall under the category of 'incapacities of defect of will.'[6] This incapacity prevents children from understanding the depth and consequences of criminal actions, both those perpetrated by and those targeting young children. From birth until the age of discretion, children existed in this legally sheltered status. Michael Dalton suggests that women and children could not be convicted of rioting without the presence of a man over the age of discretion. For Dalton, other criminal offences seem to be open to infants. In reference to felonious crimes, Dalton states that "An Ideot, Lunatick, [sic] Dumb or Deaf Person, and an Infant, are chargeable in Larceny, after the same sort as they are chargeable in Homicide."[7] Hale argues that incapacities, including infancy, are not excuses for civil offences such as trespass and batteries, but in "cases of crimes and misdemeanors…the law in some cases, and under certain temperaments take notice of these defects, and in respect of them relaxeth [sic] the severity of their punishments."[8] Determining the

[5] *The Infants Lawyer*, 12-13.
[6] Matthew Hale *Historia placitorum coronae*, *The History of the Pleas of the Crown* (London : Professional Books, 1971), 159; William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, Vol. I-IV, (Chicago: The University of Chicago Press, 1979), 35.
[7] Michael Dalton. *The Country Justice: Containing the Practice of the Justices of the Peace out of their Sessions.* (London: Printed by William Rawlins and Samuel Roycroft, assigns of Richard and Edward Atkyns, and are to be sold by Samuel Keble, 1690) Microfilm. Ann Arbor, Mich. : University Microfilms International, 1983
[8] Hale, *The History of the Pleas*, 16.

point of infancy and adulthood on the lifecycle of individuals became significantly important to eighteenth-century legal theorists.

Though largely not distinguishing between males and females with regard to oath-taking and criminal and civil legal cases, the age of discretion became a particularly ambiguous area for identifying infancy. Almost all of the authors examined listed age limits as reference points for identifying the stage of infancy. The *Infant's Lawyer* sets the minimum age limit for the age of discretion at fourteen years but offers the age of twelve years for women in marriage contracts.[9] The *Infant's Lawyer* suggests that a child above the age of fourteen years could be "outlawed," designating the child as someone who because of criminal acts had to forfeit his or her property to the crown and could be killed without recrimination by any citizen.[10] Hale and Blackstone also identify the age of fourteen, regardless of sex of the child, as the age of discretion in what Hale terms "*aetas pubertatis*," the point where a child enters adulthood.[11] Hale and Blackstone further subdivide infancy into three age groupings. These groupings were graduated in intellectual capability and included the following age ranges: ten and a half to thirteen years, eight to ten and a half, and zero to seven years. These graduated levels of intellectual capability created ambiguity in the legal culpability of youths on the cusp of the age of discretion. Theorists believed that older children had the potential for adult comprehension. This potential, however, was not guaranteed.

All the examined treatises posit that the court could not find children under seven years of age guilty of felony. Children under seven years were *doli incapax* or incapable of criminal intent. At this age, Blackstone argues that "a felonious discretion is almost an impossibility in nature."[12] At eight years of age, Hale and Blackstone argue that children could be convicted of criminal actions. Though they argue that children between fourteen and eight years "shall be *prima facie* (at first sight) adjudged to be *doli*

[9] *Infant's Lawyer*, 22.
[10] *Infant's Lawyer*, 22.
[11] Hale. *The History of the Pleas of the Crown*, 18.
[12] Blackstone, Book 4, 23.

incapax," the court and jury could assign adult status to these children based on perceived intellectual capability.

Hale, Blackstone, and Hawkins identify the ability to "discern between good and evil" rather than age requirement as the main determinant for adult treatment in criminal actions.[13] Hawkins also acknowledges the importance of distinguishing between good and evil arguing that "an Infant under the Age of Discretion could distinguish between Good and Evil, as if one of the Age of nine or ten Years kill another, and hide the Body, or make Excuses, or hide himself, he may be convicted and condemned, and forfeit, as much as if he were of full Age."[14] Blackstone also repeats this line of argumentation suggesting that "hiding manifested a consciousness of guilt, and a discretion to discern between good and evil."[15] Instead, "the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment."[16] The legal theorists thus left the responsibility for determining the status of infancy to the court judge.

All the legal treatises state that children under fourteen could be convicted of crimes but the punishment for children should differ from adult punishment. This differentiation proved contentious for the legal theorists. The *Infant's Lawyer* argues that "Statues which give Corporal Punishments shall not extend to Infants."[17] The treatise, however, cites numerous counterexamples where children were sentenced to prison terms and physical punishments, such as branding and public whipping and argues that a child above the age of discretion and convicted of "Criminal Actions, and Wrongs, and Injuries done to the Person, or Estate of another," could be sentenced to military service.[18] This implies that the opinion of the court judge determines both the convictability and the severity of punishment meted to children. Dalton argues that an "Infant (though of years of discretion, yet he) shall suffer no Imprisonment, nor other

[13] Hale, *The History of Pleas*, 26.
[14] William Hawkins, *A treatise of the pleas of the crown; or, A system of the principal matters relating to that subject, digested under their proper heads* (New York: Arno Press, 1972), Book 1, 2.
[15] Blackstone, Book 4, 23-4.
[16] Blackstone, Book 4, 23.
[17] *Infant's Lawyer*, 15.
[18] *Infant's Lawyer*, *22.*

Corporal Pain, for any Offence committed or done by him against any Statute, except that an Infant be expressed by name in the Statute."[19] Hale suggests that "General statutes that give corporal punishment are not to extend to infants,…but where a fact is made felony or treason, it extends as well to infants, if above fourteen years, as to others."[20] Hale suggests that children below ten and a half years are "regularly not liable to capital punishment…but this holds not always true."[21] Hale cites a number of court cases where children ages eight, nine, and ten years were sentenced to death. He states that children below seven years cannot be convicted of any offence and therefore not punishable. Instead, "the infant may be chastised by his parents or tutors, but cannot be capitally punished, because he cannot be guilty; and if indicted for such an offense as is in its nature capital, he must be acquitted."[22] When children under fourteen were convicted of capital offences, Hale argues that evidence against the child should be "very strong and pregnant" and the child had to understand the crime committed.

Hale states that the determination of the capability of children to commit crimes should be left "*ad arbitrium judicis* [to the judgment of the judge] upon the circumstances of the case."[23] If the judge found the child guilty of the indictment, he also determined the level of punishment. In instances where infants were found guilty of felonies, the role of the Justice of the Peace and the trial judge, Dalton argues, was to respite judgment.[24] Hale also identifies the role of the judge to "reprieve before or after judgment an infant convict of a capital offence in order to the king's pardon, yet [the law] allows no arbitrary power to the judge to change the punishment that the law inflicts."[25] Offering a stay in punishment allowed children to appeal to the Privy Council for clemency.

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[19] Michael Dalton. *The Country Justice*, 446.
[20] Hale, *The History of Pleas*, 21-22.
[21] Hale, *The History of Pleas*, 18.
[22] Hale, *The History of Pleas*, 19-20.
[23] Ibid, 18.
[24] Michael Dalton. *The Country Justice*, 375-6.
[25] Hale, *The History of Pleas*, 19.

In addition to whether children could be criminally liable for felonies and misdemeanors, other court behavior proved contingent on the intellectual ability. Offering testimony, whether for themselves or in another's case, children proved problematic for legal scholars. Infant confessions and victim testimony particularly elicited similar reactions as to child criminals from the legal theorists. Similarly, judges determined the acceptability of child testimony, whether self-incrimination or not, identifying the ability to "discern between good and evil" on a case-by case basis.[26] Blackstone argues that infants of any age should have the right to testify where they understood the nature of oath.[27] Generally, courts could not convict on the basis of an infant's confession or testimony. The judge, however, identified the acceptability of testimony by children. Limiting those who qualify to testify in criminal cases created situations where the assaulter was found not guilty despite corroborating evidence. Most legal authorities suggested a combination of child testimony and evidence requiring the jury to "enquire at large of all Circumstances."[28] Edward Hyde East, in particular, argued that infants under twelve years of age should testify in court but required additional proof of "concurrent testimony of time, place, and circumstances, in order to make out the fact."[29]

Throughout the seventeenth and eighteenth centuries, infants could not generally "make Oath" or initiate legal actions.[30] Hale notes that "instances have been given of very young witnesses sworn upon evidence in capital causes" and that the court has accepted child testimony without oath in crimes disproportionately committed against children, such as rape, witchcraft and buggery.[31] This testimony, Hale suggests, should be combined with "concurrent evidences" to secure conviction. Hawkins posits that infant testimony "may be excepted against; for in some Cases an

[26] Blackstone, book 4, 23.
[27] Blackstone, book 4, 241.
[28] *Infant's Lawyer*, 19.
[29] Edward Hyde East. *Pleas of the Crown*. (London: Professional Books Limited, 1972), 441.
[30] *Infant's Lawyer*, 22.
[31] Hale, *The History of the Pleas*, 283-4.

Infant of nine Years of Age has been allowed to give Evidence."[32] Blackstone argues that "an infant under twelve years of age, may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath."[33] This ambiguity allowed judges significant leniency in allowing testimony in criminal suits and calling for the instruction of child witnesses.

Though children maintained a special status as criminal perpetrators, few laws existed to shelter children from abuse by adults. Instead, children typically fell under legislation designed to protect adults with the exception that parents and other adults with authority over children were permitted to moderately correct their charges. Hawkins argued that infancy prevented children from bringing prosecutions except through a guardian. Two exceptions to this case were infanticide laws and statutory rape which offered special status to child victims requiring less evidence for conviction of an adult perpetrator. Though infanticide laws only applied to newly born infants, statutory rape laws applied to female children under ten years of age, required less proof for conviction than other felonious rape laws.

Hale convinced that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."[34] In all rape cases, courts struggled with confusion over the sufficiency of evidence required to show the actual commission of the offence of rape. All courts agreed that penetration was an essential element. Some said that for rape to have occurred the hymen had to be ruptured; most, however, disagreed with that view. Some said that the evidence must show the emission of semen, but a significant body of authority disagreed with that view as well. Additionally in cases of adult women evidence of resistance had to be clear, as shown by marks of injury, disordered clothing or

[32] Hawkins, 434.
[33] Blackstone, book 4, 214.
[34] Hale, 258.

eyewitness testimony. Under eighteenth-century law, it was not enough for a victim to claim that she had simply been cowed into submission.[35]

A sixteenth-century statute defined rape as "the carnal knowledge of any woman above the age of ten years 'against her will', and of a woman child under the age of ten years with or against her will."[36] Hale was of the opinion that "such profligate actions committed on an infant under the age of twelve years, the age of female discretion by the common law, either with or without consent, amount to rape and felony."[37] Blackstone, Hawkins and Lord Coke placed the age limit for the victim of statutory rape at ten years. Though there was some disagreement between authoritative writers on the appropriate age, most argue that where the complainant was younger than ten years of age, consent was immaterial.[38] Female children under the age of ten years theoretically did not have to prove utmost resistance in statutory rape cases. For children above ten and under twelve years statutory rape with 'consent' only resulted in a misdemeanor conviction. Male children perpetrating rape also found special status under common law. Blackstone argues that a "male infant, under the age of fourteen years, is presumed by law incapable to commit a rape."[39]

The status of children, at least in the theoretical constructs of these legal treatises, remained ambiguous. Common law sheltered children under seven years from convictions and state-sponsored corporal punishment. Legal theorists left determination of intellectual capability of children from ages eight to thirteen years to court judges. Though with some constraint, legal scholars assumed differences in intellectual ability in each case. The construction of case law, court decisions based on previous judicial decisions, throughout the eighteenth century formed a complex understanding of children and their intellectual capability. The actual applicability of

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[35] Georges Vigarello, *A History of Rape: Sexual Violence in France from the 16th to the 20th Century*. (Oxford: Polity Press, 2000), 25-7.
[36] 18 Eliz. C.7.
[37] Hale, supra, Vol I, p. 631.
[38] Coke, Hawkins, Edward Hyde East, and Blackstone all say the age was ten. Hale said that they were wrong, and maintained that the appropriate age was twelve: *History of the Pleas of the Crown*, Vol. 1, 628 and 630-1.
[39] Blackstone, Book 4, 212.

these legal theories of infancy discussed by Blackstone, Hawkins, Hale and others to case law will be examined throughout the following two chapters.

PART THREE: YOUNG VICTIMS: RAPE, SODOMY, AND MURDER

> On Monday last, one Jones was committed to Newgate, for committing rapes on the bodies of two children near Cow-Cross, one deaf and dumb, the other blind; the eldest not 12 years old.
>
> -- *London Journal*, 27 June 1730

> James Bell was tried, being charged on oath, on suspicion of having forced and carnally known Susanna Man, a child not 10 years old, and being found guilty of the assault, was sentenced to be two years imprisoned, to pay a fine of 20 marks, and to remain in gaol till the said fine is paid.
>
> -- *Daily Journal*, 3 August 1730

English law was one of the few European legal codes to specify and prosecute crimes that targeted children, such as statutory rape and sodomy, in the first half of the eighteenth century. France and other continental states did not begin to prosecute child rape separately as a particularly heinous crime until after the mid-eighteenth century.[1] Since the sixteenth century, the statute against child rape appeared in English law and required a mandatory death sentence for those convicted. Though this special statute targeted the protection of children in sexual assault and English law implicitly included children in other property and criminal codes, the rate of prosecution of individuals that victimized youths remained very low throughout the century. In this period, children remained under the legal control of parental and other adult caretakers under the patriarchal legal system limiting juveniles' legal recourse for criminal actions. Cases with child victims tried in the court system stepped outside acceptable treatment to children. As such these court cases provide not only information on unacceptable behavior toward children, but also how the court conceived of appropriate children's behavior, their cognitive ability, and how age relates to maturation.

This chapter examines court cases involving child victims from one and seventeen years old tried before the Old Bailey Court in London between 1714 and 1799. This age range was chosen to examine the transformation from child to adult status under the law without focusing on the much researched crime of infanticide. This

[1] Georges Vigarello, *A History of Rape: Sexual Violence in France from the 16th to the 20th Century*, Jean Birrell, trans, (Cambridge: Polity Press, 2001), 78-80.

chapter begins with a demographic look at the Old Bailey cases involving child victims, then examines particular felonious crimes committed disproportionately against children in the London area.

Though the percentage of felonious cases with child victims only constituted a small percentage of the total cases brought before this court, violence against children likely was much more common in the London area. Eighteenth-century legal proceedings did not necessarily include age information about victims or defendants. This, combined with the inability of children under twelve years to bring suit, lack of specific legislation designed to protect minors, and requirements of legal fees for prosecution, led to the under representation of children in the court room. (For more information on how felony cases were brought before the sessions courts during the eighteenth century, see Appendix A.) Though this sample of court cases proves problematic for establishing the rates of child victims in criminal suits, it does establish in what cases the public demanded retributive justice, the relative frequency of heinous crimes committed on children, and crimes where children and their families sought redress for loss of honor or goods, or for assault.

Demographic Information

From 1714 to 1799, the number of felonious cases brought to court involving child victims peaked between 1716 and 1725 at 53 cases, roughly 26 percent of the total number of cases of recorded crimes against children in this period. After this initial peak, the frequency of cases with child victims decreased throughout the remainder of the eighteenth century as figure one illustrates. In this period, the total felonious cases tried before the Old Bailey Court followed the opposite trend (see figure two). This implies that while the prosecution of crimes increased in the eighteenth century, the prosecution or the occurrence of crimes that specifically targeted children decreased. This drop in the prosecution rate occurred at a time when the often cited 'Age of Reason' and the development of new attitudes towards juveniles would lead us to expect such a decline.

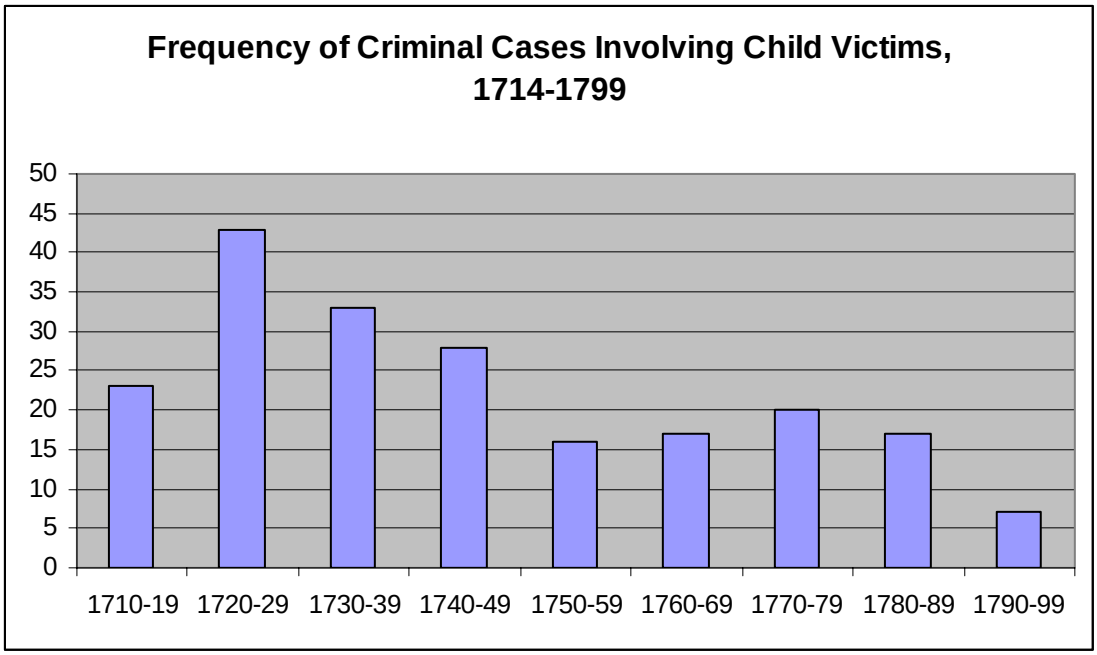

Figure 1: Number of court cases involving child victims tried at the Old Bailey Court, 1714-1799.

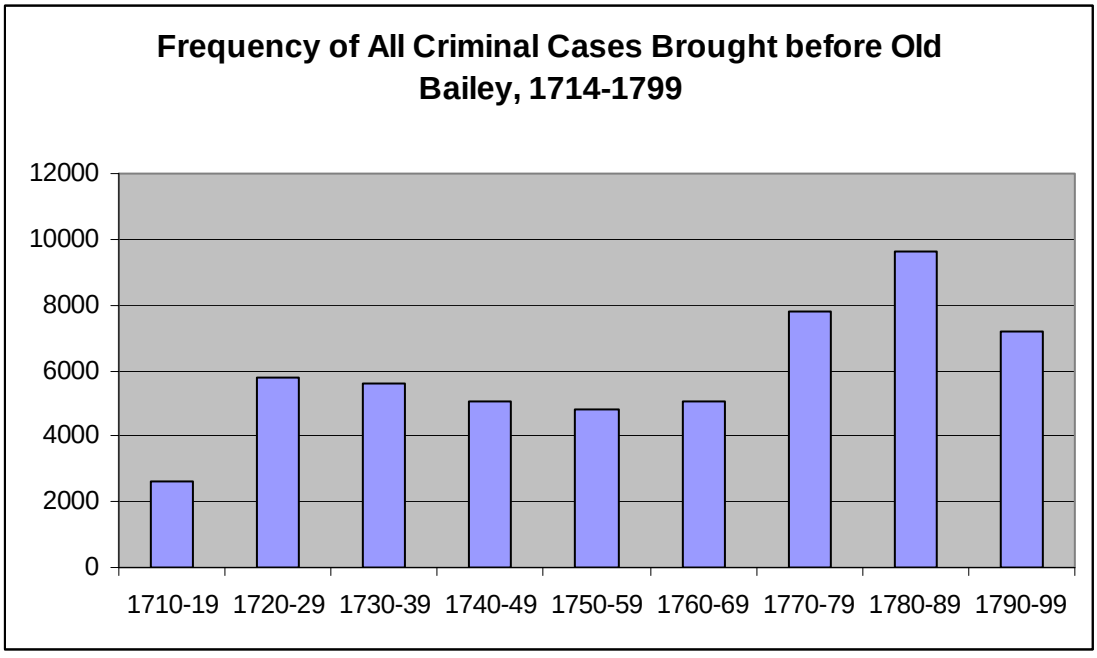

Figure 2: Total number of criminal cases brought before the Old Bailey Court, 1714-1799.

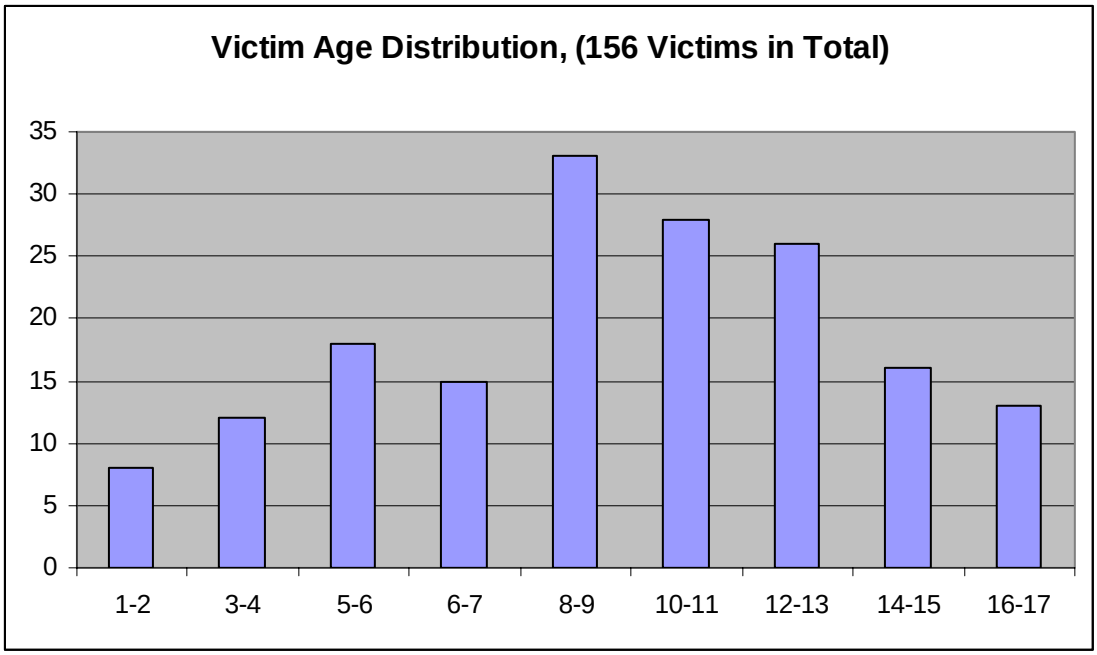

Figure 3: Age distribution of child victims, 1714-1799.

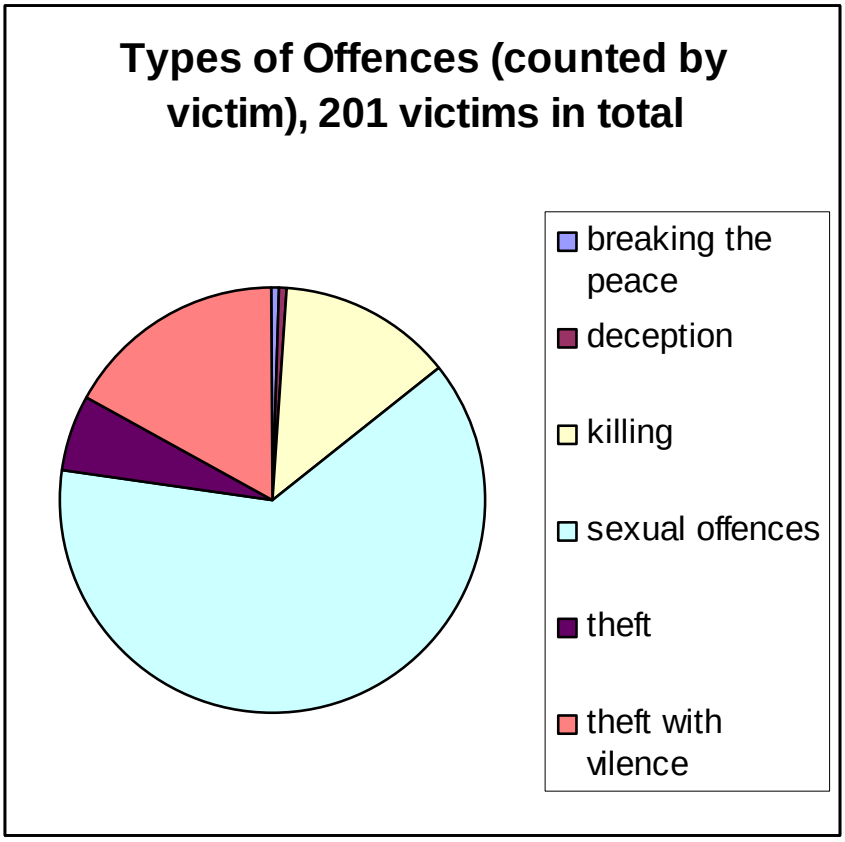

Figure 4: Types of crimes in cases with juvenile victims, 1714-1799.

The age range of child victims clustered around nine years of age as figure three illustrates. Several possible reasons might explain why children around this age were more likely to be victimized than older or younger children. First, cases involving older children likely did not refer to age during the court trial, instead identifying them as young adults rather than as children. Second, the ability of children under eight years to recount traumatic experiences and to be believed in both a magistrate preliminary hearing and a grand jury trial prevented the criminal suits of small children. As chapter two illustrates, eighteenth-century judges continually questioned children's abilities to take an oath. Unfortunately, very few records that recorded information from magistrates' preliminary trials or grand jury bills exist for this period to test the second hypothesis. Finally, children near nine years could have disproportionately been targeted as victims. These children were often placed in situations without adult supervision while employed or in their living arrangements. This created situations of abuse, oftentimes sexual, by those adults who had contact with children in their workplaces or homes. Figure three shows the division of crimes in cases with child victims. The overwhelming majority of crimes with child victims are sexual offenses, a total of 124 cases, followed by theft with violence, 34 cases, and killing, 26 cases.

Conviction also differed in cases where an adult targeted juvenile victims. Cases with child victims had a significantly lower rate of conviction than overall conviction rates at the court. The Old Bailey found the accused guilty in 23 percent of the cases with child victims compared to overall guilty conviction rate of 39.7 percent. In a number of cases the court issued a guilty verdict for a lesser crime. This partial guilty verdict percentage at nearly 12 percent also failed to equal the overall percentage ratio of partial guilt verdicts. Figure four illustrates the various forms of conviction rates for both the overall Old Bailey population and those cases involving juvenile victims. In eighteenth-century London, individuals who targeted children were much more likely to be exonerated for their crime than those who targeted older individuals.

	Guilty	Acquitted	Part Guilty	Special Verdicts	Other	Total
All Old Bailey Cases	22,372	22,647	10,220	205	930	56,374
Old Bailey Cases with Child Victims	48	129	25		2	201

Figure 5. Types of verdicts at the Old Bailey Court for all cases and cases with juvenile victims, 1714-1799.

Punishments issued by the court in cases involving juvenile victims also fail to resemble those of all Old Bailey cases with guilty or partial guilt verdicts. Instead, Old Bailey Court meted much more severe punishments to those convicted of victimizing children. In 73 of the 75 cases found guilty of committing a crime with a juvenile victim the perpetrators received punishment from the court. Of those 73 cases, the court issued a sentence of death for nearly 44 percent. Other forms of punishment included transportation (21.9 percent), branding (16.4 percent), and fines or imprisonment (10.9 percent). This compared to the most common punishment for guilty or partial guilt verdicts for all cases tried at the Old Bailey as transportation (55 percent), followed by death (15.7 percent) and multiple punishments (10.8 percent). This implies that those found guilty of crimes against children were more likely to be severely punished (44 percent received death sentences as contrasted to almost 16 percent).

The court continued to treat child victims differently from their adult counterparts throughout the eighteenth century. Though punishment seemed more strenuous in cases where individuals were found guilty of crimes against children, the probability of the court issuing a guilty verdict was significantly lower in those cases. The court only punished particularly heinous crimes towards children with the laws of England. Differences in prosecutable crimes, conviction rates for perpetrators, and even differences in punishment resulted in the court's condoning criminal actions that targeted children. The remainder of this chapter will examine specific court treatment of child victims by criminal action focusing on the court's prevention of child testimony and requirements of physical evidence in those crimes disproportionately brought by child victims.

Sexual Offences: Rape and Sodomy

The court oversaw two types of sexual offences with child victims. These crimes, rape and sodomy, proved particularly problematic for the juvenile victim. In addition to the dealing with horrific nature of the crime, these victims had to establish sexual innocence and proof of the commission of the crime. Throughout this period, judges struggled with children's ability to testify against their sexual predator. Though the courts reaction remained mixed throughout the eighteenth century, it excused most sexual perpetrators with juvenile victims.

The majority of child victims, 112 cases, involved female rape victims with adult sexual predators. With only 18 perpetrators convicted of child rape, the conviction rate was substantially lower than other felonious crimes. Though the court failed to convict most statutory rape cases, the majority of perpetrators were "detained to be tried next sessions for an assault upon the child, with an intent to commit a rape"[2] Conviction of a non-felonious assault case resulted in fines and prison terms. The remaining ten sexual offence cases revolved around sodomy or "sodomitial" intent. Because of the nature of this crime, the court prosecuted even an assault case as a felonious crime. All ten of these cases had a young male victim with an older male assaulter. Of these sodomy cases, only four of the defendants were found guilty. The court sentenced the two convicted of sodomy to death and the two convicted of sexual assault to a fine, pillory, and imprisonment.

In the eighteenth and nineteenth century, English courts struggled in confusion over the sufficiency of evidence required to show the actual commission of the sexual offences. Legally, rape and sodomy both required penile penetration of the vagina or anus, oftentimes ejaculation and that the act was committed without consent (unless a female victim was under the age of ten), as well as corroboration to protect individuals from false accusations. Physical evidence and adult witness accounts proved necessary for any conviction. Additionally, much of the contemporary medical literature supported the belief that, absent extraordinary force and violence, it was impossible to

[2] *Old Bailey Proceedings* , December 1757, Thomas Crosby (t17571207-14).

commit a rape upon a woman who had full possession of her faculties. For female children, the court viewed cognitive abilities as paralleling sexual maturity. If a child over ten years had forced sexual intercourse, she faced accusations improper or "impudent" behavior. Cases involving children close to the age of discretion more closely resembled adult-rape cases without the benefit, in many cases, of victim testimony.

For child rape cases, physical battery in addition to sexual assault had to be proven in court. A threat of force was the equivalent of force in the law, but the victim could not claim that she had been frightened into submission. In 1778, the court refused to accept the explanation for lack of resistance given by a twelve year old workhouse inmate raped by her father in the course of one of his visits to her: "I said I would tell my mistress; he said if I did he would never come and see me any more."[3]

Child testimony proved important contribution to conviction in rape and sodomy cases. Though physical evidence was needed in conjunction with oral testimony of children and their witnesses, the court's opinion about the ability of a child's oath-making determined the outcome in cases where physical evidence abounded. In *R. v. Bourn and Penn* (1723), the presiding judge decided "as to the Knowledge she (the prosecutrix) had of the Nature of an Oath, not giving the Court a satisfactory Answer, was not permitted to swear: And so the Evidence against the Prisoners not coming up to what the Lawer [sic] requires."[4] Without the testimony of the ten-year-old Catherine Black, the court chose to hold Bourn and Penn in gaol until sureties for their good behavior could be met by the prisoners. Other cases followed this practice of allowing statements, but not full testimony of children.[5] Often the court examined juvenile witnesses, but refused to do so under oath.[6] Even if examined under oath, the "Jury not thinking the Evidence of so young a Child sufficient to convict the Prisoner," oftentimes failed to convict based on child testimony even while admitting it

[3] *Old Bailey Proceedings* , January 1779, Philip Sherwin (t17790113-36).
[4] *Old Bailey Proceedings*, October 1723, Gerard Bourn and Jonas Penn and (t17231016-52).
[5] Seven-year-old Sarah Jacobs made a statement per the jury's request in *Old Bailey Proceedings* , December 1759, Aaron Davids (t17591205-25).
[6] *Old Bailey Proceedings*, April, 1768, William Stringer (t17680413-47).

into evidence.[7] In most cases of children under ten years of age, the court held that the "child was not capable of being admitted to give its evidence upon oath."[8]

In cases where the court sought children's testimony, the judge or representative of the crown often inquired about ejaculation to substantiate rape. In *R. v. John Hunter* (1747) following the judge's questioning of Grace Pitt and whether ejaculation occurred in her rape, the ten-year-old testified that "there was wet just as he was about to take it out; there was something wet, I felt it, and some of it went into me, and some of it I saw afterwards upon the Ground; it was in me a little way, but a very little way."[9] In 1733, nine-year-old Mary Faucet, testified that she "I felt something" but did not know what and that "it was wet; and when he had wetted me he got off."[10] These children chose their wording carefully. In 1715, twelve-year-old Mary Marsh swore that William Cash "threw her upon the Bed, press'd [sic] her very hard, and put something into her, but was so modest she would not declare what."[11] In testifying girls faced a double standard that required a discussion of sexuality among those who should have been theoretically ignorant of sexual contact. To prove the children were not soliciting sexual favors by their male perpetrators, they spoke in acceptably vague terms.

In children's rape trials, physical evidence from professionals began to take increasing importance in the eighteenth century. Medical evidence of penetration, injury caused by the use of force or violence, or venereal infection became critical to the success of any rape prosecution brought during the eighteenth and nineteenth centuries.[12] In 1750, Mary Hodgkin, the mother of eleven year-old Elizabeth, told the court that she waited to bring charges on Anthony Barnes because she "could do nothing without the approbation of a surgeon to assist me upon the trial."[13] Medical evidence made great gains during this period and trials began to refer more to the state

[7] *Old Bailey Proceedings*, September, 1716, Mary Pewterer (t17160906-24).
[8] *Old Bailey Proceedings*, September, 1750, John Linsey (t17500912-29); *Old Bailey Proceedings*, June, 1752, Patrick White (t17520625-30).
[9] *Old Bailey Proceedings* , April, 1747, John Hunter (t17470429-28).
[10] *Old Bailey Proceedings* , September, 1733, John Cannon (t17330912-55).
[11] *Old Bailey Proceedings* , July, 1715, William Cash (t17150713-54).
[12] Laurie Edelstein, "An Accusation Easily to be Made? Rape and Malicious Prosecution in Eighteenth-Century England," *The American Journal of Legal History*, 42: 4 (1998), 351-390.
[13] *Old Bailey Proceedings* , July 1750, Anthony Barnes (t17500711-33).

of the hymen and the results of the medical examination. The language of anatomists became standardized in the court room and the standardized definition of the hymen became the membrane linking the '*myrtiform caruncles*,' the fold of mucous membrane partly closing the orifice of the vagina which could be cut or torn through penile penetration. Though the eighteenth-century definition differs significantly from modern characterizations, the membrane became locatable and discussable in the court room and the court often required proof of the rupture of the hymen in child rape in both Britain and the continent throughout the eighteenth century which was not required in earlier periods.[14]

The reports of surgeons made it easier to establish the rape of a child, though they were far from achieving definitive precision. In the majority of the statutory rape cases that acquitted the perpetrator, surgeons testified to physical evidence that "no Laceration of the Part" occurred and thus no penetration.[15] In other cases that resulted in conviction, surgeons, like Humphry Cooper, testified to victim's "Vagina extended, torn and bruis'd with a forcible entry."[16] In addition to establishing sexual penetration, surgeons also established forcible entry by testifying to "black and blue marks that express'd violence."[17] Personal prejudice of surgeons also affected their testimony. Henry Tompson testified that penetration could have not occurred in ten-year-old Jane Gallicote's rape case and that "no man could penetrate her body, she is of too tender an age for that; it was the opinion of all the surgeons there had been no penetration."[18] For Tompson and the other surgeons, rape of such a young victim was unthinkable even if such a young victim developed a sexually transmitted disease. This reasoning helps to explain the lack of prosecuted rapes for children under nine years of age.

Nearly all child rape cases involved the transmission of the "foul disease." Almost all female juvenile rape victims complained of infliction of gonorrhea or other

[14] Georges Vigarello, *A History of Rape: Sexual Violence in France from the 16th to the 20th Century*, Jean Birrell, trans., (Cambridge: Polity Press, 2001), 81-83..
[15] *Old Bailey Proceedings*, October 1777, Benjamin Russen (t17771015-1).
[16] *Old Bailey Proceedings*, December, 1721, Christopher Samuel Graff (t17211206-67).
[17] *Old Bailey Proceedings*, January, 1749, John Osborne (t17490113-11).
[18] *Old Bailey Proceedings*, July 1751, Christopher Larkin (t17510703-21).

sexually transmitted diseases (STD), though proof of transmission of these diseases only proved sexual contact and not rape. Children raped without these diseases rarely appear in court records.[19] Because of the lack of uninfected children rape victims, the children infected with these diseases who appeared in court did so to redress permanent damage to their honor and explain the occurrence of their STD. Like ambiguities among medical authorities about penetration of the vagina, surgeons struggled with the concept and transmission of STDs. Surgeons testified that sexually transmitted disease, most often gonorrhea, could have developed from "impure cohesion," or non-penetrative contact of genitals.[20] Some surgeons, like Jonathan Wathen, argued extensive symptoms of sexually transmitted diseases could not have been caused by mere genital contact.[21]

Though the small number of sodomy cases makes a comparison to rape cases difficult, the cases suggest that the court treated male and female children differently in sexual offence trials. For child sodomy cases, all victims were male. Girls either did not prosecute if raped anally or prosecuted under genital rape laws. In sodomy cases, the court accepted testimony from all ten cases of sodomy or 'sodomitail' assault victims ranging in ages from ten to 17 years old. Like female rape victims, male children had to prove demonstrate physical resistance to sexual attacks. These children testified to being held down, their breath stifled, and noted their attempts to cry out for help during their attack.[22] Physical evidence, including bruising and lacerations around the anus or bruising that demonstrated resistance, was not required for corroboration of resistance in sodomy cases. Medical authorities also failed to appear in the testimony for these cases.

Some similarities do exist between sodomy and statutory rape cases. Child testimony continued to trouble the court regardless of the gender of the victim. In 1757,

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[19] *Old Bailey Proceedings*, December, 1767, Isaac Spicer (t17671209-64); *Old Bailey Proceedings*, October, 1765, Samuel Tibbel (t17651016-2) are two cases that the surgeon stated not venereal disease or none mentioned in the transcript.
[20] *Old Bailey Proceedings*, July 1751, Christopher Larkin (t17510703-21); *Old Bailey Proceedings*, October 1744, Francis Moulcer (t17441017-25); *Old Bailey Proceedings*, April 1768, William Stringer (t17680413-47).
[21] *Old Bailey Proceedings*, April 1749, James Penoroy (t17490411-22).
[22] *Old Bailey Proceedings*, August, 1730, Gilbert Laurence (t17300828-24).

twelve-year-old Thomas Smith "was examined as to the nature of an oath, but by its answers it appearing to have no knowledge of the consequence of false swearing, the prisoner was acquitted."[23] Additionally, sexual offences required penetration and oftentimes ejaculation as proof for the commission of sodomy. In most of these cases, the court questioned the male victims on ejaculation and the use of force. Fourteen-year-old Paul Oliver responded to the courts question of ejaculation in his sodomy cases by stating that "there was Wet and Nastiness which he wip'd off with the Sheet, and what he was ashamed to tell."[24] Male children, like other child rape victims, were forced to speak about sexuality. With sodomy, however, male children faced the added onus of reporting a sexually taboo topic.

Theft with Violence

Like in sexual assault cases, children oftentimes were targeted for other crimes because of their lack of strength and inability to testify in court. Children often had access to their employers or family belongings. This access to material goods combined with their small physical size and lack of strength made children likely candidates for both nonviolent and violent thefts. Children were easily overpowered or threatened into forfeiting material goods. For these reasons, the violent theft proved to be one of the most serious offences targeting children handled by the Old Bailey Court. Though theft oftentimes resulted in less serious punishments, such as transportation and whipping, those convicted of theft with violence were typically sentenced to death. Theft with violence consisted of two types of theft, highway robbery and robbery. Both required open and violent assault, forcibly taking property of any value from the victim, and putting him or her in fear of his or her life.[25]

For the sample of cases involving child victims, 35 of the cases charged the perpetrator with theft with violence. Of those 35 trials, the court found 14 defendants guilty and 13 partially guilty. Theft without violence constituted 11 cases (4 guilty, 3

[23] *Old Bailey Proceedings*, July 1757, William Williams (t17570713-35).
[24] *O ld Bailey Proceedings*, August, 1730, Gilbert Laurence (t17300828-24).
[25] J. M. Beattie, *Policing and Punishment in London, 1600-1750.* (Oxford: Oxford University Press, 2002), 262-3; J.M. Beattie, *Crime and the Courts in England 1660-1800* (Princeton, 1986), chaps. 4-5

partial guilt verdicts). Child oath continued to prove congestible in the court. In *R. v. Nash* (1786) and *R. v. Merche* (1734), the court questioned the juvenile victim's ability to give oath but ultimately determined their suitability. The court even allowed nine-year-old Robert Thompson to testify against John Mathers in a highway robbery case in 1717.[26] The court, however, refused to convict Mary Fadding on the testimony of the infant Frances Farmer.[27] Similarly, the court refused testimony from five-year-old Anne Helmes and acquitted Mary Turner of assault and theft of a gold necklace.[28] In the majority of cases, parents, most often mothers, testified to theft and violence committed against their children.[29]

Killing

The third type of crime that disproportionately affected children involved their untimely death. English law defined four types of killing: manslaughter, murder, infanticide and petty treason. English law defined murder, infanticide, and petty treason as premeditated, deliberate killing. Manslaughter, an unlawful killing without premeditation or malice, was by far the most commonly convicted crime in killing deaths of child victims. According to law, these deaths occurred in the course of fights, or during legitimate activities such as physically disciplining one's wife, servant or child, were typically tried as manslaughter. Most individuals tried for child murder in this sample were convicted of manslaughter, on the grounds that the killing was not premeditated. Though not examined extensively in this study, infanticide involved the killing of a new born child. Most infanticide cases involved unmarried mothers who concealed the death of the baby. Under a 1624 statute, the mother was presumed guilty of infanticide unless she could prove that the baby was born dead. For most of this

[26] *Old Bailey Proceedings*, July, 1717, John alias Joseph Mathers (t17170717-23).
[27] *Old Bailey Proceedings*, February 1715, Mary Fadding , alias Macfadding (t17150223-40).
[28] *Old Bailey Proceedings*, September, 1731, Mary Turner (t17310908-41).
[29] *Old Bailey Proceedings*, February, 1732, Hannah Snailes , alias Snailehouse (t17320223-5); *Old Bailey Proceedings*, January, 1789, Mary Wade and Jane Whiting (t17890114-58).

period, however, women were acquitted of this charge if they could demonstrate that they had prepared for the birth of the baby.[30]

Between 1714 and 1799, the Old Bailey court presided over 155 cases involving children killed by unnatural causes. Infanticide constituted the main charge in 129 of these trials. Of those infanticide cases, only 21 cases found the defendant guilty of infanticide. The court issued guilty verdicts in the remaining 27 cases where children were killed. The majority, 12 of the cases, found partial guilt or manslaughter. For the non-infanticide cases that included age information of the victim, most of the children fell below the age of seven years and the most common cause of death was running over the children with a horse and cart.

Though child victims in these murder cases could not testify against their perpetrator, children often were represented as responsible for their death. Even in testimony prior to death, age requirements for oath became much more reliant on age standards for crimes that lead to the death of a juvenile. In the 1742 murder case of nine-year-old Mary Grayling, the court prevented several witnesses from giving "an Account of the Child's Declarations in extremis, but it being the Opinion of the Court that the Child was not of competent Years to make such Declaration, and there being no other Evidence offered in Support of the Indictment, the Prisoner was acquitted."[31] Other children often testified to the brutal treatment of child victims before they were killed. In *R. v. Metyard and Morgan* (1762), fourteen-year-old Philadelphia Dowley and sixteen-year-old Sarah Hinchman testified against the defendants on behalf of a murdered fellow apprentice.

Conclusion

Child testimony for juvenile victims continued to trouble the English legal system throughout the eighteenth century. In all cases of violence toward children, the court acted in inconsistent ways, sometimes accepting child testimony, other times

[30] Lawrence Stone, "Interpersonal Violence in English Society 1300-1980", *Past and Present* 101 (1983), 22-33; M. Gaskill, "Reporting Murder: Fiction in the Archives of Early Modern England", *Social History* 23 (1998), 1-30; J. A. Sharpe, "The History of Violence in England: Some Observations" and L. Stone, "A Rejoinder", *Past and Present* 108 (1985), 206-224.

[31] *Old Bailey Proceedings*, January 1742, John Thompson (t17420115-17).

refusing to do so or placing restrictions on its validity. This special treatment of oath and youth created a situation where child victims received less protection from the law than adults. Even when statutory regulations required special treatment for children, such as in statutory rape cases, the court refused to acknowledge any particular rights or privileges of children. Additionally, the court treated juvenile victims differently in sexual crimes based on their sex. The court allowed male sexual offense victims oath in higher percentages that female child rape victims. The following chapter will examine juvenile defendants and their role in the judicial process including testimony and conviction rates.

PART FOUR: YOUNG DEFENDANTS: NON-VIOLENT AND VIOLENT THIEVES

I was rogue boy and man,
Never took a right step,
And believe never can.
I shone in 'Change-Alley,
And five times I broke,
Always cheated when silent,
And ly'd when I spoke.
-- Anonymous, "An Highwayman's History of his own Time," *The Weekly Journal; or*, *The British Gazetteer*, 28 September 1728

The 'artful dodgers' of Charles Dickens' nineteenth-century London had their beginnings in the 'infant' thieves of the eighteenth century. While changes in the treatment of juveniles in the criminal system have been well documented for the nineteenth century, few scholars have studied criminal treatment of children in earlier periods.[1] This chapter attempts to answer the following questions: How did eighteenth-century judges treat children ages eight to 14 whom legal theorists in chapter two said were presupposed by the court to be innocent? Did judges allow child criminals to testify against other juvenile criminals or to incriminate themselves? If so, did the court consider cognitive ability when determining guilt? Did the court issue different sentences in juvenile defendant cases? This chapter begins with an examination of occurrence and conviction rates of juvenile cases, moves to a discussion of punishment practices, and finally concludes with a discussion on child testimony and defense and the ability of children to commit felonious crimes.

Between 1714 and 1799, at least 436 trials involving accused children less than seventeen years old took place in the Old Bailey Court. Roughly half of those cases (217 trials) took place in the decade 1790-99. This rise coincides with Heather Shore's and Peter King's thesis of the increasing importance of juvenile crime and the development of a separate legal system designed to manage child criminals at the turn of the century. The majority of the century remained relatively constant with an average of 27 cases per decade, with the lowest number of juvenile defendant cases occurring during mid-

[1] Most notable nineteenth-century English juvenile criminal scholars include Heather Shore and Peter King. Paul Griffiths is one of the few scholars focusing on earlier periods, in his case the sixteenth century.

century, 1750-59. Figure six illustrates the percentages of trials with in all cases and those with juvenile defendants bought before the Old Bailey Court by decade in the eighteenth century.

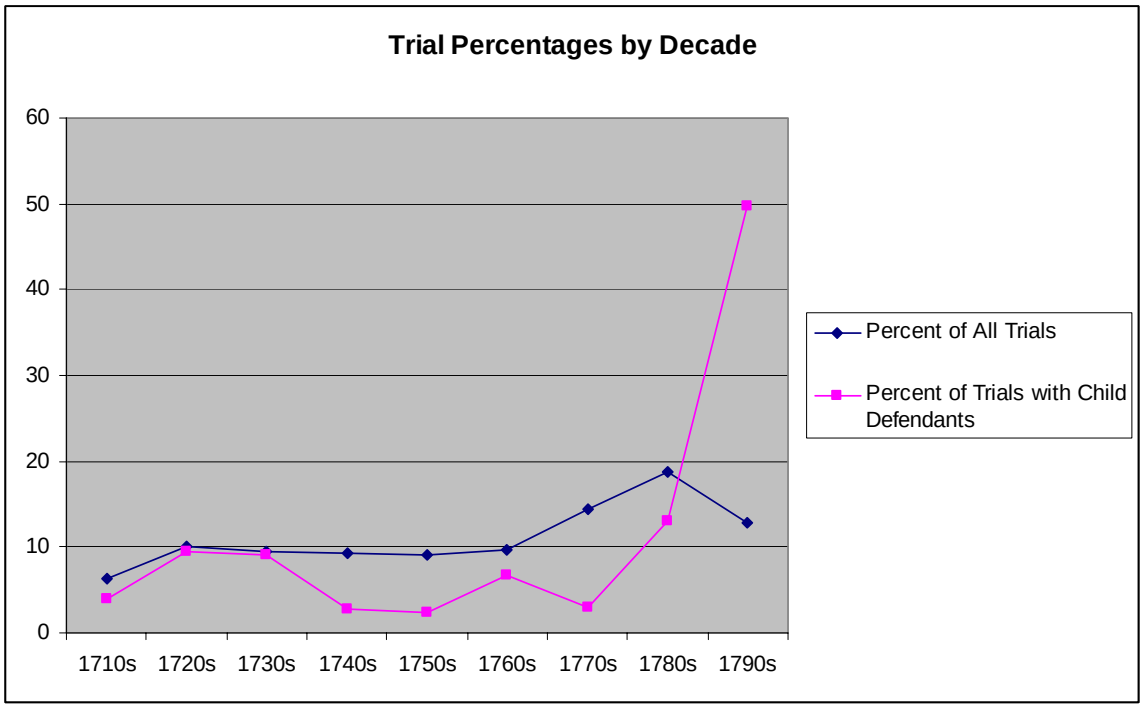
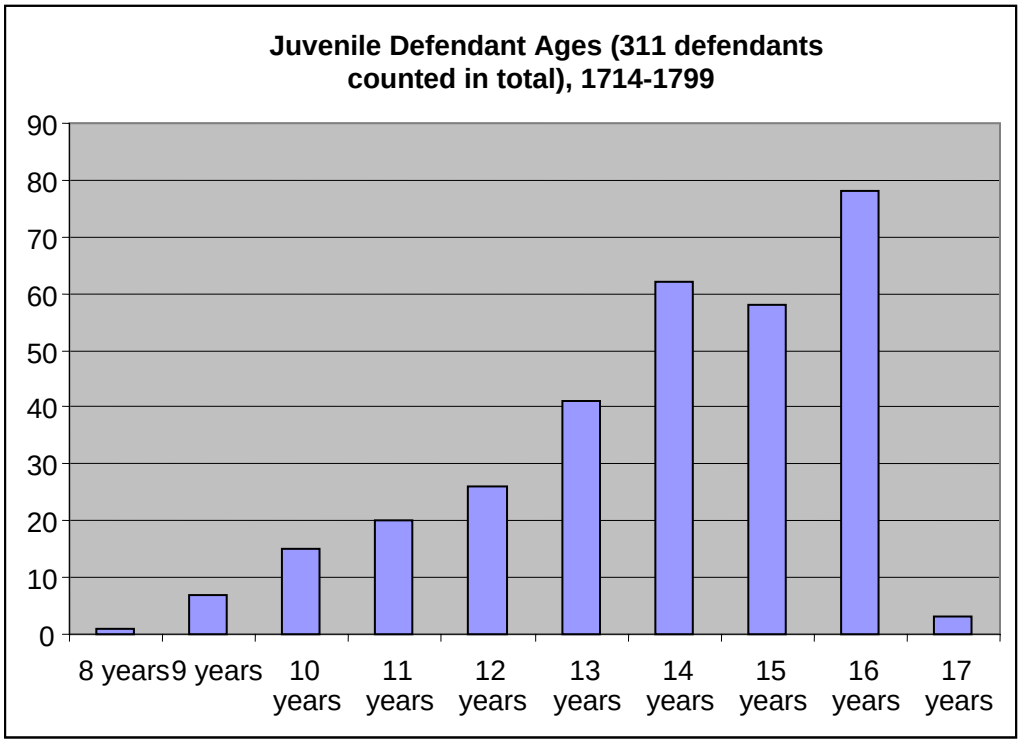


Figure 6. Percent of total trials appearing before the Old Bailey Court in London, 1714-1799.

In the eighteenth century, most criminals indicted for felonious crimes in the London area were young adults. For trials at the Old Bailey Court that recorded age information during this period, the most common defendant age group included those from 14 to 27 years of age. For those youths under seventeen years, the most common age for juvenile defendants was sixteen years. Figure seven illustrates the age distribution for both all Old Bailey defendants and its offenders aged seventeen years and below. In this period, older children were more likely to be indicted for criminal actions in the London area. In addition to age, the sex of criminal defendants seems to have determined criminal prosecution or incidence of crime. Of the cases with juvenile defendants, only 13.3 percent were female. Compared to the overall Old Bailey population of 11.9 percent of all felonious crimes committed by female defendants, women of any age group were less likely to be prosecuted for felonious crimes than

their male counterparts. Female children were slightly more likely than older females to be prosecuted and convicted in criminal proceedings.

The Old Bailey Court found nearly 58 percent of juvenile defendants guilty of their crimes. Compared to the overall guilty conviction rate of roughly 40 percent, this indicates that children were more likely than adults to be convicted of felonious crimes. Similar disparities in acquittal rates of the overall population and juvenile defendants indicate that adults were much more likely than children to be acquitted by the court. Child defendants were only acquitted in 15 percent of cases and found partially guilty in another 25 percent. Compared to the all Old Bailey cases (39 percent acquittal verdicts and 19 percent partial guilt verdicts), juvenile defendants were more likely to be convicted either partially or fully than adults. The distribution of verdicts in juvenile cases is illustrated in Figure eight.



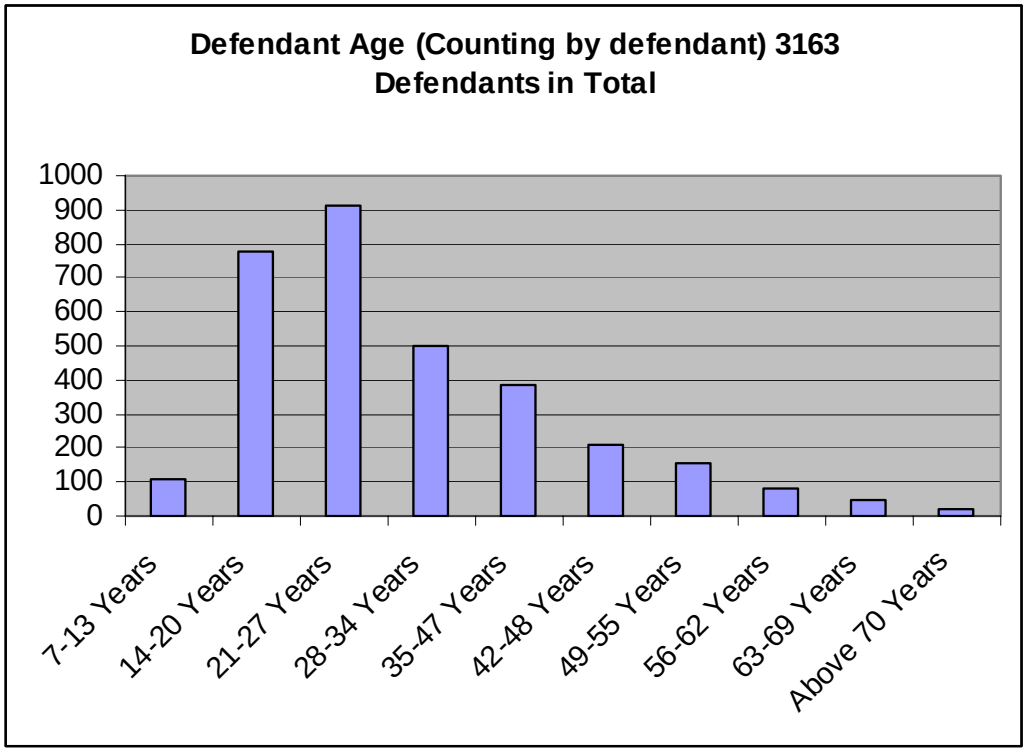


Figure 7. Defendant age for all cases in the Proceedings of the Old Bailey, 1714-1799.

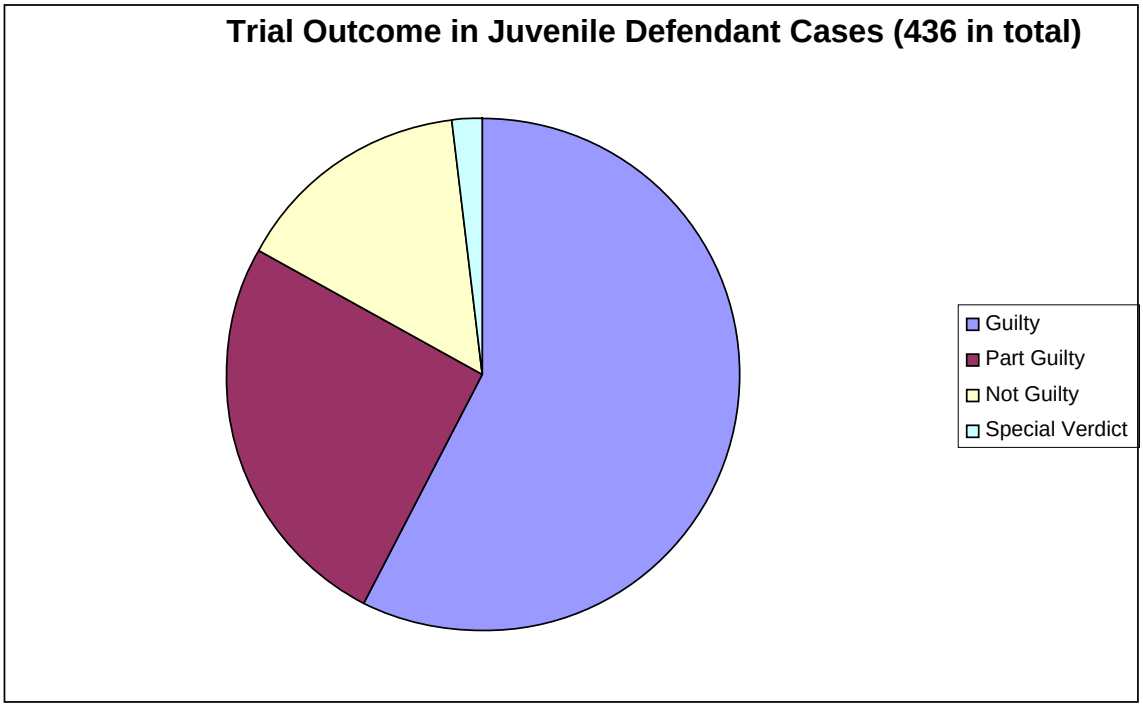


Figure 8. Verdict distribution in juvenile defendant cases at the Old Bailey, 1714-1799

The last decade, 1790-99, has both a higher incidence of juvenile defendants brought before the Old Bailey Court and significantly higher rates of conviction. For this decade over 77 percent of juvenile defendants were found guilty. In 37 of the 218 cases from this decade, the court found children part guilty of crimes. The remaining 13 cases brought not guilty and special verdicts. For the period before 1790, verdicts were more evenly meted out by the court. Of the 217 cases, 83 trials received guilty verdicts, 60 not guilty, and 74 part guilty. This difference suggests changing attitudes in the legal system in the late eighteenth century where children come under more scrutiny and were more likely to be punished by the court.

Both before 1790 and after, those children found guilty typically were charged with much more serious crimes, such as theft of higher value goods or monies. Thomas Wakelin stole 33 "Moidores" (27 shillings each), a "Pistole" (16 shillings), a "half Pistole" (eight shillings), eight Broadsides (23 shillings), and eight shillings and fourteen guineas from Isaac Branch. Wakelin was found guilty and sentenced to death.[2]

[2] *Old Bailey Proceedings*, July 1722, Thomas Wakelin alias John Hawkins (t17220704-2).

Similarly, Elizabeth Ran was found guilty of theft from her master of 20 guineas, 21 shillings, a silver spoon, two aprons, and four 'Mobs.'[3] Juries often looked upon juveniles stealing these high-priced items as more adult than childlike. The comparison of cases with the various verdicts highlights that the distinction between juvenile and adult crime was not fully developed. If this distinction were more developed, juries would have been more concerned with the age of the defendant rather than the value of the stolen item.

In cases where the court issued partial guilt verdicts, legal scholars have found juries often issued a partial guilt verdict, such as theft of goods of a lower value, in the eighteenth century. By finding the defendant guilty of the theft of goods worth less monetarily, the jury ensured a reduced punishment.[4] Such partial verdicts included whipping and transportation as opposed to the death sentence. The partial verdict outcome significantly reduced the number of individuals sentenced to capital punishment. In many cases, the reduced value of the goods was blatantly implausible. Partial guilt verdicts served the purpose of minimizing punishment throughout the eighteenth century. Examples of this kind of justice in cases involving juvenile defendants include Benjamin Baldry's theft of goods valued at 70 shillings and James Hopkins' theft of 45 shillings both reduced to the theft of 10 pence.[5] Even though the court employed this type of justice, the differences in the rates of partial guilt verdicts between cases with adult and child defendants suggest that juries did not necessarily consider the status of children as a particular circumstance requiring leniency.

In addition to differences in verdict ratios and punishments, eighteenth-century child defendants were charged and convicted of different crimes than their adult counterparts. The majority of trial indictments (406 trials) with juvenile defendants indicated theft without violence including petty theft, burglary, animal theft, and

[3] *Old Bailey Proceedings*, December 1733, Elizabeth Ran (t17331205-27).
[4] J.M. Beattie, *Crime and the Courts in England 1660-1800* (Princeton University Press: Princeton, 1986), chapter 8; J. M. Beattie, *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror* (Oxford University Press: Oxford, 2001), chapters 6 and 7; and Peter King, *Crime, Justice and Discretion in England, 1740-1820* (Oxford University Press: Oxford, 2000), chapter 7.
[5] *Old Bailey Proceedings*, September 1722, James Hopkins (t17220907-41); *Old Bailey Proceedings*, January 1725, Benjamin Baldry (t17250115-6).

unspecified theft. The value of stolen property in theft cases for juveniles averaged £5.3 per case. For the theft cases, 217 trials involved accusations of theft under £1. Only 21 cases involved theft of over £10. The largest value of stolen property in a juvenile defendant case was estimated for more than £797.[6]

Children were also sent to trial for theft with violence in 23 cases, killing in two trials, and sexual offences in one case. Though most felonious crimes appearing before the London court included theft cases at nearly 80 percent of all Old Bailey trials, the juvenile defendant sample suggests that children were more likely (93 percent) to commit or to be prosecuted for theft than adults. With children's lack of economic means and inability to secure high-paying employment, the likelihood of child thieves seems intuitive.

Juvenile Punishment

Once convicted, punishment in juvenile cases mirrors the punishments issued by the court in all cases tried at the Old Bailey Court. Nearly 59 percent of all punished juveniles were sentenced to transportation compared to the overall transportation punishment rate of 53 percent. The court seems to have not discriminated by age with its distribution of corporal punishment. In 1787, the court sentenced to death three juveniles, James Everard, age 14, John Bond, age 15, and Offspring Gregory, age 15, in one burglary trial for theft of "two cotton gowns, value 21 s. a linen gown, value 5 s. a linen apron, value 1 s. a linen shirt, value 1 s. a muslin handkerchief, value 1 s. and a green stuff skirt, value 2 s(hilling)" from Thomas Seabrook's home.[7] Similarly, the court sentenced almost 12 percent of convicted juveniles and 17.8 percent of all defendants to death and ten percent of convicted juveniles and 8.8 percent of all Old Bailey punishments to public or private whipping. Figure nine lists the punishments issued by the court for both juvenile defendant cases and all criminal proceedings in the eighteenth century demonstrating that the court failed to discriminate on the type of punishment due to age of the defendant.

[6] *Old Bailey Proceedings*, December 1786, James Barnard (t17861213-68).
[7] *Old Bailey Proceedings*, September 1787, James Everard, John Candebus otherwise Bond, Peter Bolton (t17870912-23).

	All Old Bailey Cases	Percent of Total	Juvenile Cases	Percent of Total
no punishment given	217	0.68	9	2.47
branding	1,327	4.18	5	1.37
death	5,658	17.82	43	11.81
whipping	2,795	8.80	37	10.16
fine	205	0.65	4	1.10
pillory	22	0.07		0.00
imprisonment	1,216	3.83	2	0.55
sureties for good behavior	8	0.03		0.00
transportation	16,916	53.26	214	58.79
multiple punishments	3,328	10.48	47	12.91
Army/Navy		0.00	3	0.82
total punished	31,759		364	

Figure 9. Punishments issued by the Old Bailey Court by defendant, 1714-1799.

The penal system of the eighteenth century has been described as "the bloody code" because of its use of the death sentence for most criminal punishments. This oversimplification fails to consider the complexity of the early modern penal system. Capital punishment did occupy a central place in the penal system. The number of crimes punishable by death rose exorbitantly throughout the eighteenth century. Capital punishment, however, was never as extensive as, in theory, it should have been. Individuals pleaded benefit of clergy, cases were dismissed, reprieves and pardons granted, and juries frequently found defendants guilty of lesser crimes.[8] The courts applied both capital and alternative punishments to children.

A total of 43 children from the Old Bailey Court faced the death penalty between 1714 and 1799. Only two of those cases, the judge respited the sentence. Hanging was the second most common penalty imposed on the children. Throughout eighteenth-century England, children made up significant numbers of those executed by the state.

[8] Briggs et al. 223.

With the average age of apprentices between 12 and 14 years, a rough estimate of children who faced the death penalty can be suggested from the number of apprentices who faced this penalty. Peter Linebaugh estimates that 26.4 percent of English born convicts condemned to be hanged at Tyburn were apprentices.[9] At minimum children constituted a quarter of all capital punishments meted out by the state.

Though the English system seemed violent in the letter of the law, eighteenth-century law maintained special considerations for particularly sympathetic cases. In 1718, a jury convicted John Tanner for shoplifting goods valued at four shillings and 10 pence. Tanner, however, never received any type of punishment for this act.[10] In similar cases, the court found children guilty but did not punish them for their crime. The court maintained several alternatives to punishment for juvenile offenders. After 1756, young convicts could be sent to the Marine Society for training at sea, or to the Philanthropic Society (established in 1788) for vocational training.[11] In a small percentage of cases children not punished were often just reprimanded for their crime. Even with alternatives to corporal punishment, the court wielded punishment in the majority of juvenile cases ignoring any considerations for the youth of the defendant.

A major innovation in eighteenth-century penal practice was the extensive use of transportation. Over 68 percent of the juvenile cases examined brought forced servitude and immigration as the outcome of the court case. Although ideas that transportation might lead to the reformation of the offender existed in the eighteenth century, the primary motivations behind this punishment were deterrence and the exile of hardened criminals from society. By the mid-eighteenth century, petty offenders could be transported or hanged for any simple larceny of more than twelve pence or for any robbery that put a person in fear.[12] The court sentenced older children, like fifteen-year-old James Page and sixteen-year-old Matthew Farmer, to transportation in higher

[9]Cunningham, 134; Linebaugh, 97.
[10] *Old Bailey Proceedings*, January 1718, John Tanner, alias Toby (t17180110-18).
[11] Shore, 232.
[12] Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century*. (Cambridge: Cambridge University Press, 1992), 1.

instances than young children.[13] Figure ten illustrates the age distribution for juveniles sentenced to transportation. In over 80 percent of cases where juveniles were sentenced to transportation, the children were above 13 years. The court assigned children the most common term of seven years for transportation children.

Age Of Defendant	Number of Cases
9-10 Years	9
11-12 Years	17
13-14 Years	50
15-16 Years	65
Total	141

Figure 10. Age distribution for juveniles sentenced to juveniles.

Child Testimony and Defense

The court only asked youth testifying if they understood the "nature of an oath," never questioning children appearing as defendants in felonious cases. Though the legal theorist explored in chapter two instructed the court that children between the ages of eight and fourteen were presupposed innocent and that intellectual capability had to be determined in these cases, this proof rarely appeared in the records. A few cases such as ten year-old James Tyre's only defense consisted of his statement that, "I am turned of ten; I have nothing to say," attempted to highlight the youth of the defendant.[14] In this 1789 case, the court sentenced Tyre to seven years transportation without questioning whether he understood the nature of right and wrong. In juvenile delinquent cases where the court issued acquittal verdicts, the judge based his decision solely on the youth of the defendant. In 1763, the court acquitted ten-year-old Susannah Pen on the basis of her age.[15] Again in a 1766 case, the court acquitted Owen Cheslyn "without going into the evidence, on account of his youth, being but 10 years of age."[16] Cheslyn's defense strategy, however, failed in April of the same year when he was

[13] *Old Bailey Proceedings*, April, 1799, James Page (t17990403-31); *Old Bailey Proceedings*, September, 1764, Matthew Farmer (t17640912-39).
[14] *Old Bailey Proceedings*, April 1789, John Brady, Richard Roberts, James Tyre (t17890422-67).
[15] R. v. Susannah Pen , theft: pick pocketing, 23 Feb 1763, *The Sessions Papers*
[16] *Old Bailey Proceedings*, February 1766, Owen Cheslyn (t17660219-8).

convicted of stealing a silver watch and two "chrystal stone stock-buckle" sets. The court sentenced the ten-year-old to transportation.[17]

Even while acknowledging the youth of a defendant as problematic, the court continued to sentence children to relatively harsh punishments. In 1783, the court acknowledged the youth of an eleven-year-old but argued that "in order to break these gangs of boys, it is necessary to transport this boy, young as he is, to America for seven years" for the theft of ten yards of black silk lace, value 30 shillings. [18] In most cases the court issued partial guilt verdicts resulting in transportation for a period of seven years. In 1716, the jury brought a partial verdict against Benjamin Speed, "considering the Age of the Prisoner."[19] Without consideration of Speed's age, his sentence could have been much harsher.

Some juvenile defendants participated in their trials by attempting to demonstrate doubt in their prosecution. Joshua Barnes, a boy aged around twelve years, actively took part in his defense by questioned a witness to his highway robbery trial.[20] The majority of excuses given by juveniles involved mistaken identity or the finding of stolen objects. Andrew Manseller excused the finding of stolen property on his person by his trip from "Milbank to fetch the midwife, and picked up this bundle, and going a little further I found a coat, and put it on, it was very cold."[21] William Holmes stated in his defense that one of his companions "made him a present" of the silk handkerchief stolen from George Riches.[22] Thirteen-year-old John Moore also employed this defense by stating "I heard an out cry, and a boy run past me, and a gentleman came and laid hold of me and said I was the boy."[23]

In other cases, juvenile defendants admitted to guilt of theft but tried to limit their criminal responsibility by arguing that they did not trespass. This strategy proved

[17] *Old Bailey Proceedings*, April 1766, James Reding , Owen Cheslyn , and John Merchant (t17660409-40).
[18] *Old Bailey Proceedings*, December 1783, James Cherrick (t17831210-57).
[19] *Old Bailey Proceedings*, Month 1716, Benjamin Speed (t17160222-5).
[20] *Old Bailey Proceedings*, October 1744, Thomas Wells , Theophilus Watson , Joshua Barnes , Thomas Kirby , Ann Duck (t17441017-6).
[21] *Old Bailey Proceedings*, December 1788, Andrew Manseller (t17881210-1).
[22] *Old Bailey Proceedings*, May 1799, William Holmes (t17990508-42).
[23] *Old Bailey Proceedings*, January 1783, John Moore (t17830115-7).

dangerous for English law did not show lenience in cases where the defendant pleaded guilty. Eleven-year-old James Grace attempted this by constructing a story in his defense where he "I saw this pane of glass broken, and I looked into the window, and this pair of stockings lay under the window, and I picked them up, and was going to carry them in to the gentleman, and that gentleman and that boy caught hold of me."[24] Children who attempted this defense tactic admitted their guilt to lesser crimes and hoped to cast doubt in the charges on the indictment.

Throughout the eighteenth century, courts differentiated between children and adult perpetrators in criminal proceedings. The differences that courts drew between juveniles and adults placed children at a distinct disadvantage. Those children who made it to court aged eight and up were more likely to be convicted than adults in the London area. Even employing age as a defense strategy failed to prevent harsh punishment issued by judges. Instead of following the philosophical arguments of legal theorists, judges often issued harsher punishments to child criminals than adult perpetrators. The ambiguous nature of children in contemporary legal treatises seems to have been ignored by Old Bailey judges. This treatment by the court further confuses the picture of the legal definition of childhood in eighteenth-century England because the court's motivations behind its punishments are unclear.

[24] *Old Bailey Proceedings*, January 1784, James Grace (t17840114-40).

CONCLUSION

Children occupied a unique status in eighteenth-century statutory English law. This status resulted largely from the ability to distinguish right from wrong rather than on any specific age requirements. English law granted, theoretically, special privileges for youths' lack of cognitive ability. In practice, these privileges negatively affected their treatment by the court. Legal theory about juvenile status differed significantly from the application of the law. Contemporary jurists suggested assuming innocence of children and required 'pregnant' evidence for their conviction. They also allowed child testimony in cases where children could demonstrate the knowledge of oath. The court, instead, convicted children in particularly high numbers compared to adult conviction rates and significantly limited juvenile testimony in cases with victimized children. Because contemporary legal theorists left to the court much of the judgment on the cognitive ability of children to the court, individual judges played an important role in determining legal treatment in cases where children were defendants or victims. The court's actions also differed from what contemporary legal theorists dictatedon punishment practices. To the court, children proved suitable for regular corporal punishments in felonious cases including death and transportation. Theorists, instead, viewed children as incapable of withstanding corporal punishment or imprisonment.

During the eighteenth century, the legal definition of the juvenile reveals both ambiguities and consistencies. The court consistently limited child testimony to older children, those who could demonstrate their knowledge of right from wrong. Throughout the century, the court also consistently ruled that children, even young children, could poses criminal intent. Children under eight years were most often prevented from testifying and judged without criminal liability. The court treated children above ten, however, differently crediting them with the ability to tell right from wrong. This ability allowed children to be convicted of felonious crimes but never granted children full adult status as far a testimony. Victimized children's testimony required additional substantiating proof or was not even accepted by the court. This harsh legal treatment of juveniles became more pronounced in the latter half of the

eighteenth century with drastic increases in the number of juvenile defendants processed and found guilty by the court. Though the court was consistent in its implementation of both the policies of limiting child testimony and conviction of juveniles, the two contradicted one another. The court prevented children from testifying due to their lack of cognitive ability. It also convicted children, implying that the court found these children to be criminally culpable for their crimes. This ambiguity has been highlighted by previous historians, most notably Holly Brewer.

English law treated children significantly worse than adults both as victims and as defendants, but this treatment reflected the social structure of eighteenth-century England. By allowing moderate correction for children, servants and wives, the law supported the economic and social hierarchy of the era. Children caught pick-pocketing or stealing threatened the social and economic fabric of society. The court reacted by issuing strong deterring punishments for juvenile offenders particularly those children from low socio-economic classes. Confusion over sexuality further limited children's rights in court. The court assumed that child victims alleged false charges in sexual offenses. Court officials and medical authorities denied that adult men possessed the ability of raping young girls. In addition, child witnesses proved controversial because it placed children, individuals low in the hierarchical order, in a position of testifying against older, more powerful adults. These adults oftentimes maintained positions of power, such as employer or master, over the child. By denying children the power of oath, the court supported the English patriarchal system.

Even with this patriarchy, children refused to accept court verdicts without some attempt to circumvent punishment. Youths testified and defended themselves throughout the period. At varying degrees of success, children used age considerations and constructed scenarios of innocence in cases with juvenile defendants. As victims, children also avoided certain explicit language in sexual offense testimony. Even with this use of agency, children failed to achieve equal status under English law as adults.

Although children were included in criminal proceedings in significant numbers during the eighteenth century the extent is difficult to estimate. Until the mid-nineteenth century, English courts failed consistently to record specific age information. For this reason, previous scholars have failed to examine juveniles and their legal status extensively in this period. Legal scholars have employed contemporary legal treatises by Blackstone and Hale to suggest ambiguous treatment of children under the law. A few historians, among them Julie Gammon, have looked to a few court cases to make arguments about child status. These scholars have failed to examine large samples of trial records in order to closely examine these ambiguities. With the release of the Old Bailey Proceedings' indexed data set, attention to this issue is sure to increase.

The scholarship on the history of childhood can be roughly divided into three types: social constructivism, psychohistory, and a focus on subjectivity and agency of children. This thesis combines both the social constructivism and subjectivity approach to compare legal theories of the concept of the child to actual court cases involving children. While examining actual trials, this paper includes both examples of children committing crimes or as victims of criminal proceedings and children acting as agents in their defense while testifying as defendants and victims of crimes. The paper also examines a conceptual approach to childhood by incorporating legal theorists' views of the definitions of childhood. By combining these two approaches, the paper examines how judges and juries applied the concept of children in criminal proceedings.

Many more questions remain unanswered about the eighteenth-century legal status of children. More research in exactly how age affected conviction rates and punishment practices is needed. Unfortunately, the sample collected for this study only included those aged under seventeen years and could not effectively examine this trend. Future research in this field could include a probit or logit statistical model of all criminal proceedings expanding the population beyond the London area. This model could determine how much the courts considered age as a determining factor in their verdicts and sentences. Additionally, much more research is also needed to determine the comparability of the London area to other jurisdictions of English law.

APPENDIX A: EIGHTEENTH-CENTURY CRIMINAL PROCEEDINGS AT THE OLD BAILEY

Criminal proceedings in eighteenth-century England differ greatly from contemporary methods. These differences include the length of trials, use of evidence, required fees, and the roles of the judge and barrister. One of the most obvious differences is the length of the trial. The Old Bailey Court presided over an average of fifteen to twenty cases a day in the late seventeenth and early eighteenth centuries. The length of each trial could be measured in a matter of minutes rather than the multi-day trials common in contemporary judicial systems. This appendix offers a primer for those unfamiliar with the criminal proceedings of the period outlining the judicial steps for felonious crimes followed in London and Middlesex.

The responsibility for reporting crime, and in large part for identifying the culprits, fell on the victim. The accused was taken before a magistrate and charged with an offense. This preliminary hearing developed in the seventeenth century as a way to insure that all charges of felony were sent to the appropriate court for trial and that cases contained sufficient evidence given by victims and their witnesses.[1] The Marian Bail and Commitment Statutes charge magistrates in these hearings with recording verbatim accounts of the prosecution evidence, examining the accused, and binding over on recognizance those who could prove the charge. Under the Marian Statutes, magistrates were then required to forward any and all felony complaints to a grand jury. They had no legal authority to dismiss or adjudicate such cases.[2] Several legal historians have suggested that in fact they routinely did both of these things.[3]

A complainant whose case had been rejected by a magistrate could, in theory, bring it to the grand jury, though this rarely happened and was typically not

[1] John H. Langein, *Prosecuting Crime in the Renaissance: England*, *Germany*, *France* (Cambridge, MA: Harvard University Press, 1974), 5-102.
[2] Langbein, *Prosecuting Crime*, 7–125.
[3] Anthony E. Simpson, "Popular Perceptions of Rape as a Capital Crime in Eighteenth-Century England: The Press and the Trial of Francis Charteris in the Old Bailey, February 1730," *Law and History Review* 22 (2004), http://www.historycooperative.org/journals/.

successful.[4] A grand jury decision to hand down an indictment did not, however, necessarily mean that the case would get to court. A "true bill," a document that signified their satisfaction with the evidence offered by the prosecutor, could be *nol pros'd* (indicating the unwillingness of the prosecutor to proceed further) in a fairly open and informal fashion, and it would be generally supposed that the matter had been resolved through an extralegal settlement. Even with this alternative to criminal proceedings, a high proportion of the cases considered by the grand jury for indictment were sent to the Old Bailey court.

Individuals accused of felonious crimes in the cities of London and the count of Middlesex were committed to gaol until the next gaol delivery session at the Old Bailey court. Before trial, defendants were not guaranteed prior knowledge of the indictment or the evidence presented against them. Additionally, the accused could not legally compel witnesses who could testify on their behalf. The prosecution had a clear advantage in the limited ability to offer defense and the way juries deliberated and the grounds on which they reached their verdicts. Defendants were brought to the bench in batches and plead guilty or innocent of the offense alleged. After a number had been arraigned, they were charged to a jury. The pattern of trial at the Old Bailey was further complicated by the presence of defendants from two separate jurisdictions—the city of London and the count of Middlesex. English law required that individuals were tried by a jury of their peers. Arraignments and trials had to alternate between London and Middlesex defendants.[5]

Once in trial, the victim normally presented the case orally supported by witnesses who gave their evidence briefly and typically under the questioning of the judge who acted like an examiner and cross-examiner. The judge's principle interest was to present defendants with the evidence that demonstrated their guilt and to elicit a response from them. Defendants maintained the right to call witnesses to both their actions and their character. In addition to the ignorance of the precise charged alleged

[4] J. M. Beattie, *Policing and Punishment in London, 1600-1750*. (Oxford: Oxford University Press, 2002), 252.
[5] Ibid., 262-3.

by the prosecution, the defendant also was denied access to toiletries and food during their stay at the gaol awaiting trial. Additionally, accused felons had no right to engage counsel for their defense and to speak to the judge and jury on their behalf and the notion of a defendant regarded as innocent until proven guilty had not yet gained judicial support. [6] Until the third decade of the eighteenth century, neither the prosecution or the defendant could engage council for representation and until the later half of the century few prosecutors or defendants employed lawyers to defend them.

Additionally, there were no laws that protected against prejudicial or misleading testimony. Occasionally, judges made rulings about evidence and instructed about the problems associated with hearsay evidence or uncorroborated evidence of accomplices. Most often, judges left the evaluation of all evidence to the juries.[7] The law governing eligibility for jury service included property qualifications of land and the value of goods exceeding £67.[8] Sheriffs and their officers summoned the men from whom the juries were assembled drawing their candidates from the wards according to a schedule that was replaced by a balloting system in 1730. Often men who served on juries repeated their service within the same judicial session. By the beginning of the eighteenth century most members of grand juries were in the gentry class, many of whom were magistrates, while trial jurors tended to be drawn from middling ranks of farmers and craftsmen.[9] Beattie has estimated that more than 80 percent of jurors in 1692 were drawn from the upper third of the male householder of London and overwhelmingly shopkeepers, tradesmen, and artisans. Additionally, they typically served as government officials or on other governmental or religious committees.

Beginning in the sixteenth century, juries and judges controlled the administration of judicial law by means of jury verdict and judicial discretion. This can

[6] John Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law," *Michigan Law Review*, 92(1993), 1047-85; John Langbein, "Historical Foundations of the Law of Evidence: A View from the Ryder Sources," *Columbia Law Review*, 96 (1996), 1168-1202; J. H. Baker, *An Introduction to English Legal History* (London, 1971; 2nd ed. London, 1979), 125-37.
[7] T.P. Gallanis, "The Rise of Modern Evidence Law," *Iowa Law Review*, 84 (1999), 499-560.
[8] James C. Oldham, "The Origins of the Special Jury," *University of Chicago Law Review*, 50(1983), 137-221.
[9] Peter King, "'Illiterate Plebeians, Easily Misled': Jury Composition, Experience and Behavior in Essex, 1735-1815," in *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, ed. J.S. Cockburn and Thomas Green, (Princeton, N.J. : Princeton University Press, 1988), 254-304.

be illustrated with the rise in acquittals and partial verdicts and the decline in death sentences. Additionally, the elaboration of alternatives to the death sentence, namely transportation, also decreased the number of those sentenced to capital punishment. Judges could encourage juries to reduce charges, and they could reprieve defendants convicted of a capital offence and recommend them to the king for a pardon. Judges, however, could not choose from a range of punishments in sentencing convicted felons.[10]

The trial process placed defendants at a distinct disadvantage. Most often without legal assistance, they had to organize their cases while in prison awaiting trial unaware of the specific evidence that would be presented against them. Prosecutors often did not have counsel, and judges often were sympathetic to defendants. Prosecutors paid for witnesses for the prosecution that did not always appear as promised. Although the increasing use of defense counsel restored some of the balance in the eighteenth century, many defendants were unable to afford legal assistance. Even so, those convicted the full severity of the law was often mitigated through benefit of clergy, partial verdicts, reduced or respited sentences and pardons.

[10] J. M. Beattie, *Policing and Punishment in London, 1600-1750.* (Oxford: Oxford University Press, 2002), 265-71.

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