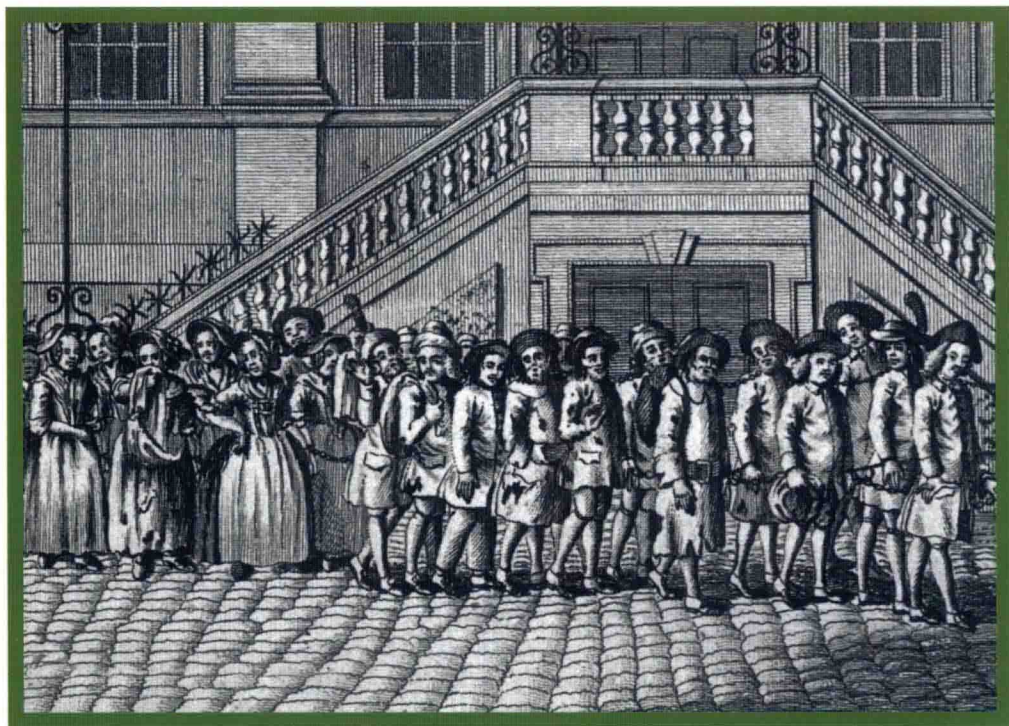


GENDER, CRIME AND JUDICIAL DISCRETION



1780-1830

Deirdre Palk

STUDIES IN HISTORY

GENDER, CRIME
AND JUDICIAL DISCRETION
1780–1830

Deirdre Palk



中华女子学院



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THE ROYAL HISTORICAL SOCIETY

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The origins of this book lie in my PhD thesis completed in 2002. My journey to that point, and beyond it to this book, has not followed the usual pattern and has been a particularly lonely one. Returning as a mature student to historical research and reflection and at the same time following a long career in a profession with no links with history or academic life, dependence on my own interior (and economic) resources has at times been more daunting than I would have wished. However, I retained a strong feeling that there were useful and interesting issues arising from my research which needed to be incorporated in a book which could be shared with other social historians, in particular historians of crime and of women. In addition, non-historian friends wanted me to write, in an accessible way, about the experiences of 'ordinary' people caught up with the late eighteenth- and early nineteenth-century English criminal justice system. I hope that my attempt to be both academically rigorous and generally accessible has been successful.

The loneliness of the journey has been significantly relieved by a number of people to whom I owe grateful thanks: to a group of inspired women who returned to historical study with me to complete a master's degree in women's history at Royal Holloway, University of London, and whose continued sisterhood and support have been important – Sara Bailey, Meg Irving, Linda Massie, Julie Peakman, Diana Peschier, Stephanie Spencer; to my supervisors during my doctoral research, Peter King, Joanna Innes, Alison Oram for their encouragement, guidance and challenging demands on my researching and writing abilities; to the staff of various record offices, libraries and archives, especially the archivists at the Bank of England for their considerable help and interest; to Randall McGowen for sharing some of his developing work; and to David Eastwood and Christine Linehan of the Royal Historical Society. The greatest gratitude, however, is due to Richard Palk, partner, best friend and fellow-historian, without whose encouragement and forbearance over the dozen or so years this project has been in gestation, this book would certainly never have seen the light of day; it is to him, radical critic, kind suggester of improvements and as familiar with every page as I am myself, that this book is dedicated.

My debt is also to the men and women who people this book. I have been closely involved with them, and have used their stories and their words, and so have changed their history. I trust I have been fair to their memories and have not dealt them any further injustices.

Deirdre Palk,
Auxerre, France
January 2006

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Abbreviations

TNA	The National Archive
BECLS	Bank of England Law Suits Committee
BEFP	Bank of England Freshfields' lawyers papers
OBSP	Old Bailey Sessions Papers
CLRO	Corporation of London Records Office
HO	Home Office
PRO	Public Records Office
PP	<i>Parliamentary papers</i>

AJLH	<i>American Journal of Legal History</i>
BJC	<i>British Journal of Criminology</i>
CJH	<i>Criminal Justice History</i>
EcHR	<i>Economic History Review</i>
EHR	<i>English Historical Review</i>
G&H	<i>Gender and History</i>
HJ	<i>Historical Journal</i>
HWJ	<i>History Workshop Journal</i>
JBS	<i>Journal of British Studies</i>
JLH	<i>Journal of Legal History</i>
JSH	<i>Journal of Social History</i>
JWH	<i>Journal of Women's History</i>
LHR	<i>Law and History Review</i>
P&P	<i>Past and Present</i>
WHR	<i>Women's History Review</i>

Contents

	<i>Page</i>
List of tables	vi
Acknowledgements	vii
Abbreviations	ix
1 Gender and the criminal justice system	1
2 Gender and the laws of England	21
3 Shoplifting	38
4 Pickpocketing	67
5 False money	89
6 After sentencing	113
7 Gendered appeals	136
8 Gendered behaviour, paternalistic justice and political necessity	155
Appendix: Sources and methodology	177
Bibliography	83
Index	97

List of Tables

1. Shoplifting: trials at Old Bailey Sessions, 1780–1823	43
2. Shoplifting: verdicts at Old Bailey Sessions, 1780–1823	45
3. Shoplifting: partial verdict sentences at Old Bailey Sessions, 1780–1823	48
4. Shoplifting: death sentences at Old Bailey Sessions, 1780–1823	51
5. Shoplifting: ages of those convicted at Old Bailey Sessions, 1791–1823	57
6. Shoplifting: items stolen: Old Bailey Sessions, 1780–1823	59
7. Shoplifting: value of stolen items: Old Bailey Sessions, 1780–1823	60
8. Shoplifting: <i>modus operandi</i> : Old Bailey Sessions, 1780–1823	62
9. Pickpocketing: trials at Old Bailey Sessions, 1780–1808	73
10. Pickpocketing: verdicts at Old Bailey Sessions, 1780–1808	74
11. Pickpocketing: partial verdict sentences at Old Bailey Sessions, 1780–1808	76
12. Pickpocketing: ages of those convicted at Old Bailey Sessions, 1791–1808	79
13. Pickpocketing: items stolen: Old Bailey Sessions, 1780–1808	82
14. Pickpocketing: <i>modus operandi</i> : Old Bailey Sessions, 1780–1808	85
15. Bank of England currency cases considered for prosecution, 1802–34	93
16. Reasons for not prosecuting in Bank of England currency cases, 1802–34	95
17. Bills of indictment ‘not found’ in forged Bank of England note cases	97
18a. Bank of England forged note trials: pleas and verdicts at Old Bailey Sessions, 1804–21	104
18b. Bank of England forged note trials: pleas and verdicts at Old Bailey Sessions, 1821–34	105
19. Bank of England forged note trials: results at Old Bailey Sessions, 1804–34	107
20. Summary of sentences for shoplifting, pickpocketing and forged Bank note crimes: Old Bailey Sessions, 1780–1834	119
21. Initial commutations of death sentences for shoplifting and pickpocketing: Old Bailey Sessions, 1791–1817	120
22. Factors mentioned in petitions from Old Bailey convicts, 1820s–1830s	139

Gender and the Criminal Justice System

Four people ordered for execution, one for forgery, one for burglary, two for beating and robbing a man in a house of ill-fame. There was a woman engaged, who was spared on account of her sex, but she was the most guilty of all.¹

A journey through the criminal justice system

Amy Steele was fifteen years old when she was sentenced to death for robbery in 1821 at the Old Bailey court. This looks like an example of the terrifying harshness of the 'bloody code' of criminal justice which operated in England at this time. Yet, four years later, the same Amy Steele was back at home with her parents, free and pardoned of all wrong-doing. Steele's story was not a freakish aberration of the justice system in the early years of the nineteenth century. Rather it was an example of what very often happened in a country where 'the entire legal fabric, from prosecution to punishment, was shot through with discretion'.² So, was Steele's good fortune a result of being female, the outcome of persistent paternalistic leniency shown towards women through history? Or was the reason more complicated than this?

If Steele's story is carefully followed through the judicial records, issues other than her gender emerge. After the pronouncement of the terrible sentence, appeals for royal mercy came from her parents, mercy for their 'child' who had never offended before, and who had the potential to become a respectable member of society. The judge who sentenced her then reported doubts over the facts of her case, and summed her up as 'a bad character . . . but from the mildness and feebleness of her manner one would not expect her to be engaged in an outrage of this sort'. Royal mercy was extended to her, and she was conditionally pardoned – instead of being executed, she should be transported to Australia for the rest of her life. But Steele did not leave England. The next decision made about her future – another conditional pardon – despatched her to prison in the General Penitentiary at Millbank to serve ten years there. When a cholera epidemic hit Millbank in 1824, she was transferred to a hulk on the Thames, and shortly found herself on a list of

¹ Lord Colchester (ed.), *A political diary, 1828–1830*, by Edward Law, Lord Ellenborough, London 1881, entry for 12 June 1828, 154–5.

² J. Brewer and J. Styles (eds), *'An ungovernable people': the English and their law in the seventeenth and eighteenth centuries*, London 1980, 18.

women granted free pardons and sent home, only two and half years after she was sentenced to death.³

Steele's story presents an intriguing and complex mix of reasons for judicial leniency. In this book some answers are suggested to questions about the effects of gender in a number of capital property crimes (shoplifting, pickpocketing and forged Bank note circulation in London and Middlesex) and in the operation of the English criminal justice system in the late eighteenth and early nineteenth centuries. Were offenders against the criminal law treated differently in accordance with their sex, and if so, why and how? These questions have, as yet, been only partially faced by historians. Some have presented what appears to be a more lenient pattern of treatment of women offenders (at least where serious crimes are concerned);⁴ but the attempt to discover why this should be so has proved a much more difficult task.

The same attempt to explain the 'mismeasure' of justice between men and women exercises modern criminologists. Here, there is no dearth of theory, reflection and analysis.⁵ One of the most interesting of these modern criminological studies showed how men and women coming before the courts said different things about themselves, and about what they had done, but there was no 'gendered' difference in the ways they sought to justify themselves. There was significant gender difference, however, in how the courts made judgements about their characters, and therefore in the sentencing thought appropriate.⁶ Another valuable study, published in 1997, started from the proposition that a 'superficial examination of the criminal statistics suggested that, for virtually every type of offence, women were treated more leniently than men'. It went on to show that the leniency which emerged from sentencing patterns for shoplifting, violence and drug offences in 1991 was more in the nature of different rather than lighter sentences. Interviews with

³ TNA, PRO, HO 17/53/11h02; HO 17/53/21k8.

⁴ See particularly P. King, 'Gender, crime and justice in late eighteenth- and early nineteenth-century England', in M. Arnot and C. Osborne (eds), *Gender and crime in modern Europe*, London 1999, 44–74, and *Crime, justice and discretion in England, 1740–1820*, Oxford 2000, 259–96; and G. Walker, *Crime, gender and social order in early modern England*, Cambridge 2003.

⁵ Since the literature is vast, only a selection is mentioned here: D. Farrington and A. Morris, 'Sex, sentencing and reconviction', *BJC* xxiii (1983), 229–48; F. Heidensohn, *Women and crime*, Basingstoke 1985; L. Gelsthorpe, *Sexism and the female offender*, Aldershot 1989; A. R. Edwards, 'Sex/gender, sexism and criminal justice: some theoretical considerations', *International Journal of the Sociology of Law* xvii (1989), 165–84; L. Gelsthorpe and A. Morris, *Feminist perspectives in criminology*, Milton Keynes 1990; K. Daly, *Gender, crime and punishment*, New Haven, Conn. 1994; S. Edwards, *Sex and gender in the legal process*, London 1996; C. Hedderman and L. Gelsthorpe (eds), *Understanding the sentencing of women*, London 1997. C. Smart, *Women, crime and criminology: a feminist critique*, London 1976, is still useful although it shows its age; the 'silence' of which it speaks in relation to women's crime is no longer entirely relevant.

⁶ Daly, *Gender and crime*.

magistrates showed clearly the influence of gendered attitudes on their decision-making, both conscious and subconscious.⁷

Only relatively recently has writing on the history of crime and the criminal justice system in England broached the difficult question of the relationship between gender and law-breaking, and gender and judicial decisions in the early modern and modern periods.⁸ Despite the growth of the study of women's history and the increasing interest in social history over the last thirty years, there is still insufficient research and writing on the criminality of women and their encounter with the criminal justice system. In particular, the voices of those on one side of the unremarkable, daily drama of the system of criminal justice – the men and women who were tried, judged and punished – remain largely unheard. Those on the other side – prosecutors, juries and judges – rarely gave reasons for their decisions which determined the fate of the poor and the obscure. Nevertheless, the decisions which were made at all stages of the criminal justice system were not as arbitrary and illogical as they might at first seem; they were the result of rational choices made within a system which frequently demanded that choices were made.⁹

Historians currently researching and writing on women, crime and the courts in the early modern and modern period¹⁰ are beginning to discard the traditionally presented picture of women as law-abiding and not worth consideration in crime and criminal justice history.¹¹ The study of crime and the criminal justice system requires that the many women involved in crime, tried and punished, are taken more seriously. The motives of those with judicial power over them need to be better understood.

⁷ Hedderman and Gelsthorpe, *Understanding the sentencing of women*.

⁸ P. King, 'Female offenders, work and life-cycle in late eighteenth-century London', *Continuity and Change* xi (1996), 61–90, and *Crime, justice and discretion*, 196–207, 235–7, 279–88; Arnot and Osborne, *Gender and crime*; C. Emsley, *Crime and society in England, 1750–1900*, 2nd edn, London–New York 1996; J. Kermode and G. Walker, *Women, crime and the courts in early modern England*, London 1994; Walker, *Crime, gender and social order*; L. Zedner, 'Women, crime and penal responses: a historical account', in M. Tonry (ed.), *Crime and Justice: a Review of Research* xiv (1991), 307–62, and *Women, crime and custody in Victorian England*, Oxford 1991; C. Conley, *The unwritten law: criminal justice in Victorian Kent*, Oxford 1991; U. Rublack, *The crimes of women in early modern Germany*, Oxford 1999. Relevant earlier works include J. M. Beattie, 'The criminality of women in eighteenth-century England', *JSH* viii (1975), 80–116 [repr. in D. Kelly Weisberg (ed.), *Women and the law: the social historical perspective*, Cambridge, Mass. 1982], and *Crime and the courts in England, 1660–1800*, Oxford–Princeton 1986; and C. Z. Wiener, 'Sex roles and crime in late-Elizabethan Hertfordshire', *JSH* viii (1975), 38–64.

⁹ N. Landau (ed.), *Law, crime and English society, 1660–1830*, Cambridge 2003, 4–6.

¹⁰ See, for instance, King, 'Female offenders'; Kermode and Walker, *Women, crime and the courts*; Walker, *Crime, gender and social order*; Zedner, 'Women, crime and penal responses', and *Women, crime and custody*; Conley, *Unwritten law*; Rublack, *Crimes of women*.

¹¹ L. Pike, *A history of crime in England*, London 1876; C. Lombroso and W. Ferrero, *The female offender*, New York 1895; O. Pollack, *The criminality of women*, New York 1961; J. J. Tobias, *Crime and industrial society in the nineteenth century*, London 1967. Similar views to those expressed in these works on female criminality can be found in much earlier writings: see Zedner, 'Women, crime and penal responses'.

Addressing the questions

The questions that will be addressed in this book are crucial ones about men and women's involvement in three selected crimes: shoplifting, pick-pocketing and circulation of forged paper currency. All three of these crimes were felonies which attracted the death penalty. The questions are about the life-style, the social status and the occupations of those charged with these felonies, and how such factors may have motivated their actions. They are also questions about male and female means and techniques of participation in such criminal activities, and whether their methods differed from each other. If there were differences in the ways that men and women committed their illegal acts, might that, in itself, have resulted in differing judicial responses and decisions? Were juries and judges, as they came to decisions about men and women charged with identical offences, comparing identical or different behaviours?

The decisions which were made about these offenders will then be addressed, not only at the stage of the criminal trials, but at all the stages of the justice system, an endeavour so far barely attempted by historians. The result of a trial and the handing down of a sentence by the judge were only the first moves in the long journey that many men and women took through the criminal justice system. There were many opportunities in that system for them to escape to lesser sentences, even to freedom, and at all these points it is possible to ask how the gender of the offender affected what happened.

The three capital property crimes and the men and women caught up in them have been scrutinised in order to see whether this might provide answers to the questions outlined above. The study centres on the men and women from London and Middlesex who appeared before the court of the Old Bailey Sessions, charged with stealing privily in a shop (shoplifting), stealing privily from the person (pickpocketing) and circulating (uttering) forged Bank of England currency notes. These offences were selected for three reasons. They involved a significant proportion of women, and this allows a more balanced consideration of the questions posed.¹² They attracted the death sentence, which permits those convicted to be followed through the subsequent stages of the judicial system. Their capital status gave the offences added significance in the eyes of contemporaries. The enquiry is mainly confined to London and Middlesex. This region provides a rich setting since it is the only part of England where there are full trial reports to give the kind of qualitative evidence which is important in providing an

¹² Women were involved in a wide range of property crimes, but their numbers in some of them were small. Horse, cow, and sheep stealing, burglary, housebreaking, and highway robbery, for instance, involved very low overall numbers of indicted females: King, *Crime, justice and discretion*, table 6.4 (for Essex) at p. 196, and 'Gender, crime and justice', table 2.1 (for Old Bailey and Home Circuit) at p. 45.

insight into the life-style and behaviour of the accused.¹³ The enquiry is set between the 1780s and the 1830s, a time of significant change and development in the English system of criminal justice. Debates about punishment, in particular the death penalty, the possibility and purpose of transportation and the growing use of prison, were at their height and the judicial and penal system was under strain from vastly increasing criminal business.¹⁴

Following the men and women involved in these crimes through the various stages of the criminal justice system is a particularly important feature of the enquiry. The following description aptly captures the complexity of the system and provides a striking metaphor for the way in which the criminal justice system worked in England:

Those accused of property crimes . . . found themselves propelled on an often bewildering journey along a route which can best be compared to a corridor of connected rooms or stage sets. From each room, one door led on towards eventual criminalization, conviction, and punishment, but every room also had other exits. Each had doors indicating legally acceptable ways in which the accused could get away from the arms of the law . . . Each room was also populated by a different and socially diverse group of men and women, whose assumptions, actions and interactions, both with each other, and with the accused determined whether or not he or she was shown to an exit or thrust on up the corridor.¹⁵

So, the three crimes, and the men and women involved, have been considered not only crime by crime, but also in stages, reflecting their journey through the justice system. The first question addressed is to what extent English law itself was structurally gendered. Then comes analysis of the evidence from the public trials at the Old Bailey, the verdicts and sentences of the court, together with evidence about how the crimes were committed and who the defendants were. Subsequently the less public arena of the

¹³ See appendix below for details of the sources used, the specific dates for detailed analysis and the methodology for the research.

¹⁴ Views on the debate about punishment can be found in Beattie, *Crime and the courts*, 520–615; S. Devereaux, 'In place of death: transportation, penal practice and the English state, 1770–1830', in C. Strange (ed.), *Qualities of mercy: justice, punishment and discretion*, Vancouver 1996, 52–76, and 'The criminal branch of the Home Office, 1782–1830', in G. Smith, A. May and S. Devereaux (eds), *Criminal justice in the old world and the new: essays in honour of J. M. Beattie*, Toronto 1998, 270–308; V. A. C. Gatrell, *The hanging tree: execution and the English people, 1770–1868*, Oxford 1994; M. Ignatieff, *A just measure of pain: the penitentiary in the industrial revolution, 1750–1850*, London 1978; and R. McGowen, 'The image of justice and reform of the criminal law in early nineteenth-century England', *Buffalo Law Review* xxxii (1983), 89–125, and 'A powerful sympathy: terror, the prison and humanitarian reform in early nineteenth-century Britain', *JBS* xxv (1986), 312–34. There is evidence of administrative overload in Home Office records: HO 17, petitions archive from 1819; HO 19, register of petitions; HO 26, criminal registers, 1791–1823.

¹⁵ King, *Crime, justice and discretion*, 1–2.

appeals system and the pardoning process is examined to see if light can be shed on what happened there, and the role of gender in this part of the journey.

The approach of historians so far

It has been the accepted view that the entire English criminal justice system was driven by and operated through the exercise of discretion on the part of those who had power within it.¹⁶ However, the role of gender in this discretionary process in the late eighteenth and early nineteenth centuries went unremarked until recently.

For as long as systematic records of crime have been kept, the sex of offenders has been recorded. Over time, certain trends and patterns in female criminality have been observed and commented upon by historians. Amongst long-term patterns are the accepted facts that women commit a minority of all recorded crimes; and that their crimes are categorised as less serious and less 'professional' than those of men.¹⁷ It is usually said that, in the eighteenth century, women accounted for a relatively small proportion of (property) offences, and were less likely than men to be accused of capital crimes or of property crimes involving violence. This generalisation, based largely on research which counted and compared indictments without any qualitative approach, limits what can be known about context and other issues such as the occupation, age and status of defendants and their relationship to the victim of crime.¹⁸ A picture of continuity seems to emerge, if overall criminal statistics over a long period provide the only view. The ratio of men to women indicted for felony/serious offences appears to remain relatively constant from the Middle Ages onwards,¹⁹ with an increase in the

¹⁶ Brewer and Styles, *Ungovernable people*, 18; D. Hay, 'Property, authority and the criminal law', in D. Hay, P. Linebaugh and E. P. Thompson, *Albion's fatal tree*, London 1975, 17–63; P. King, 'Decision-makers and decision-making in the English criminal law, 1750–1800', *HJ* xxvii (1984), 25–58; J. Langbein, 'Albion's fatal flaws', *P&P* xcvi (1983), 96–120.

¹⁷ F. Heidensohn, 'Gender and crime', in M. Maguire, R. Morgan and R. Reiner (eds), *Oxford handbook of criminology*, Oxford 1994, 998.

¹⁸ King, 'Female offenders', 61–2.

¹⁹ See, for example, J. Bennett, *Women in the medieval countryside: gender and household in Brigstock before the Plague*, Oxford 1987; K. Garay, 'Women and crime in late-medieval England: an examination of the courts of gaol delivery, 1388–1409', *Florilegium* i–ii (1979/80), 87–103; J. Given, *Society and homicide in thirteenth-century England*, Stanford 1979; B. Hanawalt-Westman, 'The female felon in fourteenth-century England', *Viator – Medieval and Renaissance Studies* v (1974), 253–68, and *Crime and conflict in English communities, 1300–1348*, Cambridge, Mass. 1979; A. L. Klinck, 'Anglo-Saxon women and the law', *Journal of Medieval History* viii (1982), 107–21; S. Mercer, 'Crime in late-seventeenth-century Yorkshire: an exception to a national pattern?', *Northern History* xxvii (1991), 106–19; Beattie, 'Criminality of women'; and Wiener, 'Sex roles and crime'.

women's share occurring only in the later twentieth century.²⁰ Few historians seriously challenge this long-term view.²¹ However, when criminal records can be consulted in much more detail, when different classes of crime are observed and the exploration covers the whole range of the criminal justice system, the 'universal truth' – that women commit much less crime than men and are more leniently treated when they do – looks questionable.

As late as 1996 it was possible to say that historians of crime in England in the eighteenth and early nineteenth centuries had given little attention to the role of gender, and had 'found it remarkably difficult to give their work a properly contextualised gender dimension'.²² Through the 1980s and into the 1990s many text books on crime in the eighteenth and early nineteenth centuries contained no index reference to women or gender, other than to women as victims of crime, or with reference to infanticide or prostitution.²³ Some historians of crime now include considerations of women and of gender in their work, and by 1996 it was possible to say that

It is not simply that historians and criminologists have begun to explore the role of women in criminal activity . . . and the experience of women enmeshed in the various elements of the criminal justice system, but, more importantly, there is a recognition that gender is central to economic, political and social relations, and as such it contributes to the ways in which communities, institutions and states formulate their regulations and their laws as well as to the ways in which these regulations and laws are interpreted and enforced.²⁴

One historian of the English criminal justice system, John Beattie, has carried out groundbreaking work over the last few decades, which has led to growing

²⁰ A. Morris, *Women, crime and criminal justice*, Oxford 1987, 19–20; Heidensohn, *Women and crime*, 5, and 'Gender and crime', 1001.

²¹ Exceptions to views of the constant nature of the global statistics for female involvement in crime until the twentieth century are M. Feeley and D. Little, 'The vanishing female: the decline of women in the criminal process, 1687–1912', *Law and Society Review* xxv (1991), 719–57, and M. Feeley, 'The decline of women in the criminal process: a comparative history', *CJH* xv (1994), 235–74. However, P. King, 'Gender and recorded crime: the long-term impact of female offenders on prosecution rates across England and Wales, 1750–1850', ch. vi in his *Crime and law in the age of reform*, forthcoming 2006, makes a persuasive argument against the views of Feeley and Little.

²² King, 'Female offenders', 61.

²³ J. A. Sharpe, *Crime in early modern England, 1550–1750*, Harlow 1984, and *Judicial punishment in England*, London 1990; G. F. E. Rudé, *Criminal and victim: crime and society in early nineteenth-century England*, Oxford 1985; C. Emsley, *Crime and society in England, 1750–1900*, 1st edn, Harlow 1989; J. Briggs, C. Harrison, A. McInnes and D. Vincent (eds), *Crime and punishment in England: an introductory history*, London 1996 (a very few references); A. Barrett and C. Harrison, *Crime and punishment in England: a sourcebook*, London 1999.

²⁴ C. Emsley, 'Introduction', to Arnot and Osborne, *Gender and crime*, pp. vii–viii. Emsley added 'Mid-point assessment, I: Crime and gender', to the 2nd (1996) edn of *Crime and society*. See also idem, 'Albion's felonious attractions: reflections upon the history of crime in England', in C. Emsley and L. A. Knafla (eds), *Crime history and histories of crime: studies in the historiography of crime and criminal justice in modern history*, London 1996, 67–85.