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“Female husbands”, community and courts in the eighteenth century

While there was no specific law prohibiting sex between women in the eighteenth century, some women were prosecuted as a consequence of same-sex relationships. These ‘female husbands’, women who married other women under male identities, often lived highly individual lifestyles; but their path through prosecution and punishment involved a much more intricate web of relations. Thus an exploration of their cases highlights important features of the contemporary criminal justice system as well as popular and elite attitudes to the specific offences.

In particular, understandings of the role of the community in the discovery, prosecution and punishment of criminal offences are complicated by an examination of the female husband cases. In a crucial period of change for the legal system, the complexities of its processes as well as the impact of class, gender and culture are exposed. Light is shed upon the shifting roles and interests of the individual, the local community, and the courts at a point when criminal cases were in the early stages of a shift from private prosecution and public punishment to greater formality and state control. These unusual cases bring into focus the complex role of community relationships in an evolving legal system.

I. INTRODUCTION

In the eighteenth century, many women's lives were hard and becoming harder: women's wages were falling in rural occupations, formal trades were generally closed to unmarried women even if widows were able to engage in them, and single women were viewed with increasing suspicion.¹ While urban life offered opportunities to such women, it also ‘forced on them a greater need for self-reliance.’² It is perhaps unsurprising, then, that some took direct action to remedy their situation through living as men, a relatively unusual but by no means unknown strategy in the eighteenth

¹ Bridget Hill, *Women Alone: Spinners in England, 1660-1850*, New Haven, 2001, in particular 25-27; 29; 96-97; and 101.

² JM Beattie, *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror*, Oxford, 2001, 71.

century.³ Contemporary accounts thus found these women's behaviour comprehensible even without recognising lesbian or transgender possibilities.

Although the medical and cultural discourse of hermaphroditism potentially provided a biological explanation for the masculinity of some women,⁴ and although some chose to live as men for more or less their entire adult lives (sometimes only being discovered after death), most cases were treated as simple impostures. These women were assumed to remain physically and psychologically essentially female; indeed, popular accounts often ended with the return of the imposter to female garb and manners.

Their path could, if they were fortunate, lead to a long and successful life as a man;⁵ or a career (albeit often brief) in the military.⁶ Women who, thus disguised, enlisted in the armed forces featured most often both in news reports and in popular culture, and were frequently lauded rather than condemned. Their motivations were assumed to be either patriotic fervour, disappointment in love, or an attempt to pursue a (male) beloved. For example, Sarah Penelope Stanley, honourably discharged from the Ayrshire Fencible Cavalry when her sex was discovered, was still in male dress when she came before a London court charged with theft. She recounted a personal history which included marriage to a man who left her penniless, male impersonation through economic necessity alone, and creditable military service. Crucially, she also promised a return to conventional feminine dress and behaviour. Her court appearance ended with a gift of money collected by court personnel.⁷

However, there was one category of women whose adoption of a male identity was liable to end in an ignominious journey of exposure, community hostility, court proceedings, and often harsh judicial punishment. This article will consider the latter cases, and in particular the role of the community in the discovery, prosecution, and punishment of these individualistic women. Often popularly referred to as 'female husbands', they extended their male personae beyond daily life and work and into the sexual realm when they courted and married other women. Since they were understood to be women in disguise, their sexual behaviour was correspondingly understood as between women and therefore deviant. Although prosecution was by no means inevitable, I have identified six criminal cases between 1694 and 1777;⁸ in none of these was the issue of

³ Numerous examples can be found in, for example, Wheelwright, *Amazons and Military Maids* and Lillian Faderman, *Surpassing the Love of Men: Romantic Friendship and Love Between Women from the Renaissance to the Present*, London, 1985.

⁴ Emma Donoghue documents the equation of lesbianism with hermaphroditism in popular discourse in 'Imagined More than Women: lesbians as hermaphrodites, 1671-1766' *2(2) Women's History Review* (1993) 199.

⁵ A typical report of posthumous discovery concerns John Chivy's death in February 1764: he had been married for over twenty years and worked in husbandry, but was discovered after death to be physically female (*London Chronicle*, 16-18 February 1764). Two years later, the case of Mary East was reported: having lived as a married man, James Howe, for over thirty years, she admitted that she was a woman when resisting a blackmail attempt following the death of her wife (*London Chronicle*, 7-9 August 1766).

⁶ See the career of Sarah Penelope Stanley, below; for numerous further examples, see Julie Wheelwright, *Amazons and Military Maids*, London, 1989.

⁷ G T Crook, *The Complete Newgate Calendar*, Vol IV, London, 1926, 221-222.

⁸ Randolph Trumbach suggests the case of Constantine Booth is also a female husband prosecution ('London's Sapphists: From Three Sexes to Four Genders in the Making of Modern Culture' in Julia Epstein and Kristina Straub, eds, *Body Guards: The Cultural Politics of Gender Ambiguity*, London, 1991, 122) but in fact she was the hermaphrodite spouse in a bigamy case rather than the defendant: *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 18 July 2011), September 1719, trial of Katherine Jones, alias Nowland (t17190903-50).

hermaphroditism raised. How did these cases come to be prosecuted, and what was the role of the wider community in their journey to and through the courts?

Their route through the criminal justice system will be considered in three stages: discovery, prosecution, and punishment. The first of these explores how the female sex of these defendants was discovered, and by whom. It will pay particular attention to the role of parties outside the marriage in this process, and consider the very early point at which such outsiders became involved in proceedings. Subsequent sections consider the motivations of those involved in taking the trouble and expense of bringing a prosecution before the courts, before following the progress of these cases into the courtroom. Again, the extent to which prosecutorial decisions were made or influenced by parties other than the victim is analysed for each case; and the wider interests at play are explored. Finally, the punishment of those female husbands who were convicted is considered, and the community element even at this apparently most formal stage of the judicial process is emphasised.

In talking of the community, it will become apparent that this term does not describe a homogenous body of people. On the contrary, many factors including relationships with the parties, social hierarchies, and economic and political status affected the precise nature of the role each actor or set of actors played. The term 'community' is effectively a shorthand for those who had some connection to the defendant and victim, whether that was familial, social, geographical, or some combination of these. It invokes a group of people with overlapping – not unified – lives, experiences and interests. Such a definition may be imprecise, but its flexibility is of value here in allowing the discussion to reflect the diverse and contingent responses to these spouses from those around them.

While legal historians have recognised the importance of the community context to prosecutorial decision-making,⁹ most academic attention has been focused upon the decisions open to the individual victim-prosecutor him or herself in this 'golden age of discretionary justice in England'.¹⁰ Given the absence in eighteenth-century England of a professional police force, of state prosecution, and – in the earlier part of the century, at least – of lawyers in the criminal courtroom, prosecutors had great discretion as to whether to bring criminal charges, what charges to bring, and how far to pursue the case.¹¹ King comments that '[t]he criminal justice system relied on the participation of a wide range of social groups at almost every stage in the prosecution process and gave them extensive discretionary powers',¹² with the decisions of individual prosecutors having enormous impact. Building upon King's work, this article argues that in the female husband cases, community influence over prosecutorial decision-making was substantial and frequently went significantly beyond the model he describes for property offences, of an autonomous victim-prosecutor weighing the risks of potential community disapproval.¹³

⁹ See in particular Peter King, *Crime, Justice and Discretion in England 1740-1820*, Oxford, 2000; Clive Emsley, *Crime and Society in England 1750-1900*, London, 1996, pp 178-188; JM Beattie, *Crime and the Courts in England 1660-1800*, Princeton, 1986, 39-40.

¹⁰ King, *Crime, Justice and Discretion*, 1.

¹¹ Emsley, *Crime and Society*, 184-185; John H Langbein, *The Origins of the Adversary Criminal Trial*, Oxford, 2003, 3-4.

¹² King, *Crime, Justice and Discretion*, 2.

¹³ King, *Crime, Justice and Discretion*, 28-35.

Tracing both the path of prosecution and community involvement in female husband cases is far from straightforward. Evidence is often missing, and surviving reports may give only the sparsest of detail. In particular, whatever the realities of such cases, they were often presented in contemporary accounts as straightforward financial offences with an unnamed victim and few details of prosecutor or prosecution. Thus the only record we have for a trial of 1694 is the account written by Anthony à Wood in a letter to a friend:

appeared at the King's Bench in Westminster hall a young woman in man's apparel, or that personated a man, who was found guilty of marrying a young maid, whose portion he had obtained, and was very nigh of being contracted to a second wife. Divers of her love letters were read in court, which occasion'd much laughter. Upon the whole she was ordered to Bridewell to be well whipt and kept to hard labour till further order of the court.¹⁴

However, there is more detailed evidence of the five female husband prosecutions which form the subject-matter of this article. The sources are a combination of court records, newspaper reports, and accounts in volumes such as the *Annual Register*.

Given the incomplete survival of court records, and the selectivity of published accounts, we cannot be sure what proportion of such offences these represent, although King's research into crime reporting in the late eighteenth century does suggest that offences involving indirect appropriation, such as fraud, or non-fatal violence, including sexual offences, were particularly likely to be reported. Idiosyncratic elements and a degree of humour also added to the likelihood that a crime would be reported.¹⁵ Our cases were generally prosecuted as fraud, and implicitly invoked sexual offences, so it is probable that a significant proportion appeared in the media. Their relatively unusual facts, and sometimes apparently humorous undertones, would only have increased their appeal.

Limited records and the vagaries of the criminal justice system mean that tracing these prosecutions can resemble following a path through a maze rather than a linear progression. In navigating that maze, we will see that it has been created not by a series of atomised individuals but by intersecting relationships. The discretion which permeated judicial processes was not exercised freely by each actor, but rather negotiated between them and their wider community. Those dynamics were strongly, if imperfectly, evident when communities responded to the discovery of female husbands: their relatively novel circumstances required careful negotiation of societal norms, expectations, and controls if the disruption they caused was to be contained.

II. DETECTION AND EXPOSURE

¹⁴ Anthony à Wood (abridged by Llewellyn Powys), *The Life & Times of Anthony à Wood*, London, 1932, 306-307.

¹⁵ Peter King, 'Making Crime News: Newspapers, Violent Crime, and the Selective Reporting of Old Bailey Trials in the late Eighteenth Century', 13 (1) *Crime, Histoire et Sociétés/Crime, History and Societies* (2009), 91.

We might anticipate that the initial revelation, at least, of a husband's female anatomy would be a matter for the complainant. After all, it might be expected to occur during consummation of the marriage or subsequent sexual activity, and thus the wife was best placed to make the discovery. However, in several of the cases, the community were actively concerned even at this earliest stage; in others, they became involved very shortly afterwards.

One case would not have come to light at all without the interference of the couple's neighbours. The apparently unconsummated marriage of Mary Parlour and Samuel Bundy in 1760 was the subject of local gossip in Southwark, South London, although it is not clear how this speculation originated. The explanation that Bundy could not engage in sexual relations because he¹⁶ was undergoing a cure for 'a bad distemper' did not impress the couple's neighbours, who showed strong curiosity about the couple's sexual activity: while Parlour 'waited with Patience', 'some of the Neighbours thought proper to make a strict Search; upon which they found the Bridegroom to be a perfect Female', later identified as Sarah Paul.¹⁷

It is interesting that the word 'proper' is used. It suggests that as well as curiosity, these neighbours believed themselves to be motivated by a sense of obligation (either to the naive bride or to upholding community standards). That sense of community obligation in policing marriage can be contrasted with popular opposition to the legal policing imposed by Hardwicke's Marriage Act 1753.¹⁸ In London, clandestine or Fleet marriages had been common, often because of their relative cheapness rather than for any more sinister motive.¹⁹ Weddings were customarily followed by the public bedding of the couple;²⁰ although 'contract marriages' involving nothing more than verbal agreement followed by sexual intercourse had effectively died out, they were not quite extinct as late as the 1730s.²¹ In that context, anxiety about consummation and the sexual nature of the relationship rather than its legal form made cultural sense.

Such concerns might occur within the family as well as beyond it. Surviving records are unclear whether Ann Hutchinson or her mother Christian made the discovery in 1720 that Ann's

¹⁶ We do not know how these female husbands identified; contemporary accounts are heavily mediated, and today's identity labels cannot be straightforwardly applied to eighteenth-century people, as discussed below. This article will therefore adopt the admittedly imperfect solution of using male pronouns to refer to the accused while they lived as men, and female pronouns following their discovery, at which point they generally returned (or were coerced back) to female identities. Similarly, they will be referred to under the surname they were using (or being prosecuted under) at the time.

¹⁷ *London Evening Post*, 18-20 March 1760.

¹⁸ David Lemmings, 'Marriage and the Law in the Eighteenth Century: Hardwicke's Marriage Act of 1753', 39(2) *The Historical Journal* (1996), 339 at 340. It is perhaps worth mentioning that although the Act targeted clandestine marriages and enforced publicity, it appears to have had limited impact upon female husbands. In fact, the weddings themselves do not seem to have been secret or irregular: we know that Hamilton's marriage (which pre-dated the Act) took place in her wife's home parish following the reading of banns, for example, while Sarah Paul married in her parish church, albeit by licence (Saint Saviour, Southwark, Register of marriages, London Metropolitan Archives (LMA) P92/SAV 3041). The frequency of female husband prosecutions actually increased after the Act was passed.

¹⁹ Lawrence Stone, *Uncertain Unions: Marriage in England 1660-1753*, Oxford, 1992, 22-27.

²⁰ Stone, *Uncertain Unions*, p 22. However, such customs were starting to decline by the eighteenth century, albeit more slowly among the lower classes (Beatrice Gottlieb, *The Family in the Western World from the Black Death to the Industrial Age*, Oxford, 1993, 80-83)

²¹ Rebecca Probert, 'The Impact of the Marriage Act of 1753: Was It Really "A Most Cruel Law for the Fair Sex"?' 38 (2) *Eighteenth-Century Studies* (2005), 247 at 249-50.

fiancé was a woman, but the mother and daughter jointly prosecuted Sarah Ketson 'for being a loose person & pretending to be a man courting ... Ann Hutchingson by the name of John Ketson with an intent to marry defraud and cheat her'.²² There are no further facts recorded, beyond indications that Ketson was imprisoned for several more months, but the wording does suggest that discovery occurred before the marriage took place.

This involvement of an older, presumably more experienced woman is a repeated motif. It fitted into a discourse of the wife's innocence and naivety, particularly in the sexual context, whose prominence in published accounts does not quite obscure the fact that some wives knew of and colluded in the deception. For women such as Mary Parlour, the actions of others seem to have forced a prosecution which would otherwise not have taken place – either by forcing a discovery upon the wife or, as we shall see, by making public what she already knew.

This combination of community scrutiny and a preponderance of London cases may at first surprise: it is easy to assume that moving from a small town or village to a large city such as London meant leaving behind intense community surveillance. To some extent that was true.²³ However, even in the metropolis, neighbourhood networks could exert a strong influence over individuals much as they did in the countryside.²⁴ Assumptions that urban life offered greater opportunities for offending simply because community structures were weaker therefore need to be approached with caution. Rather, the advantage of urban life for female husbands was perhaps not so much a lack of surveillance as a combination of economic opportunity and, crucially, distance from people with whom they had grown up and who might recognise and expose them.

One reported case was prosecuted outside London, and here it was the wife who made the discovery and exposed her husband; even so, others were quick to become involved, not least the town council. Charles Hamilton, an itinerant quack who sold remedies at markets, had moved to Wells, Somerset, where he courted and married his landlady's niece Mary Price in 1746. They moved around Somerset as he practised his trade; while the couple were living in Glastonbury a few months after their marriage, Mary Price publicly complained that she had discovered her husband was a woman.²⁵ The exact circumstances of the discovery are skated over in the court papers, but in her deposition Price stated that they 'lay together several Nights, and ... the said pretended Charles

²² 'A true Kalendar of ... New Prison', March 1720, London Metropolitan Archives (LMA) MJ/SR/2344; see also Fraser Easton, 'Gender's Two Bodies: Bodies: Women Warriors, Female Husbands and Plebeian Life', *Past and Present* 180 (2003): 131-174, 152. New Prison was in Clerkenwell, London.

²³ Beattie notes that '[f]or single women especially, the capital offered a greater degree of independence and privacy – a certain freedom from the surveillance and controls of patriarchal and paternalistic social relationships' (*Policing and Punishment*, 71).

²⁴ Upchurch makes a similar point in relation to sex between men: 'The anonymity of urban space ... was always limited', with lives largely 'lived within family and community networks' (Charles Upchurch, *Before Wilde: Sex Between Men in Britain's Age of Reform*, Berkeley, 2009, 19).

²⁵ The case was widely reported: see the *Bath Journal*, the *Gentleman's Magazine* November 1746, the *Annual Register* 1746, the *Newgate Calendar*, 136-7. The original case papers are in Somerset Record Office (SRO), QSR 314 (7). An anonymous pamphlet about the case, written by Henry Fielding (*The Female Husband: or, The surprising history of Mrs Mary, alias Mr George Hamilton, who was convicted of having married a young woman of Wells*, London, 1746) is almost entirely fictional (Sheridan Baker, 'Henry Fielding's *The Female Husband*: Fact and Fiction', 74(3) *Publications of the Modern Language Association of America* (1959), 213).

Hamilton (who had married her as aforesaid) entered her Body several times, which made [Price] believe, at first, that the said Hamilton was a real man, but soon had reason to Judge otherwise'.²⁶ (One should note that the couple had in fact been married a little under two months before Hamilton was arrested.) Having announced her discovery, Price did not herself pursue the prosecution against Charles/Mary Hamilton, as it was taken up by the Corporation of Glastonbury: the community was thus quick to become involved, and at a very high level.

However, we cannot generalise from these cases to assume that community involvement was necessarily central to the initial stages of such prosecutions. On the contrary, a case of 1773 was discovered and apparently prosecuted exclusively by the deceived individual. Henrietta Lake (who is not named in the initial reports) appeared on 17 June before the Lord Mayor sitting as a Justice of the Peace (magistrate).²⁷ The prosecutor was 'an old woman' in possession of £100 who had married Lake believing her to be a man, only to discover that her new husband was a woman. The age of the wife and the apparent lack of any motive beyond the financial – one report suggests that Lake was acting jointly with 'a young fellow, who was her sweetheart'²⁸ – distinguish this case from the other female husband prosecutions.

III. REASONS FOR PROSECUTION

Once discovery was made, the next question was what should be done. With no police force or state prosecution agency for such cases, the decision was ostensibly an individual one and criminal proceedings were not inevitable. John Brown, for example, had been married to Ann Steel for five years when his attempt to enlist in York culminated in his identification as local woman Barbara Hill. The marriage was ended against the couple's wishes, but there was no quarter sessions case, probably no petty sessions case (before a single magistrate), and newspaper reports make no mention of any formal punishment.²⁹

Nonetheless, the outcome was not left in the hands of Hill's wife: although Steel 'came to town in great affliction, begging that they might not be parted',³⁰ a note on the marriage register for Bolton Piercy shows that Hill was 'of course separated from the said Ann Steel'.³¹ Yet while extra-judicial action was seen as adequate here, some unfortunate female husbands were brought before the courts. What factors might lead the victim or those around her to pursue the matter through prosecution?

²⁶ Deposition of Mary Price.

²⁷ The case was reported in the *General Evening Post*, 17-19 June 1773, *Middlesex Journal or Universal Evening Post*, 17-19 June 1773 and 22-24 June 1773, and *London Evening Post*, 24-26 June 1773.

²⁸ *General Evening Post*, 17-19 June 1773.

²⁹ Borthwick Institute's account of the case (Borthwick Institute for Archives, 'The story of Barbara Hill', <<http://www.york.ac.uk/borthwick/holdings/guides/research-guides/lgbt/barbara-hill/>> accessed 10 December 2016) notes that 'there seem to be no entries in the court books of the archbishop or of the Dean and Chapter'. I have searched local and national newspapers and the quarter sessions records held in York Archives and Local History for the relevant months, without finding any reference to court proceedings.

³⁰ *London Chronicle*, 31 January - 2 February 1760.

³¹ Borthwick Institute, 'The story of Barbara Hill'.

Ending the marriage

The victim herself might seek to prosecute for several reasons. One was eminently practical: if the relationship broke down, disclosing the husband's deception was a way for the wife to clearly and publicly end the marriage. While this was not without social cost for her, it did ensure that she was no longer legally bound to her husband. That was important because for as long as a woman was married, the doctrine of coverture meant that her legal personality was subsumed into that of her husband, giving him the legal power to dictate most aspects of her life including where she lived, while her earnings and possessions belonged to him. Once her marriage was ended (indeed, was shown to have never existed in law), she was free either to resume a single life or to remarry more conventionally. Thus while Ann Steel was unwilling to end her relationship with Hill when its nature was discovered in 1760, she remarried in 1765.³² Interestingly, her new husband was from the same parish and would therefore have known of the previous relationship.

Revenge

Prosecution could also be a wife's way of exacting revenge if the relationship had ended badly: for example, if she really had been deceived as to the sex of her husband. The fury of Henrietta Lake's (unnamed) victim is apparent from the report of her as 'so much enraged that she obtained a warrant against her *spouse*' before the Lord Mayor, and had Lake committed to the Poultry Compter.³³ However, the story then took a most unusual turn as Lake escaped from the prison - again in male dress - with the assistance of Richard Walker, a recently-discharged turnkey (jailer) who provided her with the key she used to escape, in return for 'nine guineas, a bond and some notes'.³⁴ She was recaptured within hours; her prosecutor then 'made a debt of it, and arrested her for 100l', thereby making the case one of civil debt rather than criminal law.³⁵ In this period, debtors could be imprisoned until either the debt was paid or the creditor relented, and so Lake remained in Poultry Compter. Both Lake and her victim had made imaginative use of the criminal justice system, and we have no evidence that either felt accountable to a wider community in doing so.

Reputation

To prosecute was also a clear statement by the wife that she had been deceived rather than complicit, thereby reasserting her own sexual virtue (even at the expense of being presumed naive and gullible). She could claim that she had been fooled by the disguise and was an innocent victim. Here, the advantages of prosecution did not accrue to the wife alone: there were powerful motivations for the court and community to believe, or at least appear to believe, in the wife's ignorance of the deception.

³² Borthwick Institute, 'The Story of Barbara Hill'.

³³ *Middlesex Journal or Universal Evening Post*, 17-19 June 1773.

³⁴ *London Evening Post*, 24-26 June 1773. He would in turn be convicted of conspiracy to pervert the course of justice, although his sentence was respited (ie postponed or reprieved): *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 17 April 2011), 7 July 1773, trial of Richard Walker (t17730707-86).

³⁵ *Middlesex Journal or Universal Evening Post*, 22-24 June 1773.

To do so was to reinforce the message that lesbianism did not really exist as an option for women. Additionally, there was strong cultural support for the idea that relationships between women would not last and that the parties involved (or at least those who retained some femininity) would return to heterosexuality. As Faderman remarks, '[t]he ephemerality of lesbian relationships was a notion cherished by male writers throughout the centuries.'³⁶ Since male writers were generally from the same class and background as male lawyers (indeed many lawyers such as magistrate Henry Fielding were also writers), these attitudes could reasonably be presumed to be found in the law courts too. Both court reports and popular pamphlets such as Fielding's *The Female Husband*, a highly fictionalized account of the Hamilton case, fed in turn into popular culture.

Breach of gender and sexual norms

We are thus moving closer to the underlying reasons for relatives, neighbours, and even outsiders to involve themselves in an expensive and time-consuming legal process. Two key issues have been raised by historians: hostility to the seizing of male prerogatives by a female, and hostility to the sexual element of the offences.

Female transvestism was often not prosecuted, and in certain circumstances might even be celebrated; while sex between women was policed socially and considered 'criminal' in popular language,³⁷ but was not usually treated as an issue for the courts. However, the two in combination were a potent mixture which communities and authorities were eager to suppress. Lynne Friedli and Lillian Faderman both emphasise male impersonation as the primary problem, with Friedli arguing that 'the major issue was deception and the consequent usurpation of rights and privilege, rather than sexual deviance in itself',³⁸ although Faderman does note that 'sexual acts, especially if a dildo was used, seem to have been necessary to arouse extreme societal anger'.³⁹ That may, though, understate the significance of the sexual element: as Donoghue suggests, this was a 'crime ... neither purely social nor purely sexual' but containing both elements.⁴⁰ Easton goes further, differentiating between 'imitation of the sexed body of a man' by assuming a male social role, justified on grounds of industry and patriotism, and the unjustifiable 'successful imitation by some female husbands of the sexual body of a man'.⁴¹

There is another significant feature of those cases which ended up before the courts. These defendants had not only assumed male social and sexual privileges, but were also living outside

³⁶ Faderman, *Surpassing the Love of Men*, 47.

³⁷ Hester Thrale defined 'Sapphist' as a woman who liked 'her own sex in a criminal way' (*Thraliana: the Diary of Mrs. Hester Lynch Thrale (Later Mrs. Piozzi), 1776-1809*, ed. Katherine C Balderston, Oxford, 1951, cited in Emma Donoghue, *Passions Between Women: British Lesbian Culture 1668 – 1801*, London (1993), 4); an anonymous pamphlet talked of 'Tommiess' as committing 'Unnat'ral Crimes' (*The Adulteress*, London, 1773, 25-6, cited in Donoghue, *Passions Between Women*, 5); and Robert James' *Medicinal Dictionary* defined 'Tribads' as women with enlarged clitorises who 'make Attempts to converse in a criminal manner with other Women' (*A Medicinal Dictionary*, London, 1743).

³⁸ Lynn Friedli, "'Passing Women'" – A study of gender boundaries in the eighteenth century' in GS Rousseau and Roy Porter, eds, *Sexual Underworlds of the Enlightenment*, Manchester, 1987, 237.

³⁹ Faderman, *Surpassing the Love of Men*, 52.

⁴⁰ Donoghue, *Passions Between Women*, 61.

⁴¹ Easton, 'Gender's Two Bodies', 135.

direct male control. While soldiers or sailors, far from being independent, lived within a clear hierarchy with male superiors, female husbands lived in a household in which they assumed full legal authority over both themselves and their wives. They might even remove themselves from the informal discipline of the community: Hamilton, after marrying Price, had resumed an itinerant lifestyle as a travelling seller of quack remedies. Easton hints at this in his remark that 'women warriors, like the majority of passing-women workers, were generally viewed as properly subordinate and industrious individuals, and were well tolerated, whereas female husbands were seen as loose and disorderly, and were ostracized and sometimes criminalized.'⁴²

It is worth spelling out that the female husband was seen as a disorderly *woman*, dangerously adrift from patriarchal authority. Beattie addresses such contemporary concerns in his discussion of the prosecution of women in London in the early eighteenth century. He identifies 'a deeply rooted patriarchal anxiety about the irresistible sexual power and danger of women, particularly of unmarried women who could be seen as living independently of fathers or husbands or masters – women who were 'loose' in more than one sense of the word.'⁴³ Although he is talking particularly of women involved in prostitution, the pertinence of these points to female husbands is apparent, and indeed Sarah Ketson was described in precisely those terms as 'a loose person' in the charge against her.

In considering this highly gendered response to them, the depth and extent of the male personae adopted by female husbands raises an obvious question as to whether their place is in lesbian or transgender history. Oram has discussed in some detail the difficulty of distinguishing between cross-dressing, transsexuality or transgender, and lesbianism, and notes that the interrelationship between these has diverged only relatively recently.⁴⁴ Following Oram, I argue that these cases belong in both strands of history and we cannot simply import contemporary divisions. More particularly, in this context both community and court responses to these defendants were based on the assumption that they were females married to other females. Consequently, regardless of how we might interpret or speculate upon the women's own identities and self-conceptions, the treatment they received was based upon the assumption that they were women assuming male privileges, including sexual privileges.

Further, the accounts indicate that some of the female husbands moved between male and female identifications, or saw themselves as women in male disguise. Such accounts must, of course, be approached with caution: the reports are so mediated by legal norms, journalistic licence, and the defendants' own strategic decisions that we cannot do more than make a guess at how far they record these defendants' subjectivities. 'Public representations ... need to be understood as strategic and complex constructions negotiated during often dangerous interactions with men in positions of

⁴² Easton, 'Gender's Two Bodies'. 133.

⁴³ Beattie, *Policing and Punishment*, 64.

⁴⁴ Alison Oram, 'Cross-dressing and Transgender', in H G Cocks and Matt Houlbrook, eds, *The Modern History of Sexuality*, London, 2006, 259.

relative power and influence—journalists, police, lawyers and judges.⁴⁵ They therefore add as much complexity as clarity to our understandings of these cases.

Class insubordination

It is also noteworthy that female husbands generally came from the lower classes, and so fear of class insubordination as well as gender insubordination probably came into play. Sapphism was associated with lower-class women who could ‘infect the worthier classes from “below”’ (or with aristocratic women who ‘tempted virtuous gentry from “above”’).⁴⁶ Further, Lanser argues that during this period, appropriate female friendships were ‘a status symbol marking women as well-connected and well-bred.’⁴⁷ Accordingly, relationships between women were very much defined in class terms, rendering the inappropriateness of working-class female husbands’ relations with women both a marker of their own lower-class status and, by way of contrast, a reaffirmation of the virtuous ‘proper’ friendships enjoyed by their social betters.

IV. PRIVATE PROSECUTIONS

Those aware of the exposure of a female husband were thus faced with somebody who breached both gender and class norms (unless, as sometimes happened, the accused’s biography could be contorted into a more conventional narrative of thwarted heterosexuality and chasteness).⁴⁸ The female husband’s offence, then, was not just against the victim but also against wider society, potentially giving the community powerful motives for seeking to punish the transgression.

One way of countering such insubordination was by criminal prosecution, although that course almost always required individuals to assume the trouble and expense of bringing the case. During the eighteenth century, the courts were only in the early stages of a transition from victim-led prosecutions involving amateur justices of the peace and amateur constables to trials involving professional prosecution and defence counsel.⁴⁹ As a result, a case would not be pursued unless

⁴⁵ Lucy Chesser, ‘When Two Loving Hearts Beat as One’: same-sex marriage, subjectivity and self-representation in the Australian case of Marion-Bill-Edwards, 1906-196’ 17(5) *Women’s History Review* (2008) 721 at 724.

⁴⁶ Susan S Lanser, ‘Befriending the Body: Female Intimacies as Class Acts’ 32(2) *Eighteenth-Century Studies* (1999), 179 at 186. Conversely, Cocks points out that sodomy prosecutions in the late eighteenth century ‘cast a shadow over other forms of masculine association and complicated the processes of law enforcement. When local magistrates began to take rumours of elite involvement seriously, the cohesion of a local as well as a national ruling class ... was threatened.’ (H G Cocks, ‘Safeguarding Civility: Sodomy, Class and Moral Reform in Early Nineteenth-Century England’ 124 *Past and Present* 190 (2006), 121)

⁴⁷ Lanser, ‘Befriending the Body’, 186.

⁴⁸ See for example Mary East, discussed in fn 3.

⁴⁹ Langbein, *The Origins of the Adversary Criminal Trial*, 4.

somebody, usually but not always the victim,⁵⁰ thought that the time, expense,⁵¹ and inconvenience⁵² were merited; in the female husband cases, prosecutors included the wife but also a mother, an associate whose connection to the victims is unknown, and a town corporation. Generally, prosecutions might not be brought where either community justice or direct compensation from offender to victim were available instead,⁵³ where the victim did not want to bring a capital charge against the offender, or where the victim was either too embarrassed or too intimidated by the offender and their associates to prosecute.⁵⁴

Conversely, outside pressure might also lead to a prosecution which the victim would have preferred not to bring, as in the case against Sarah Paul. The revelation of the defendant's sex had come as no surprise to her partner Mary Parlour: 'the adopted husband says, the wife soon discovered the mistake she had made, but was determined for some time not to expose the matter'. Paul's account is supported by the facts that the marriage was then almost six months old and that after the arrest, Parlour chose to '[keep] the prisoner company in her confinement'.⁵⁵ The pressure upon Parlour to account for their sexual relationship, and to prosecute when it was shown to be non-heterosexual, is an indication of the force public opinion could exert upon individuals. It is therefore remarkable that Price was able to resist that pressure by failing to attend a later hearing, thereby ending the case. However, their story does not have a happy ending: six years later, it was reported that Sarah Paul had died in the workhouse of St Sepulchre, aged twenty-seven.⁵⁶

Prosecution by third parties

Given the extent of community influence exerted upon her, the prosecution brought by Parlour blurs the dividing line between private and public. Such private prosecutions arguably took on even stronger elements of the public when brought by outsiders to the offence, particularly if they belonged to an official body, as when the Corporation of Glastonbury prosecuted Mary Hamilton. However, we cannot transpose current notions of prosecution in the public interest onto their actions. Although contemporary legal reformers argued that prosecution did serve a public good (Henry Fielding asserted that 'Robbery is an Offence not only against the Party robbed, but against the Public, who

⁵⁰ Clive Emsley suggests that over 80 per cent of prosecutions were conducted by victims of crime or by other private individuals acting on the victims' behalf (*Crime and Society in England 1750-1900*, London, 1996, 178, with reference to Douglas Hay, 'Controlling the English prosecutor' 21 *Osgoode Hall Law Journal* (1983), 165 at 167).

⁵¹ Costs awards at the Surrey Quarter Sessions of 1767 ranged between seven shillings and a guinea, but probably did not represent the full cost of bringing the prosecution (Beattie, *Crime and the Courts*, 46-7). A head housemaid would earn about £5 a year, so a prosecution would cost her around two months' wages ('Costs and Wages in Great Britain', <<http://www.rootsweb.ancestry.com/~irlcar2/wages.htm>> accessed 8 August 2014, using information taken from Christopher Hibbert, *The English: A Social History, 1066-1945*, London, 1987).

⁵² Not the least such inconvenience could be the failure of the prosecution on a technicality, such as an incorrect name or date (Douglas Hay, 'Property, Authority and the Criminal Law' in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, Douglas Hay, Peter Linebaugh, John G. Rule, E P Thompson and Cal Winslow, eds, London (1975), 17-63, 33).

⁵³ Emsley, *Crime and Society*, pp 178-181; Beattie, *Crime and the Courts*, 39-40.

⁵⁴ Emsley, *Crime and Society*, p 188; Beattie, *Crime and the Courts*, 40.

⁵⁵ *London Chronicle*, 22-25 March 1760.

⁵⁶ *St. James's Chronicle or the British Evening Post*, 29-31 May 1766

are therefore entitled to Prosecution'),⁵⁷ these prosecutors only brought cases which they saw as in their own (group) interests which might well not coincide with those of the wider public.⁵⁸ Hay suggests that such men were concerned with the maintenance of order and deference rather than with the preservation of property alone, and both the progress of Hamilton's case and the idiosyncratic choice of offence support this view.⁵⁹

Preserved in the Hamilton court papers is a letter from Thomas Hughes dated 9 October 1746, instructing counsel Henry Gould on behalf of the Corporation of Glastonbury; Sheridan Baker makes a convincing argument that Hughes was the solicitor prosecuting the case.⁶⁰ The presence of counsel reflects not only the difficulty in identifying an appropriate offence, as discussed below, but also the importance given by the Corporation to the prosecution. By this stage, the case had been reported in the *Bath Journal*, attracting attention beyond the immediate community. In dealing with it firmly and decisively, and particularly by naming the offence as vagrancy, the town corporation were able to assert and underline their authority and ability to control disruptive outsiders.

The case is also a reminder that the ruling class was a small group which held judicial authority close. The men of the corporation which instructed counsel, the justices of the peace who took depositions, and counsel himself were all tightly connected, to the extent that prosecution and judiciary even overlapped (John Masters was both mayor and one of the magistrates taking depositions, while the other magistrate, Thomas White, had been mayor the previous year).⁶¹ This situation was not specific to small towns: in London there was a similar concentration of authority. The Lord Mayor, for example, enjoyed considerable civic power while also sitting daily as a justice of the peace (as did many of his aldermen) and being chairman of the Guildhall and Old Bailey sessions.⁶² When Hay suggests that 'the operation of the law was often the result of an agreement on tactics between the JP and the prosecutor', he is referring not only to shared class interests as gentlemen of property but to the fact that they were often friends, neighbours and associates.⁶³

Groups of associates extending beyond the ruling class were also making their presence felt in the eighteenth-century courtroom. A new source of prosecutions came to prominence over the course of the century: prosecution societies which brought together individuals, largely of the middling sort, who shared the cost of criminal cases seen as being in their mutual interest. The

⁵⁷ Henry Fielding, *An Enquiry into the Causes of the Late Increase of Robbers*, London, 1751, 108.

⁵⁸ For a detailed analysis of the relationship between private prosecution societies and the public interest in preventing crime, see Mark Koyama, *Prosecution Associations in Industrial Revolution England* (paper presented at the Centre for Historical Economics and Related Research at York, May 1, 2011, <<http://ssrn.com/abstract=1842148>> accessed 13 June 2016).

⁵⁹ 'Property, Authority and the Criminal Law', 51.

⁶⁰ Baker, 'Fact and Fiction', 220 fn 26.

⁶¹ Deposition of Mary Hamilton, SRO QSR 314(172); Glastonbury Town Council, 'Past Mayors of Glastonbury', <<http://www.glastonbury.gov.uk/past-mayors.html>> accessed 10 December 2016.

⁶² Beattie, *Crime and the Courts*, 88.

⁶³ Hay, 'Property, Authority and the Criminal Law', 51. For another example of the impact of such close networks, see H G Cocks, 'Safeguarding Civility: Sodomy, Class and Moral Reform in Early Nineteenth-Century England', 190 *Past and Present* (2006), 121-146. He examines an investigation into sodomy of 1806: the magistrates felt forced to defend their investigations into fellow members of the ruling class by arguing these were not done in their capacity as magistrates, but as friends seeking to find the source of rumour and calumny. No such unease was shown about the conviction and execution of five lower-class men as a result of the same investigation.

involvement of such societies in prosecutions for immorality reached its peak at the beginning of the eighteenth century, when the Societies for the Reformation of Manners were actively involved in pursuing and prosecuting sexual offences. They claimed to have prosecuted 1,363 offenders in 1727 for a range of disorderly practices including drunkenness, gaming and sodomy.⁶⁴ Soon, though, their use of informers, and suggestions that they were corrupt, saw their popularity ebb; in 1738 they formally disbanded.⁶⁵ By the mid-eighteenth century when most of our cases occurred, associations for the prosecution of felons were generally less concerned with moral reform than with mutual economic interests.⁶⁶ Shubert notes that '[w]ith only the rarest of exceptions, crimes against morality, public order and the state did not concern them'.⁶⁷ That reflected a general trend in the criminal law of the period, which placed prime importance upon the preservation of property, argued by Locke to be the fundamental purpose of government.⁶⁸ However, bringing prosecutions on behalf of non-members was not unknown, although this generally occurred where the crime was economic and the victim too poor to bring their own case, in furtherance of the societies' aim of deterrence.⁶⁹

The tantalisingly sparse details of Charles/Ann Marrow's 1777 prosecution do allow for the possibility that the prosecutor might have been acting for such a society.⁷⁰ We can be sure of little in Marrow's case, not even the accused's surname which also appears as Marlow, Morhow and Marrison in the court papers,⁷¹ but we can piece together the broad progress of the court case. It was brought not by any of the three women Marrow had allegedly married,⁷² but by George Field, a schoolmaster in Hammersmith, who had to enter into a recognizance for forty pounds.⁷³ His relationship to the protagonists and his motives for bringing the prosecution are unknown, but his profession and the recognizance indicate that his role, status, and relationship to the court were very different to those of the Glastonbury Corporation. First, as a schoolmaster he was firmly among the middling sort and outside the ruling class. Secondly, he was required to provide a recognizance which effectively

⁶⁴ '33rd Account of the Progress', appended to Richard Smalbroke, *Reformation necessary to prevent Our Ruine: A Sermon Preached to the Societies for Reformation of Manners, at St. Mary-le-Bow, on Wednesday, January 10th, 1727*, London, 1728.

⁶⁵ Dudley W. R. Bahlman, *The Moral Revolution of 1688*, New Haven, 1957, pp 65-66 cited in Rictor Norton, 'The Raid on Mother Clap's Molly House', *Homosexuality in Eighteenth-Century England: A sourcebook*, 5 February 2005, <<http://rictornorton.co.uk/eighteen/mother.htm>> accessed 10 December 2016.

⁶⁶ Adrian Shubert argues that the first true association of this kind was created in 1744; it and the 450 or so associations which followed were almost never concerned with crimes against morality ('Private Initiative in Law Enforcement: Associations for the Prosecution of Felons, 1744-1856' in Victor Bailey, ed, *Policing and Punishment in Nineteenth Century Britain*, London, 1981, 25-41). That does not mean that members' motivations were purely financial: Koyama (*Prosecution Associations*, 31) points out that members joined 'partly because they were concerned with crime and law and order and partly because they wanted to be seen to be concerned with crime and order and because they desired the good opinion of their friends and neighbours.' There was also a social element, with association events such as annual dinners common.

⁶⁷ Shubert, 'Private Initiative in Law Enforcement', 25.

⁶⁸ John Locke, *The Second Treatise of Government*, London, 1690, section 94.

⁶⁹ See for example Koyama, *Prosecution Associations in Industrial Revolution England*, 19.

⁷⁰ The London Metropolitan Archives hold records of a Hammersmith society (LMA P80/PAU/011: 'Minutes of Committee and general meetings of association for prosecuting thieves and felons') but it operated only from 1811. It is, however, possible that earlier societies existed whose records do not survive.

⁷¹ Ann Marlow (Recognizance of prosecutor, May 1777, LMA JM/SP/1777/05/029), Ann Marowh (Recognizance of prosecutor; list of 'Persons in Custody' in Middlesex Sessions Session Book, June 1777, LMA MJ/SB/B/0257); Ann Marrison (Petition of Ann Marrison, July 1777, LMA MJ/SP/1777/07/026).

⁷² *Annual Register*, 1777, 91-2, reproducing an article which appeared in the *Daily Advertiser* 8 July 1777.

⁷³ Recognizance of prosecutor, May 1777, LMA JM/SP/1777/05/029; 'Persons in Custody' in Middlesex Sessions Session Book, June 1777, LMA MJ/SB/B/0257.

obliged him to prosecute or risk incurring a significant fine. Although this was usual in prosecutions of the period (but with forty pounds at the higher end), it contrasts sharply with the close connections between prosecutors, counsel and court in Hamilton's case.

Finally, the constabulary system theoretically had a role to play in such cases. In contrast to the prosecution societies, constables owed their duties to the public, 'to secure and protect the innocent from the hands of violence; to preserve the public peace to the utmost of [their] power'.⁷⁴ Each male householder (except the poorest and most elderly) was liable to take a turn at acting as constable for a year, although many would pay a fine or hire a deputy rather than serve.⁷⁵ While not all criticisms of the system were justified, the fact that these were unpaid and untrained members of the local community must have affected their enthusiasm for policing moral offences. A further disincentive was the aftermath of the sodomy prosecutions against the habitués of Mother Clap's molly house in 1726. Constables had worked hand-in-hand with the Society for the Reformation of Manners, but this greatest success for the Society was ultimately counter-productive.⁷⁶ Initial popular support was replaced by concern about the methods used in such cases and the Society went into a fatal decline. Thereafter, attempts to involve parish constables in the policing of moral offences were met, as Storch notes, 'apparently with disappointing results'.⁷⁷

The Hamilton case, then, is exceptional in having an official body directly involved in its prosecution. However, even a private prosecutor rarely made her decisions altogether alone. King points out that victims would consult others before charging the defendant: typically, they might refer to their own family and friends; those of the accused; and leading members of the local community.⁷⁸ In the female husband cases, most victims appear not so much to have consulted as to have been directed by these others, but community involvement in the cases extended even beyond that. Once underway, the prosecution may have been a private burden but it was also a public affair: the degree of popular interest in these cases is apparent from surviving reports. According to the *Bath Journal*, "great Numbers of People flock to see [Hamilton] in Bridewell, to whom she sells a great Deal of her Quackery",⁷⁹ many of them presumably less unambiguously outraged by her actions than the town Corporation.

A disapproving *Whitehall Evening Post* reported similar visits to Sarah Paul:

Since in Prison she has got, through the Folly of her Visitants, upwards of 30s. a Day; dresses herself occasionally in Women's Apparel, and some Times in a neat Sailor's Habit; and has since under Confinement been visited by above 12 young Women, to whom she paid her Respects as a Man for Marriage.⁸⁰

⁷⁴ Saunders Welch, *Observations of the Office of Constable*, 3, cited in Beattie, *Policing and Punishment*, 120.

⁷⁵ Beattie, *Policing and Punishment*, 114, 134-5.

⁷⁶ See for example Norton, 'The Raid on Mother Clap's Molly House'.

⁷⁷ Robert D Storch, 'The Old English Constabulary', (1999) 49 *History Today*.

⁷⁸ King, *Crime, Justice and Discretion*, 28.

⁷⁹ *Bath Journal*, 22 September 1746, 107.

⁸⁰ *Whitehall Evening Post or London Intelligencer*, 1-3 April 1760.

Indeed, there was so much interest in Paul's case that on 25 March 1760, her examination was postponed 'for fear of a Riot and Disturbance, to the Disappointment of several hundred Spectators, who assembled to have a Sight of her'.⁸¹ The ambiguity of popular attitudes is captured by the *Public Ledger* which, in describing the event, refers sarcastically to 'so celebrated an heroine'.⁸² We are forcefully reminded that communities were heterogenous: for all their active involvement in these cases, they did not speak with one voice.

Decisions as to charge

When prosecution was pursued, it was not always clear what the female husband's offence should be, a dilemma emphasised in reports of Hamilton's case.⁸³ Although some vagueness was not uncommon in the early stages of proceedings,⁸⁴ it still persisted here when George Hodges Esq presented the indictment, which referred vaguely to 'a Misdemeanor in going Disguised in Mens Apparell & marrying one Mary Price'.⁸⁵ Only when counsel appeared in the courtroom was the issue resolved: according to the *Bath Journal*, '[t]here was a great Debate for some Time in Court about the Nature of her Crime, and what to call it, but at Last it was agreed, that she was an uncommon notorious Cheat'.⁸⁶ Hamilton was convicted before the Quarter Sessions in Taunton for 'imposing on his Majesty's subjects' contrary to the Vagrancy Act 1744.⁸⁷

Hamilton's prosecutors were unusual in charging her with a non-financial offence. They had good reasons, though, for this choice: vagrancy carried overtones of deception, sexual misconduct,⁸⁸ and above all, outsider status. The Corporation of Glastonbury was a relatively new body (founded in 1705) whose creation followed arguments that in the absence of a truly local justice of the peace, 'the morall of the inhabitants [had been] corrupt, and cavill and breach of the peace very frequent'.⁸⁹ It would thus have been eager to emphasise that it was indeed improving the peace and morals of Glastonbury, and that this particular offender was an outsider in an otherwise respectable town.⁹⁰

While discussion was usually less public and overt, the prosecutor had a great deal of discretion in choosing what crime to charge. Factors such as the level of punishment they desired for the offender, the evidence available to them, any offer by the offender to make restitution, and

⁸¹ *Whitehall Evening Post or London Intelligencer*, 25-27 March 1760.

⁸² *Public Ledger or The Daily Register of Commerce and Intelligence*, 26 March 1760.

⁸³ This difficulty is raised in most reports of the case; see in particular the *Bath Journal*, November 3, 1745.

⁸⁴ King, *Crime, Justice, and Discretion*, 42-43.

⁸⁵ 'Indictments and Presentments at Taunton Sessions 7 October 1746', Quarter Sessions Process Book, SRO Q/SPi/11. George Hodges appears in the archives as a JP who sat at Wells Quarter Sessions and made a number of orders between 1743 and 1747 (SRO QSR/311-315).

⁸⁶ *Bath Journal*, 3 November 1745, 132.

⁸⁷ *Gentleman's Magazine* November 1746; *Annual Register* 1746; Crook, *Complete Newgate Calendar*, Vol III, 137.

⁸⁸ Audrey Eccles, for example, notes that justices would 'stretch it to deal with ... immorality not specifically illegal under statute law' (*Vagrancy in Law and Practice under the Old Poor Law*, Farnham, 2012, 66; see also 81-86; 156-158).

⁸⁹ Petition of 1703, quoted in Robert Dunning, *A History of the County of Somerset*, vol 9, *Glastonbury and Street*, Woodbridge, 2006, 33.

⁹⁰ See further Caroline Derry, 'Sexuality and Locality in the Trial of Mary Hamilton, "Female Husband"' 19(3) *King's Law Journal* (2008), 595.

the greater expense of prosecuting felonies compared with summary crimes, might routinely influence these decisions. Most importantly in female husband cases, formulation of a charge profoundly affected the way in which the facts could be framed. A financial offence would focus upon exploitation of the wife by her female husband, avoiding the more dangerous territories of sexuality and shared affection. Usually, fraud was used: although these cases generally involved couples with very limited means, the clothes of the wife would suffice as the subject-matter if nothing better was obtained. Sarah Paul was committed to Southwark Bridewell 'for defrauding a young woman of money and apparel, by marrying her': Mary Parlour had financially supported the household while her husband was out of work, pawning clothing to do so.⁹¹ The reasons for that support - the possible emotional and sexual elements of the relationship – did not need to be addressed because the financial aspect alone was relevant to the charge.

Decisions as to venue

There was another decision to be made, too: the venue for the prosecution. Although most of the cases for which we have records were dealt with by the Quarter Sessions or, in London, Sessions of the Peace, there was also the possibility of summary conviction before a single justice of the peace in the Petty Sessions. Indeed, Paul's case was entirely dealt with before a single magistrate, Justice Clark sitting at Loman's Pond, Southwark, albeit not through prosecutorial choice but because the case never progressed beyond the preliminary stages. Petty Sessions records often do not survive, and were not systematically kept in any event; we know of Paul from newspaper reports, not court documents. A potentially rich source of information is therefore often unavailable to us.⁹²

However, we may overestimate reliance on both the Quarter Sessions and community-based informal justice if we do not take this lowest level of the court system into account. King argues that 'it was in the summary courts more than anywhere else that the people met and experienced the law in the eighteenth century'.⁹³ In fact, resort to summary justice was far from unusual: King found that in one rural hundred near Colchester, during the four-year period from 1788 to 1792, 'at least 40 per cent of ... households sent one or more of their members to the petty sessions as either victim or accused'.⁹⁴ He suggests that this was by no means untypical.

These courts were presided over by local justices of the peace, further blurring the distinction between community and formal justice. The line between civil and criminal law was also heavily blurred: proceedings often focused upon negotiated settlement rather than formal sentence,

⁹¹ *London Chronicle*, 22-25 March 1760. In light of this charge, it is surprising that Fraser Easton ('Gender's Two Bodies', 131) argues that the case (along with Hamilton's) illustrates a departure from a view of female husband cases as representing financial frauds to a perception of them as involving lesbian sexuality and disorderly behaviour charged as 'cheating' and other forms of vagrancy. In fact, financial rather than vagrancy charges predominated after Hamilton's case – Ann Marrow's prosecution even has the familiar allegation of multiple 'wives' – while the Sarah Paul case he cites in support of a new sexual understanding of such marriages in fact highlights sexual abstinence.

⁹² Peter King, 'The Summary Courts and Social Relations in Eighteenth-Century England' 183 *Past and Present* (2004), 125 at 130.

⁹³ King, 'The Summary Courts', 126.

⁹⁴ King, 'The Summary Courts', 131-132.

although punishments such as whippings and fines could be imposed.⁹⁵ The courts were accessible since they were local and cases could be heard at any time. By contrast, the Quarter Sessions were held in the county town four times a year, as their name suggests, and the Assizes less frequently; even in London, the City of London and Middlesex Sessions of the Peace met just eight times a year. Expenses were also significantly lower in the summary courts – not least because there was no need for parties and witnesses to travel to the county town - and fees might, at the magistrate's discretion, be further reduced.⁹⁶

All these decisions tended to be made with one eye on the reaction of other people. While close acquaintances and wider communities might agitate for prosecution, they might also oppose it or seek to limit its severity. In fact, we know that reactions to some of these defendants were mixed, with popular interest in Hamilton and Paul tempering hostility with curiosity. Even six years later, a newspaper report would refer ambiguously to Paul's 'Variety of Adventures in Men's Cloaths, which made a great Eclat'.⁹⁷ Prosecutors had to weigh up such popular fascination and even approbation when deciding to pursue court action. Where there was a perceived shared interest in prosecuting an offender then others might intervene formally or informally to support the victim in bringing a case. Conversely, informal sanctions available to victims might also be used against them if they brought an unpopular case.

V. PUNISHMENT

Where a community could engage in surveillance and investigation, they could also punish disorderly members. King has explored some of the extra-judicial sanctions available to neighbours, which included dismissal from employment; eviction; refusal of credit by local shopkeepers; loss of community support, both informal and formal (for example, removal of friendly society membership); and expulsion or admonition by one's church.⁹⁸ Urban crowds in particular might also use physical sanctions such as ducking⁹⁹ or pelting with mud, stones and other objects, occasionally going so far as to kill their subject.¹⁰⁰ Such informal punishment generally depended upon a level of community support. That is not to suggest that there would be a homogenous community view in every case, simply that those to whom the punisher(s) were most closely connected, or upon whom they were most reliant, would have to be taken into account. If somebody was too isolated in their action, they risked a critical mass of the community turning against them.

It is important to emphasise that the division between formal and informal could be very hazy. Much of the church's power to punish offences of morality had been transferred to the civil courts,

⁹⁵ See Gwenda Morgan and Peter Rushton, 'The magistrate, the community and the maintenance of an orderly society in eighteenth-century England' 76 *Historical Research* (2003), 54.

⁹⁶ King, 'The Summary Courts', 146-7.

⁹⁷ *St. James's Chronicle or the British Evening Post*, 29-31 May 1766.

⁹⁸ King, *Crime, Justice and Discretion*, 25-26.

⁹⁹ King, *Crime, Justice and Discretion*, 27.

¹⁰⁰ Robert Shoemaker, 'Streets of Shame? The Crowd and Public Punishments in London, 1700-1820' in Simon Devereaux and Paul Griffiths, eds, *Penal Practice and Culture, 1500-1900: Punishing the English*, Basingstoke, 2004, 235-6.

but a clergyman often retained influence and moral authority within his parish. Its impact could be considerable, as in Hill's case: she may have escaped criminal prosecution, but the forcible ending of a relationship is a form of discipline whose significance should not be underestimated. It is also a reminder that the division between legal and informal sanctions was neither entirely straightforward nor impermeable.

That remained true even within the courtroom itself: Hay argues that the use of discretion 'allowed the magistrate to make decisions that sometimes escaped legal categories altogether.'¹⁰¹ When Sarah Paul's wife and prosecutor Mary Parlour failed to appear before the justice of the peace, he had no choice but to discharge Paul. However, he still felt able to order Paul's masculine clothes to be burned. His legal authority for so ordering is unclear, to say the least; but as a leading member of the local community, he would be concerned to act in its perceived interests – and his own in not revealing the limits of his authority.¹⁰² Such concern encompassed not only the status of the court, but also the status of the individual magistrate: they and those before them would be aware of any other positions of authority which they occupied, and apparent powerlessness in one context might colour perceptions of them in those other roles.

While boundaries might be blurred in the earlier stages of the court process, one might imagine that conviction and sentence in the courts moved the condemnation and punishment of the offender away from the community and into the most formal realms of the justice system. On the contrary, eighteenth-century judicial punishments gave the community a key and often central role. Mary Hamilton was sentenced to six months' imprisonment and public whipping in four towns: that involved being corporally punished under the gaze of their inhabitants, a system which served multiple functions beyond the straightforwardly retributive. First, she would be recognised: future deceptions should, at least in theory, be more difficult. More broadly, Shoemaker argues that such public punishment 'shaped reputations ... [it] was intended to identify him or her as someone who could not be trusted, to damage his or her reputation as a respectable member of the community'.¹⁰³ Secondly, it would shame the offender, who would be paraded naked to the waist while suffering physical chastisement. Thirdly, the community could exert some influence: Shoemaker suggests that the urging of the crowd might affect the severity of a whipping;¹⁰⁴ Eccles notes that in 1751, Middlesex vagrant committee were informed that public whipping of vagrants was dangerous for constables because of lack of public support.¹⁰⁵ Thus whipping was a not-too-distant cousin of more informal punishments for those who breached community norms.

The pillory was even closer to community punishment: it was a minimal formalisation of crowd justice, since it not only depended upon the local populace to inflict direct force (through the throwing

¹⁰¹ Hay, 'Property, Authority and the Criminal Law', 40.

¹⁰² See for example the advice to Justices of the Peace to 'conceal the infirmity of their authority' in Edward Christian, *Charges Delivered to Grand Juries in the Isle of Ely, upon Libels, Criminal Law, Vagrants, Religion, Rebellions, Assemblies, &c. & c. for the Use of Magistrates and Students of the Law* (second edition), London: W Clarke and Sons, 1819, p 291.

¹⁰³ Shoemaker, 'Streets of Shame?', 232.

¹⁰⁴ Shoemaker, 'Streets of Shame?', 48.

¹⁰⁵ Eccles, *Vagrancy in Law and Practice*, 163.

of missiles at the offender, the shouting of insults, and so on), but vested them with ultimate power to decide the degree of punishment. At its extremes, some pilloried prisoners received approval and money from the crowd,¹⁰⁶ while others were killed.¹⁰⁷ Pillorying was a relatively unusual punishment, occurring on average five times a year at this period, primarily for 'unnatural' sexual offences and perjury.¹⁰⁸ It was also very much a public punishment, aimed at the 'public labelling of the recipient as deviant' and the damaging of their reputation;¹⁰⁹ for that purpose, Charing Cross was a popular London site as it had 'markets and considerable traffic'.¹¹⁰ However, the control this method of punishment gave to the crowd was precisely one of the policy concerns it raised.¹¹¹ By the second half of the century, several hundred constables and officers were usually in attendance.¹¹² Even so, in June 1777, four colliers sentenced to stand in the pillory in Falkirk had been rescued by 'a large party of colliers'.¹¹³

That same month, Ann Marrow was convicted of fraud and sentenced to six months' imprisonment at Clerkenwell House of Correction, and to stand in the pillory at Charing Cross within the first month.¹¹⁴ Unsurprisingly, she was 'struck with the most alarming terror at that truly shameful and most dangerous punishment'.¹¹⁵ However, her petition against it was unsuccessful and she was exposed in the pillory in accordance with the original sentence. The outcome of that punishment is not entirely certain: a newspaper report the following day makes no mention of injuries,¹¹⁶ but a week later, it was reported that she had lost her sight and her death was imminent.¹¹⁷ Her death was not reported, so the *Annual Register* is probably correct in stating that she was blinded by the injuries sustained.¹¹⁸ That outcome indicates a visceral level of hostility which was also apparent in the desire to see offenders such as Hamilton whipped.

¹⁰⁶ For example, John Williams in 1765 and Daniel Eaton in 1812, both convicted of sedition (Shoemaker, 'Streets of Shame?', 245); and a Mr Parsons who invented a 'ghost' to haunt his creditor: when pilloried, the crowd gave him money to pay the debts (Frank McLynn, *Crime and Punishment in Eighteenth-Century England*, London, 1989, 282).

¹⁰⁷ Two people died in the pillory between 1775 and 1799, although for one of these, William Smith in 1780, the death may have been due to an improperly set-up pillory rather than the actions of the crowd (Shoemaker, 'Streets of Shame?', 244-245). Edmund Burke raised his death before the House of Commons; thereafter, the secretary of state showed greater willingness to remit pillory sentences (Greg T Smith, 'The Decline of Public Physical Punishment in London' in Carolyn Strange, ed, *Qualities of Mercy: Justice, Punishment, and Discretion*, Vancouver, 1996, 33).

¹⁰⁸ Shoemaker, 'Streets of Shame?', 240; McLynn, *Crime & Punishment*, 283.

¹⁰⁹ Shoemaker, 'Streets of Shame?', 232; McLynn, *Crime & Punishment*, 282.

¹¹⁰ Shoemaker, 'Streets of Shame?', 233.

¹¹¹ Shoemaker, 'Streets of Shame?', 245.

¹¹² Beattie, *Policing and Punishment*, 130.

¹¹³ *Morning Chronicle and London Advertiser*, 19 June 1777.

¹¹⁴ Persons in Custody, Middlesex Sessions, June 1777 Session Book, LMA MJ/SP/1777/07/026. More detail appears in the Petition of Ann Marrish, which states the sentence as 'to be imprisoned in the house of Correction at Clerkenwell for 6 months and between the hours of Eleven and two on some day within the first month of the s^d term to be set in the pillory for the space of one hour at Charing Cross.' The brief account in the *Newgate Calendar* wrongly gives the custodial element as three months' imprisonment (Crook, *Complete Newgate Calendar*, 113).

¹¹⁵ Petition of Ann Marrish. This petition raises further questions, since it is written in a confident and educated hand and in standard and formal terms. It is therefore unclear whether it was written for Ann Marrish (the more likely explanation) or whether she was an unusually educated woman (possible, since the writing of her signature does not differ greatly from the handwriting of the petition itself; although of course the signature might likewise not be her own).

¹¹⁶ *General Evening Post*, 22-24 June 1777

¹¹⁷ *London Evening Post*, 31 July – 2 August 1777

¹¹⁸ *Annual Register*, 1777, 92.

The choice of a punishment so dependent upon crowd activity highlights the straightforward antipathy Marrow's case seems to have attracted, in contrast to the more varied responses to defendants such as Hamilton and Paul. Without further information about the facts of her offence, it is fruitless to speculate upon why that should be. However, it may partly reflect a general hardening of attitudes towards male impersonation, which would cease to be such a staple of popular culture in the nineteenth century.

The *Newgate Calendar* suggests that the treatment Marrow received was an illustration of how 'great was the resentment of the spectators, particularly the female part'.¹¹⁹ Their reading is an ideological one, though, as at Charing Cross only women were generally allowed to pass the cordon of constables to pelt the offender (part of an attempt in the latter part of the century to tighten the authorities' control on the punishment).¹²⁰ It should be noted that notions of women as the gentler sex were particularly problematic in the context of popular crowds; the *Newgate Calendar's* comment reflects contemporary tensions between assumptions about women's more peaceable natures and awareness that the reality was rather different. E P Thompson suggests that in eighteenth century food riots, '[i]nitiators of the riots were, very often, the women ... cunningly combining fury with the calculation that they had slightly greater immunity than the men from the retaliation of the authorities'.¹²¹

The fact that Marrow was stood in the pillory despite her petition is also a reminder of the importance of all levels of society in deciding the outcome of such cases. The lower classes may have been present at Charing Cross, following a case brought by one of the middling sort, but the ruling class had both sentenced her to be there and subsequently refused mercy to her when she petitioned to have her sentence reduced. Petitions were most likely to be successful when supported by those of high social standing: Hay explains that 'mercy was part of the currency of patronage'.¹²² Such patronage itself reflected a delicately balanced relationship between the ruling class and the wider community. If the offender or her crime were unpopular (as was the case for Marrow) then offering support would not reinforce a gentleman's paternalistic control but rather undermine it. Had her sentence not met with popular approval then the outcome could have been very different: propertied men were well aware that 'it was better to feign mercy rather than reveal impotence'.¹²³

VI. CONCLUSION

There is a real temptation, when considering the criminal justice system of the eighteenth century, to focus upon the individual actors and their agency and discretion. We can approach the victim-prosecutor as a discrete agent, making decisions unfettered by many of the constraints imposed by

¹¹⁹ Crook, *The Complete Newgate Calendar*, Vol IV, 113-114.

¹²⁰ Francis Place, cited in Shoemaker, 'Streets of Shame?' 250.

¹²¹ E P Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century' 50(1) *Past and Present* (1971), 115.

¹²² Hay, 'Property, Authority and the Criminal Law', 5.

¹²³ Hay, 'Property, Authority and the Criminal Law', 51.

modern state machinery. That is all the more tempting when considering the prosecutions of female husbands, with their individualism, their sometimes peripatetic lifestyles, and their desire for independence. However, to take this approach would be to do a disservice not only to the interweaving of the judicial system and the wider community, but also to female husbands themselves. Individualistic as they may have been, they cannot be understood independently of their quotidian context. To appreciate their courtroom experiences we must look beyond them, beyond even their marriages, and see their place within the wider community. As Liz Stanley argues, focusing on a single subject 'essentialises the self, rather than focussing on the role of social processes in producing – and changing – what 'a self' consists of.'¹²⁴

The history of female husbands' prosecutions confirms the breadth of those social processes, which engaged all levels of society from the poorest class of which they were usually members to the ruling class which had the power to invoke the law and its punishments against them. The law itself derived its authority not only from the power of those who administered it but also from the involvement of the lower classes and middling sort who actively participated in its processes. Although society and the legal system which partly governed it were hierarchical, they were based upon relationships: the parties involved in the female husband cases were not functioning within a purely top-down system but rather found themselves caught up in a more complex web of relations.¹²⁵

Female husband prosecutions were small in number and unusual in nature. Their interest therefore cannot come from any claim to typicality (even if such a thing were possible): they are not microcosms of eighteenth century criminal cases in general. On the contrary, it is their very distinctiveness which makes them so compelling. Their disruption of social order and norms of gender and class stimulated the community to closer involvement in their prosecution than was the case for property offences. Since those involved had few precedents to fall back on, they had to make decisions in novel contexts, and thus to articulate reasoning which usually went unspoken. Because the facts these cases brought into the public realm were so apparently novel, the press was there to record words and actions which would otherwise have disappeared. The female husband prosecutions thereby expose both the extensive discretion and the social and legal constraints experienced by prosecutors in this period, and above all the effects of social relationships and wider interests upon them. The result is some relatively rich – if frustratingly incomplete – material through which to explore the nature of the prosecution process and the role of the wider community within it.

The model of the victim-prosecutor appearing against the defendant, before a neutral court, is thus complicated and problematized. Indeed, the nature and extent of wider community interests

¹²⁴ Liz Stanley, 'Romantic Friendship? Some issues in researching lesbian history and biography' 1(2) *Women's History Review* (1992) 193 at 194.

¹²⁵ E P Thompson argues that class is "a relationship, and not a thing", a view supported by the complex calculations in these cases (E P Thompson, *The Making of the English Working Class*, New York, 1966, 11.)

engaged meant that the wife of a female husband was unlikely to experience the 'wide and often almost untrammelled discretion' King ascribes to victims of property crimes.¹²⁶ These cases illuminate the parties' situations within communities which were negotiating competing as well as complementary interests; which had shared but not uncontested ideologies of gender, sexuality and class; and which operated within a changing legal system. The resulting insights are not only particular to these cases: they also reveal much about the roles of communities in the wider legal worlds of the eighteenth century.

¹²⁶ King, *Crime, Justice and Discretion*, 355.