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Divine Suppressors:

Bigamy in the Eighteenth-Century Criminal Justice System

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The criminal justice system in eighteenth-century England was an integral part of European society. The legal system had always been associated with several facets of everyday life and touched upon the lives of those in every class of European society. One of England's oldest and most significant courthouses was the Old Bailey, which held thousands of trials and sessions over the two hundred and forty years it was active. Out of the wide variety of cases to choose from, ten sexual offences revolving around bigamy were selected to present how the criminal justice system leaked into different areas of life. In order to accurately and adequately depict what these cases revealed, this paper examined three different faculties of the criminal justice system: commitment, procedure and members. Specifically, the ten bigamy cases revealed how the criminal justice system operated on a basis of religion and the patriarchal system. Religion was to be found in the commitment of the oath of truth given at the beginning of each testimony, the patriarchal system was revealed through rape cases, and the members, being the clergymen, revealed both elements at play.

Religion played a role in the criminal justice system not only as a type of offence but as an integral part of the court's proceedings. The oath of truth was the most immediate form that religion would take during trial, whereby a person would be sworn in so that they could testify truthfully to the court. In terms of bigamy cases in the Old Bailey, the cases of Thomas Heild and Alexander Nelson are just two examples of witnesses being called to testify "upon oath" to the court.[1] Heild's first wife Sarah Mills was called upon to testify at the request of the jury to see if she would testify against the testimony of the defendant.[2] Though her testimony was not as detrimental to showcasing the validity of her marriage to Heild, Mills was nonetheless sworn in upon the oath. This is just an example as to how all testimonies, no matter their significance to the case, were required in eighteenth-century England to be validated by an oath of truth.

With the role of the oath of truth justified in some of the bigamy cases above, one can now begin to reveal what this aspect of both religion and court proceedings reveal in the criminal justice system. It would be important to first validate that the oath taken in bigamy cases were also taken in other court cases, in order to further prove what the oath shows about the criminal justice system. Law professor Dr. James C. Oldham talked in his article about the use of the oath and its religious meaning within other court cases such as those dealing with animal theft and religious offences.[3] Moving forward, the oath of truth served its purpose as a method of testimonial validation within the criminal justice system that was backed up by the fear of God. In eighteenth-century Europe, hearsay was perceived by the court authorities such as the judge

[1] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 16 March 2020), April 1754, trial of Alexander Nelson (t17540424-72); *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 16 March 2020), September 1754, trial of Thomas Heild (t17540911-31).

[2] *Old Bailey Proceedings*, Nelson (t17540424-72).

[3] James Oldham, "Truth-Telling in the Eighteenth-Century English Courtroom," *Law and History Review* 12, no. 1 (1994): 102.

and jury as acceptable for admittance as valid evidence.[4] Although, this was not consistent throughout every courtroom in Europe but was acceptable at the Old Bailey and seen in certain trial notes such as the one written by William Murray—"[he] is known as one of England's greatest judges" according to American historian and archivist Ruth Anna Fisher.[5] Hearsay commonly took form in the criminal justice system in two ways: from an authority figure or a commoner associated with one or more individuals involved in the court case. In the case of Henry Fry, Reverend Gardner testified under oath that he married Fry to his second wife Elizabeth Paterson himself with the audience of two witnesses.[6] In Walter Welch's case, John Welch, who was a friend of Walter, testified under oath that he was one of the witnesses who heard the whole marriage ceremony take place and saw the ring being put on the bride.[7] Though one testimony at face value would seem to hold more validity over the other on the basis of how the man is a reverend for the Church of England, both of which are simple hearsay. The only validity could be found with hearsay in the eighteenth-century courts was in the oath of truth given beforehand.

Outside of providing legal validity for hearsay testimonies, the oath of truth carries much more significant value in the criminal justice system in terms of religion. In the words of former Washington state bar member Harry Hibschman, "The object of the oath was to frighten the

[4] Ibid, 104.

[5] Ibid, 103-104; Ruth Anna Fisher "Granville Sharp and Lord Mansfield," *The Journal of Negro History* 28, no. 4 (1943): 386.

[6] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 16 March 2020), January 1758, trial of Henry Fry (t17580113-16).

[7] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 16 March 2020), April 1754, trial of Walter Welch (t17540424-9).

witness into telling the truth lest he suffer under the hand of an outraged Deity."[8] More specifically, this "deity" would be most commonly recognized as the god of Judeo-Christians, coordinating with the Church of England's protestant doctrine.[9] However, as a result of the Omichund v. Barker case in 1744, people following any religion or no religion at all were considered accountable under the oath of truth.[10] For those swearing under oath, that means if a person were to perjure him/herself before the court, they would not only face punishment through means of the criminal justice system but there would be divine judgement as well. An example of perjury found in the bigamy cases was the case of Thomas Heild who lied whilst under oath to the court that he was never married to his first wife before marrying his second.[11] However, perjury was not always a part of the eighteenth-century criminal justice system in England. It became more prevalent in English courts in 1696 when William III, also known as William of Orange, and his wife Mary II of England declared themselves joint sovereigns of England due to James II being considered the king "de jure" but not the king "de facto."[12] James II was considered the king by law, "de jure," but not by fact/divine right, "de facto."[13] Perjury

[8] Harry Hibschman, "'You Do Solemnly Swear!' or That Perjury Problem," *Journal of Criminal Law and Criminology (1931-1951)* 24, no. 5 (1934): 901.

[9] Anthony Trollope, *Clergymen of the Church of England* (London, England: Chapman & Hall, 1866), 81. https://play.google.com/books/reader?id=cs8F-qxZTl8C&hl=en&pg=GBS.PA83.

[10] "A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century," *Michigan Law Review* 75, no. 8 (1977): 1686.

[11] *Old Bailey Proceedings*, Heild (t17540911-31).

[12] Allan I. Macinnes, *Union and Empire: The Making of the United Kingdom in 1707* (Cambridge, England: Cambridge Univ. Press, 2007), 248, https://books.google.ca/books?id=fVdVpfTsgfAC&pg=PA248&dq=william of orange 1696&hl=en&sa=X&ved=0ahUKEwjovL-0kazoAhXohOAKHSPeB5IQ6AEIMDAB#v=snippet&q=william III king 1696&f=false; Charles F. Mullet, "Religion, Politics, and Oaths in the Glorious Revolution," *The Review of Politics* 10, no. 4 (1948): 463.

[13] "de, prep." OED Online, March 2020, Oxford University Press. https://www-oed-com.proxy1.lib.trentu.ca/view/Entry/47599?redirectedFrom=de+jure (accessed March 17, 2020).

had to be introduced during that time because James II was not truly afraid of wrongfully taking the throne and facing divine judgement as a result. Essentially, without immediate repercussions, the oath of truth and the fear of God, taking part in the criminal justice system was not something to fear, but with perjury the consequences of giving false testimony made the divine judgement more real. Another example of the oath and divine judgement being put on display is when children were asked to take the oath. Law professor Helen Silving presented a case where a six-year-old child was sworn in under oath and preceded to lie to the jury but was later caught.[14] It was noted how the child had no perception as to the legal and divine consequences of lying both before the jury and before God, thus she was not affected by the oath of truth.[15] The oath of truth relied on the fear of divine judgement that stemmed from religion in that time period to extract truthful testimonies from individuals. Ultimately, the oath of truth displayed how the criminal justice system of eighteenth-century England relied in some ways on the fear of God and divine judgement to administer punishment and produce truthful testimonies.

Moving away from the religious aspect for the time being, the eighteenth-century criminal justice system was condoned in such a way that a patriarchal system was able to thrive. Sexual offences such a bigamy cases in the Old Bailey were no exception when it came to showcase how English men had a dominating power over women. Mary Hudson was one such victim of that in the case of Israel Walker when she went on record to say how Israel took jewels, money and scrap metal, forced her to mortgage her home, only to then take the mortgage money from her and abandon her in Holland.[16] Another such example was in the case of Thomas Yates

[14] Helen Silving, "The Oath: I," *The Yale Law Journal* 68, no. 7 (1959): 1374.

[15] Ibid.

[16] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 17 March 2020), December 1753, trial of Israel Walker (t17531205-52).

who after his fleet marriage with wife Rebecca Griffiths, stole her clothes and "left [her] destitute without anything in the world."[17] In terms of the patriarchal system, what both of these cases had in common was neither the judge or jury seemed to recognize the apparent theft between the wife and her rogue husband. Both Hudson and Griffiths were used by men to take their belongings without and regard to their wives' physical and emotional well-being. Rather, the legal authorities in the criminal justice system chose to focus on whether the husband and/or wife remarried illegally, which presented how the patriarchal system was able to go on through bigamy cases.

In order to adequately prove how the patriarchal system is present in the criminal justice system during eighteenth-century England, one must look at other crimes in which men had the dominating presence over women. Sexual offences such as rape cases were a prime example of how cultural perceptions and English law shaped the patriarchal system inside of the eighteenth-century criminal justice system. History professor Garthine Walker presented the reader the social viewpoint of rape culture during the eighteenth century—most commonly the female victim and the male rapist. For the females, in a time of rampant prostitution and brothels, women were generally perceived as being in control of their sexual encounters.[18] Furthermore, Walker suggested that the social perception of men convicted of raping a woman appealed toward the patriarchal system because it was wrong to charge a man "for doing what came naturally."[19] Men during that time period were seemingly painted as the victim in some ways of merely following their desires and falling victim to sexual desire which was openly provided by

[17] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 17 March 2020), May 1753, trial of Thomas Yates (t17530502-27).

[18] Garthine Walker, "Rape, Acquittal and Culpability in Popular Crime Reports in England, c. 1670–c. 1750," *Past & Present*, no. 220 (2013): 116-117.

[19] Ibid, 117.

women. These perceptions translated into the criminal justice system through how cases went to trial and the verdicts administered.

Established under the common law of England around the beginning of the seventeenth century, rape was a felony that could only be brought up at quarter sessions or the assize.[20] Trial lawyer Laurie Edelstein wrote about how it was difficult to get these types of cases to trial in the first place because quarter sessions and the assize relied on the jury's evaluation of one's character.[21] What this meant was in instances where a person of a higher class were to rape a person of the lower class, the case would not likely go to trial because the judge and jury would be inclined to believe someone of a higher education and social/political class. An example of this was in the case of Richard Warren where Warren's character was both questioned and praised as a "very honest industrious man" working in the middle class.[22] In terms of the verdicts, age was one of the critical factors that altered the final decision. With that, Antony E. Simpson described how in cases where prosecutors and juries found a man guilty of raping a girl between the age of ten and twelve would feel more comfortable in charging him with a felony under capital punishment.[23] This implied that in other cases where a man did not rape a child, the judge and jury were more apt to potentially charge him with a misdemeanor rather than the full felony. By the court authorities being more open to charging men with misdemeanors rather

[20] Laurie Edelstein, "An Accusation Easily to Be Made? Rape and Malicious Prosecution in Eighteenth-Century England," *The American Journal of Legal History* 42, no. 4 (1998): 359. John Merriman, *A History of Modern Europe: From the Renaissance to the Age of Napoleon* (New York, NY: W. W. Norton & Compant Ltd., 2010), 193.

[21] Edelstein, "An Accusation Easily to Be Made? Rape and Malicious Prosecution in Eighteenth-Century England," 359.

[22] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 18 March 2020), October 1756, trial of Richard Warren (t17561020-48).

[23] Antony E. Simpson, "Vulnerability and the Age of Female Consent: Legan Innovation and Its Effect on Prosecutions for Rape in Eighteenth-Century London," in *History 3751/4751: The History of Crime in England - Fall 2019*, 22 (Acton, MA: XanEdu, 2019).

than full-fledged felonies, it demonstrated how men were able to rape women and to some degree get away on a lesser offence than what could have been administered. When looking at bigamy cases at the Old Bailey, punishment also took a decline in terms of severity. In the case of Welch, he was both branded and imprisoned because of how he not only illegally remarried but bribed his first wife to keep their marriage a secret—in comparison to the case of John Forrest, his punishment was only branding because of how he illegally remarried.[24] Historian Susan D. Amussen wrote how the jury would find a way to undervalue the damage done to avoid execution for crimes like bigamy or theft, this resulted in only one third of those convicted of a felony sentenced for execution.[25] Overall, through rape cases this showed how the patriarchal system was able to operate in the criminal justice system in eighteenth-century England.

Both religion and the patriarchal system operated within the confines of the criminal justice system, and the clergymen were a prime example of both systems at work. For bigamy cases, clergymen associated with the prosecutor and/or the defendant were crucial in proving or disproving the marriage(s) that supposedly took place. One such case where a clergyman was invaluable to determining a marriage was in the case of Henry Fry. It was Mr. Atwood who was able to provide witness testimony saying how he remembered Fry's face from the time he married him to his wife; it was also Atwood provided the banns book of which the marriage was published three times.[26] Without that evidence Fry's first marriage would have been much harder to prove, which would have put the whole case under contention in terms of if Fry was guilty of bigamy. At the same time, a clergyman's testimony and evidence could both be null

[24] *Old Bailey Proceedings*, Welch (t17540424-9); *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 18 March 2020), July 1753, trial of John Forrest (t17530718-50).

[25] Susan Dwyer Amussen, "Punishment, Discipline, and Power: The Social Meanings of Violence in Early Modern England." *Journal of British Studies* 34, no. 1 (1995): 11.

[26] *Old Bailey Proceedings*, Fry (t17580113-16).

and void under the circumstances where he is not a proper clergyman. One such case was the bigamy case of Robert Archer where clergyman Peter Simpson was found that he married Archer and his second wife without a license being published three times before the church on account of a bribe.[27] With all the evidence of the apparent marriage discredited it was more complicated to prove Archer guilty or not guilty of bigamy. With their role and importance established in bigamy cases, one can begin to look as to how the clergymen in the eighteenth-century criminal justice system in England embody both the religious and patriarchal systems.

As previously mentioned, clergymen were critical when it came to the validation of marriage(s) in bigamy cases. Besides witness testimonies of friends, the defendant and the prosecutor, clergymen were the leading authority in evidence procedure rather than lawyers concerning sexual and religious offences. Oldham noted that lawyers like Edward Coke, who was regarded as "the greatest master of common law," was a great lawyer, but many judges like Chief Justice Willes trusted their god and saints as better authorities.[28] In terms of legal authorities, that showed how trusted religion was by some of the court's officials. There was not only a trust in God but a trust in God's servants, hence the clergymen's role in presenting evidence before the court. To further demonstrate clergymen and religion in the criminal justice system, rather than looking to another type of case, one could look to another type of court.

The ecclesiastical courts in England were described by law professor Edwin Maxey as having jurisdiction "over everything which had to do with the souls of men."[29] These courts were devoted to any civil or criminal act that was associated with clergymen or the Church of

[27] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 18 March 2020), April 1752, trial of Robert Archer (t17520408-38).

[28] Oldham, "Truth-Telling in the Eighteenth-Century English Courtroom," 102; William Holdsworth, "Sir Edward Coke," *The Cambridge Law Journal* 5, no. 3 (1935): 334.

[29] Maxey, Edwin. "The Ecclesiastical Jurisdiction in England," *Michigan Law Review* 3, no. 5 (1905): 363.

England.[30] That showed how integral clergymen were to the criminal justice system as a whole, that they were a part of both ecclesiastical courts and quarterly sessions. Finally, the evidence presented by the clergymen were closely associated with the Church of England as a result of political changes like the Marriage Act of 1753.[31] In terms of bigamy cases, the act forced marriages to be done at a church by a clergyman, with banns published three times in the book of the registers in accordance to the Church of England.[32] These same procedures were used as divine evidence to confirm that a proper marriage occurred in the bigamy cases of Warren and John Love.[33] Through their role and procedures both inside and outside of the court the clergymen helped the religious system thrive in the eighteenth-century criminal justice system.

To delve into the idea as to how clergymen were a representation of the patriarchal system in the criminal justice system, one must look to how they condoned themselves both outside of English courthouses and in cases other than bigamy. History professor Maureen C. Miller talked about a form of gender called "emasculinity" of which the clergy constructed during and after the Reformation.[34] The term meant extreme masculinity; a clergyman who was considered extremely masculine was a man "more radically distanced from female impurity and […] more powerful by virtue of its freedom from familial entanglements."[35] That harkens back

[30] Ibid.

[31] Jeanne Fahnestock, "Bigamy: The Rise and Fall of a Convention," *Nineteenth-Century Fiction* 36, no. 1 (1981): 58.

[32] Ibid.

[33] *Old Bailey Proceedings*, Warren (t17561020-48); *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 19 March 2020), January 1753, trial of John Love (t17530111-17).

[34] Maureen C. Miller, "Masculinity, Reform, and Clerical Culture: Narratives of Episcopal Holiness in the Gregorian Era," *Church History* 72, no. 1 (2003): 27-28.

[35] Miller, "Masculinity, Reform, and Clerical Culture: Narratives of Episcopal Holiness in the Gregorian Era," 28.

to Walker's point of how women were perceived as leading men into sexual impurity with divine and/or legal consequences. Clergymen inherently saw themselves as higher than women based on their divine morality. That mentality translated over into the eighteenth-century criminal justice system—outside of bigamy cases, extremely masculine clergymen played a role in court proceedings involving murder, adultery and fornication.[36] Mark Breitenberg mentioned how in these cases clergymen would often devalue the role of women, implying how men do not need to be subjected to women and their duties.[37] The clergymen in the criminal justice system could sway the verdict in favour to the man because of their patriarchal views. This played out in bigamy cases such as the case of Israel where clergyman James Drummond praised Israel for making "a very handsome appearance, and [being] exceedingly well dress'd," but his wife was only referred to as a widow with kids.[38] This implied how clergymen viewed woman as inferior based on their sexual impurity, which demonstrated the patriarchal system in the eighteenth-century criminal justice system.

In conclusion, the ten bigamy cases revealed how the criminal justice system operated on a basis of religion and the patriarchal system. For religion, the divine intervention of the oath of truth and the integration of clergymen planted the system into courthouses across England. In terms of the patriarchal system, rape cases shed further light on its integration into bigamy cases and the criminal justice system, with England's social climate and divine sexism found in clergymen supporting it. Ultimately, the criminal justice system in eighteenth-century England

[36] Mark Breitenberg, "Anxious Masculinity: Sexual Jealousy in Early Modern England." *Feminist Studies* 19, no. 2 (1993): 378; John Johnson and George Huntley. *The Clergymans Vade-Mecum: An Account of the Ancient and Present Church of England; the Duties and Rights of the Clergy; and of Their Privileges and Hardships* (London, England: Printed for Robert Knaplock in St. Paul's Churchyard, and Sam Ballard in Little-Britain, 1723), 28.

[37] Breitenberg, "Anxious Masculinity: Sexual Jealousy in Early Modern England," 378.

[38] *Old Bailey Proceedings*, Walker (t17531205-52).

operated on the religious and patriarchal systems of its time period, as demonstrated through ten bigamy cases.

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Hailing from London, Ontario, Luke Horton studies at Trent University where he studies in honors programs of both history and English literature. He is the Director of Academics of the Trent Durham Student Association (TDSA) where he advises the Board of Directors on academic matters and helps to foster an environment where students can learn and have a voice in their own education. Luke as well is involved in multiple other clubs and programs, including the Academic Mentoring Program, the Trent History Club and the Trent D&D Club.. In his spare time, he volunteers at the Robert McLaughlin Gallery where he aids in teaching youth about art and the history of the museum. After graduating, Luke aims to take his bachelor's degree to teacher's college and pursue a career as a high school teacher.

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