

Prosecuting Fraud in the Metropolis, 1760-1820

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Abstract

The inspiration for this thesis comes from a recognition of the problems in prosecuting financial crime in the modern day. In exploring how fraud was prosecuted from 1760 to 1820, this thesis seeks to contextualise modern prosecutorial failings into a longer history of the struggles to define and address fraud and deceptive practices. It also seeks to contribute to existing research into historical financial crime by providing a detailed history of fraud offences and the settings in which these offences had been previously enforced.

This thesis will answer three central questions: what offences made up ‘fraud’ by the early nineteenth century? – Who was prosecuting these offences? – and, how was fraud being prosecuted at this time? The first of these questions seeks, for the first time in the literature, to identify and trace fraud offences to the nineteenth century. This thesis will then identify who was prosecuting fraud, and then how they prosecuted fraud in order to explain how fraud offences were shaped through enforcement and how this impacted upon the development of fraud offences. In asking these three central questions, this thesis will provide a lens through which to explain how, and for whom, the criminal justice system operated in the eighteenth century.

This thesis explores and categorises all fraud trials heard at the Old Bailey between 1760 and 1820 and builds on these records by using a range of greater and lesser known sources including City of London officials’ notes, government financial records, and more obscure materials of contemporary practitioners. By tracing the prosecution of fraud from the lowest to the highest criminal courts in London, this thesis provides an holistic overview of the choices available to prosecutors of fraud, and explains why so many fraud trials were heard within the senior courts rather than the summary courts. This explanation is made possible by the application of structuralist theories which explain why particular social and economic groups prosecuted fraud offences at such a high level, and how the criminal justice system operated to assist such prosecutions.

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Glossary of Terms

Aldermen	The City of London elected officials who sat as Magistrates, and from whom one was chosen each year to serve as Lord Mayor of the City.
Assize Court	The most senior criminal court for trials of first instance. The assize court heard mostly felonies but some misdemeanours. In London, see Old Bailey
Crown Court Reserved	The appellant court within which sat the Twelve Judges. See the Twelve Judges.
Felony	The most serious category of criminal offence, some felonies were capital. Historically, a conviction for felony resulted in the forfeiture of all goods. By the eighteenth century the main procedural characteristic was the denial by right of defence counsel in matters of felony.
Guildhall	Where the Aldermen of the City of London held Summary Court Sessions, see Summary Courts.
King's Bench	A common law court which heard both criminal and civil matters. Criminal cases could be removed from ordinary criminal courts using a writ of <i>Certiorari</i> .
Magistrates Court	See Summary Courts

Mansion House	Where the Lord Mayor of London held Summary Court Sessions, see Summary Courts.
Metropolis (London)	London was made up of the City of London, Middlesex, and Westminster. The Metropolis in the eighteenth century covered the central and northern parts of modern London; south of the river Thames was Southwark which formed part of London but which fell under the jurisdiction of Surrey. See Image 7.1
Misdemeanour	The least serious category of criminal offence, some misdemeanours could result in seven years transportation. By right, a prisoner was entitled to counsel in matters of misdemeanour.
Old Bailey	The assize court for the entire Metropolis of London but which sat within the walls of the City of London.
Petty Sessions	Another term for a Summary Court
Quarter Sessions	The second highest criminal court in England in which could be heard felonies or misdemeanours but which heard primarily misdemeanours. Quarter Sessions sat four times a year and were sometimes referred to as 'Sessions' for short-hand.
Sessions	This can refer to Petty Sessions or Quarter Sessions depending on the context of the usage.

Star Chamber	Established in the fifteenth century as a court (ostensibly) hearing prosecutions and litigation against socially and economically powerful persons. Decisions of the Star Chamber are contentious as it is well recognised that the court abused its position to pursue political opponents.
Summary Courts	The lowest criminal court which heard mostly criminal matters and often acted as the first court to which a criminal complaint was made. Presided over by Magistrates. The work of these courts would largely be transferred to the Police Courts in the nineteenth century. See Magistrates' Court and Petty Sessions
Twelve Judges	The senior professional twelve judges in England who decided on matters of law appealed to the Crown Court Reserved. These judges also sat within courts of first instance such as the assize courts, including the Old Bailey.

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Chapter 1 Introduction

The prosecution of fraud in twenty-first century England and Wales entails a tangle of separate organisations, treading on one another's toes, and wrangling for high-profile cases. There are many organisations that can prosecute different forms of fraud in England including, but not limited to: The Serious Fraud Office, The Financial Conduct Authority, The Competitions and Markets Authority, and the Specialist Fraud Division of the Crown Prosecution Service.¹ The remit of these organisations are by no means clearly delineated. The result of this quagmire of prosecutors, with their separate expertise and agendas, is a chaotic legal system that seemingly prioritises certain forms of crime and financial misconduct over others, in an ostensibly arbitrary manner. The 2000s saw an attempt to improve the chaos of financial misconduct regulation through a series of measures including the establishment of The Financial Services Authority² and the codification of common fraud.³ However, recent high-profile prosecutions such as the Libor scandal reflect a continuing lack of clarity regarding which organisation should prosecute many cases.

How did regulation and enforcement of financial crime become so disorganised and ineffectual? Is this a modern phenomenon, or have such crimes and behaviours always plagued the country? This thesis will provide context to contemporary experiences of the prosecution of fraud by looking back through the history of fraud prosecution in England to locate both the laws of fraud, and the ways in which they have historically been enforced. This thesis will reveal similar difficulties to the modern day in the defining of fraud, but it will also uncover how socio-political, and economic motives lie behind the failures in the effective enforcement of fraud laws, both in the eighteenth century and today.

¹ For more detail see: <https://www.sfo.gov.uk/>; <https://www.fca.org.uk/>;
<https://www.gov.uk/government/organisations/competition-and-markets-authority>;
https://www.cps.gov.uk/your_cps/our_organisation/sfd.html

² Financial Services and Markets Act 2000

³ For a critique of this legislation see: Gary Wilson and Sarah Wilson 'Can the general fraud offence 'get the law right'?: some perspectives on the 'problem' of financial crime. *Journal of Criminal Law* (2006-2007).

As shall be detailed below, this thesis has relevance to a wide range of disciplines.⁴ The tracing of the black letter laws surrounding fraud contributes to discussions surrounding the history of criminal and contract law. Similarly, the use of fraud as a lens through which to explore and critique the eighteenth century criminal justice system will be of interest to legal and crime historians. Economic and business historians are rightly drawn to the pivotal changes of the nineteenth century⁵ and this thesis provides further contextualisation for the exploration of the development of company and banking law prior to this period. By exploring the prosecution of fraud prior to the birth of the modern company, this thesis can provide a backdrop for the nineteenth century changes and in particular, challenge perceptions that the legal playing field for fraud started in 1826.

This thesis does not speak only to historians. Researchers of contemporary financial crime may also draw parallels and material from this research. In particular, researchers of modern financial crime who are interested in definitional and ontological debates around financial crime may find the development of black-letter fraud offences relevant in that it reflects how some definitions of fraud are ingrained in English law whereas others, particularly the *mens rea*⁶ of fraud offences are a relatively new development⁷. Criminologists with an interest in financial crime and crimes of the middle-classes may also be interested to see the types of fraud, and the types of people prosecuted for certain types of fraud in the eighteenth century. For instance, there is little evidence that sophisticated or complex fraud was prosecuted at the Old Bailey during this period.⁸

⁴ Consequently, the level of detail given throughout this thesis is with a multiple audience in mind as advised by Morton Horwitz see Morton Horwitz, *The Transformation of American Law, 1780-1860* (Harvard University press, 1969) p.xi

⁵ In particular the 1826 legislation which allowed for joint-stock banking and the rapid increase in the scope and breadth of the stock market. See for example Timothy L Alborn, *Conceiving Companies. Joint-stock Politics in Victorian England* (Routledge, 1998); P.L Cottrell, *Industrial Finance 1830-1914*, (Methuen & Co Ltd, 1980); S. Evelyn Thomas. *The Rise and Growth of Joint Stock Banking* (Sir Isaac Pitman and Sons, Ltd, 1934)

⁶ This refers to the mental element of an offence, such as intent, recklessness, or dishonesty

⁷ For further discussion, see Chapter 3

⁸ See Chapter 5 for a breakdown of the types of fraud heard at the Old Bailey during this period.

Researchers of the prosecution and enforcement of modern financial crime regulations will see clear parallels between the conclusions of this thesis and contemporary discussions surrounding fraud. In particular, the use of discretion in the prosecution, or not, of financial crime. A key conclusion at the heart of this thesis is that fraud prosecutions were used in the eighteenth century to uphold the necessary commercial conditions which allowed for the development of capitalism. By the nineteenth century this prosecutorial discretion shifted to prevent prosecution of banking and corporate fraud, again to uphold the conditions required for commercialism. In the present day, particularly post-2008, discussion around the use of prosecutions in the face of deeply controversial financial activity have continued the long tradition of recognising the relevance of prosecutorial discretion in which actors or activities are defined as fraudulent or otherwise.

The Project: An Overview

The prosecution of fraud in the eighteenth century is not a story of high-level, sophisticated financial crime. Nor is it a story of fat-cat bankers or grasping clerks, manipulating complex account and financial structures to fund lavish and debauched lifestyles. A more accurate understanding of fraud in the eighteenth century is grounded far more in the every-day and commonplace. However, whilst a commonplace group of offences, these offences threatened to unravel the emerging threads of capitalism before they could be knitted together. By impacting upon everyday activities, simple contracts, and economic relationships such as purchasing goods, fraud impacted upon most social strata and relationships from creditor and debtor, to master and servant.

This thesis will dispel some preconceptions regarding fraud, namely that fraud offences are the preserve of the middle-classes or that fraud offences are predominantly committed through a breach of trust.⁹ This thesis will also provide, for

⁹ This perception of fraud is partly derived from nineteenth century legislation which shall be further discussed below and partly from twentieth and twenty-first scholarship on financial crime which has followed Edwin Sutherland's pioneering research which realigned fraud as a middle-class offence. The works of Sutherland shall be discussed later in this chapter.

the first time in the literature of crime and legal history, a comprehensive outline and critique of the offences making up the category of 'fraud'¹⁰, the most commonly being the obtaining of goods by false pretences or by false personation.¹¹ 'Fraud' is arguably one of the most difficult categories of criminal law to define. This umbrella term is used to define a variety of behaviours that can be rather narrow or wide. A wide and general definition of fraudulent offences, such as more modern definitions of fraud could be any behaviour which utilises some deceptive practice or dishonestly to achieve a benefit for oneself or another or to cause or a loss to another.¹² This twenty first century approach to fraud partly clarifies the law but when applied to categorising eighteenth and nineteenth understandings of fraud, it becomes too vague to be of use. Consequently, the definition of fraud is problematized yet further and is derived through a process of archival research. Definitions of fraud offences are located through a combination of traditional legal history methods – tracing statute and case law for precedent – and also how these laws were enforced within the courts.

The three central questions of this thesis are: what offences made up 'fraud' by the early nineteenth century? – Who was prosecuting these offences? – and, how was fraud being prosecuted at this time?

The first of these questions seeks to trace, identify, and critique the development of the offences collectively identified as 'fraud'. Partly, this is to provide a background to the fraud offences which has not previously existed. This question also challenges some preconceptions of fraud, including that fraud offences were an extension of forgery¹³, and that fraud required the breaching of some trust or prior relationship

¹⁰ 'Fraud' refers to a category of offences rather than one cohesive offence.

¹¹ A detailed analysis of these laws can be found in Chapter 3

¹² Fraud Act 2006

¹³ Many crime historians conflate fraud with forgery. In particular see: Peter King, 'Making Crime News: newspapers, violent crime and the selective reporting of the Old Bailey trials in the late eighteenth century' *Crime, History and Society*, vol.13 no.1 (2009) p.91-116 p.97; David Philips, *Crime and Authority in Victorian England* (Croom Helm Ltd, 1977); Jim Sharpe, *Crime, Order and Historical Change in The Problem of Crime*, eds. John Muncie and Eugene McLaughlin (Sage Publications Ltd, 2002)

to be exploited.¹⁴ This thesis introduces an original framework to understand fraud offences in the form of five central doctrines (a sixth is added with regard to felonious fraud). This thesis does not merely seek to identify the statutes and case law which made up fraud offences, but also seeks to provide an understanding for the doctrinal framework within which such laws developed. Such a framework refers to the underlying values, priorities, and agendas within which such laws were shaped by both Parliament and the courts. This doctrinal approach is not limited to the criminal law but rather, applies to how the underlying definitions and terminologies of fraudulent behaviour, both for criminal and contractual application, were applied and altered by the higher courts. In identifying this doctrinal framework this thesis can explain how fraud offences were constructed, and the ways in which they developed from Tudor times to the end of the eighteenth century. The doctrinal approach imposed on the eighteenth century in this thesis can equally be applied to the first half of the nineteenth century, before the enforcement of fraud offence laws which were concerned more with the breach of a trust¹⁵.

Having established the underlying framework through which fraud laws developed, this thesis will provide further definitions of fraud based upon how the black-letter law was applied and enforced. By exploring the relationship between how the law was defined and how it was enforced, this thesis will paint a more accurate picture of fraud in the courts during this period. By defining and tracing fraud offences to the early nineteenth century, this thesis will also reveal how frauds were both misdemeanours and felonies and will shine a light upon how these different categories of fraud offences were disposed of within the criminal justice system. In taking an approach which uses as its starting point the fraud cases which were heard at the Old Bailey, this thesis has revealed a previously ignored form of fraud that being the fraudulent obtaining of naval prize monies

¹⁴ Randall McGowen, 'From Pillory to Gallows: the Punishment of Forgery in the Age of the Financial Revolution' *Past & Present* no.165 (Nov.1999) pp.107-140.

¹⁵ 20 & 21 Vict. This nineteenth century shift in underlying perceptions and definitions of fraud will be returned to throughout this in thesis, particularly later in this chapter.

The second research question - who was prosecuting fraud? - will further develop understanding of the history of fraud offences and in particular, how the prosecution of fraud resulted in laws developing in the way they did. It shall be argued that the development of the law depends upon how it is enforced and, in the case of eighteenth century criminal law, who was willing and able to prosecute fraud. This thesis reveals there were two main prosecutors of fraud offences at the Old Bailey, tradespeople and the Navy. The significance of tradespeople as prosecutors lies at the heart of the theoretical underpinnings of this thesis, that fraud is the perfect example of an offence which was prosecuted in order to support and promote commercial activity and bolster the early development of Capitalism.

The presence of the Navy and its agents as prosecutors of fraud is a significant finding as it demonstrates how state actors were systematically leading prosecutions over a hundred years before the establishment of a Director of Public Prosecutions and decades before organisations such as the Bank of England began to act as a professional prosecuting body.¹⁶ The presence of naval agents bringing fraud prosecutions is an early example of the state developing a central role as the prosecutor of fraud against a public authority. Arguably, this places the advent of the state as prosecutor not in the nineteenth, but in the eighteenth century. This finding is particularly significant as it demonstrates how state institutions were undertaking activities more associated with the modern state. Certainly these early state-actor prosecutions are demonstrating an active role of public authorities in fraud prosecutions which historians of company, business, and banking law would associate with late-nineteenth century criminal justice.¹⁷

The final research question at the heart of the thesis, how was fraud being prosecuted, will allow for the in-depth exploration of the eighteenth century prosecution process from complaint to conviction. The most utilised archive in this thesis is the Old Bailey Proceedings (The 'Proceedings'), from which all fraud indictments between 1760 and 1820 have been extracted, and from which a

¹⁶ Randall McGowen's work on the Bank of England is discussed in detail in Chapter 5

¹⁷ Martin J, Wiener, *Reconstructing the Criminal, Culture, Law and Policy in England 1830-1914*. (Cambridge University Press, 1990)

database of information has been generated. The question of *how* fraud was prosecuted is further answered throughout this thesis by asking the supplementary questions of why *these* cases were being heard at the assize level rather than in a lower court¹⁸ and how fraud prosecution decisions proceeded.

This thesis tells the first half of the story of the prosecution of fraud, defining the offence, identifying the prosecutors, and asking when and how these prosecutions were brought to the Old Bailey. This thesis does not directly engage with questions surrounding those accused of fraud, the prisoners appearing at the Old Bailey, the sentencing of those convicted of fraud offences, and their experiences of the criminal justice system. These issues do however emerge through the exploration of the prosecution of fraud, particularly in terms of the typologies of fraud which are defined according to the mechanisms through which these offences were committed¹⁹. Likewise, conviction rates and the use of counsel by prisoners are also assessed, albeit with the focus upon prosecutors. This thesis engages less with the story of the prisoner for two reasons. First, the prosecution process deserves in-depth attention and had the prisoner's tale also been considered, this would have necessitated less attention upon the prosecution. The second reason for less focus being given to the prisoner is more practical. As shall be outlined in Chapter 2, the Proceedings give very little information regarding the prisoner and even the official court records such as the recognizances contain very little detail of the accused. The nineteenth century sees a great change in the manner and the extent to which information relating to prisoners was collected²⁰. Prior to this interest in prisoner data collection, the criminal justice system was far more concerned with the information of the prosecutor²¹ and it is upon this information this thesis will focus.

Having outlined the central questions of this research, the main parameters of this thesis will now be briefly outlined. These areas of focus include the jurisdictional

¹⁸ An overview of the litigation choices available is given in Chapter 4, and an exploration of the lower courts is given in Chapters 6 and 7.

¹⁹ See Chapter 5

²⁰ It is this raft of information such as prisoner biometrics and sentencing records which form the basis of the website of the AHRC funded project, Digital Panopticon: The Global Impact of London Punishments, 1780-1925: <https://www.digitalpanopticon.org/>

²¹ This will be discussed further in Chapter 2

parameters of the research, the chosen time period, and the theoretical analysis through which the archival records will be assessed.

Fraud: an offence-based approach

Definitions and understandings of fraud are integral to the study of any financial crime whether the focus is contemporary or historical. Fraud encapsulates a range of offences and much has been written on the nature and ontology of types of fraud²². One of the aims of this thesis is to challenge perceptions and preconceptions of fraud, and to examine the offences which made up fraud prosecutions, and explore the conditions within which these offences were committed and then prosecuted. As shall be discussed below when addressing the current literature on financial crime, both historical and, to a lesser extent, modern, this thesis is trying to demonstrate that fraud prosecutions in the eighteenth century did not correspond with the more central conceptions of fraud, particularly white-collar crime. This will be illustrated by taking a data-led approach, using the archival sources as a starting point to uncover what types of fraud were being prosecuted during the period, 1760-1820; definitions of fraud will be derived from the archival sources used, both black-letter and the offences prosecuted as reflected in court records.

This thesis is taking an offence-based approach in that the definitions of fraud which are used in this thesis are derived from contemporary sources, most significantly statute and case law of the era alongside court records²³. Whilst twentieth-century definitions of financial crime will be discussed in this chapter, the purpose of this thesis is not to prove whether these definitions are sound²⁴ but rather, to use eighteenth century evidence to expose the types of fraud being prosecuted at that time. Having explored these prosecutions, conclusions will be drawn regarding what this tells us about the development of fraud through to the present day

²² See below the discussion on white collar-crime

²³ The choice of sources will be discussed in Chapter 2

²⁴ The perils of anachronistic analysis will be returned to throughout this thesis.

Twentieth century definitions of fraud have largely engaged with Sutherland's excellent work on definitions and understandings of white-collar crime²⁵.

Sutherland contended that crimes traditionally associated with business ought to be considered alongside more traditional theories of criminal behaviour²⁶.

Sutherland went on to define what constituted white-collar crime but his initial clarion call to consider the crimes of the wealthy has been hugely influential.

However, Sutherland's approach and his view of white-collar crime is not wholly unproblematic. For example, Aubert argued that attempts to define white-collar crime were a 'futile terminological dispute'²⁷. Putting criticism aside, this thesis will not automatically be defining fraud as white-collar crime because one of the objectives of the thesis is to understand eighteenth century fraud using contemporary data. The objective is not to use eighteenth century records to prove any particular twenty or twenty-first century definition of financial crime more accurate than any other.

The concept of white-collar crime as a category of offence is a powerful one and one to which Sutherland was right to draw attention.²⁸ The crimes of the middle and upper classes are often overlooked by a range of groups and researchers from criminologists to prosecutors. Trying to form a coherent view of crime without considering middle and upper class criminals would be misleading. However, we must be careful not to conflate too many aspects of financial crime in order to produce a neat definition of fraud. Sutherland's definition of white-collar crime answers two very important questions: 'what offence did a person commit?' and 'what type of person committed the offence?'²⁹

²⁵ See in particular E.H Sutherland, *White Collar Crime* (Holt, Rinehart and Winston, Inc, 1949) and E.D. Sutherland, Is "White Collar Crime" Crime? *American Sociological Review* Vol.10 no.2 (1944) pp.132-139.

²⁶ Sutherland, *American Sociological Review* p.132

²⁷ Cited in W.G.Carson, White-Collar Crime and the Enforcement of Factory Legislation. *10 British Journal of Criminology* 383 (1970) p. 383

²⁸ See in particular E.H Sutherland, *White Collar Crime* (Holt, Rinehart and Winston, Inc, 1949) and E.D. Sutherland, Is "White Collar Crime" Crime? *American Sociological Review* Vol.10 no.2 (1944) pp.132-139.

²⁹ See in particular S.P Shapiro, Collaring the Crime, not the Criminal: Reconstructing the Concept of White-Collar Crime. *American Sociological Review*, Vol.55, No.3 (Jun 1990) pp.346-365. p.347

We must be careful not to confuse white-collar crime with fraud; it could be argued that all white-collar crime is fraud, but not all fraud is white-collar crime. By labelling all fraud-related offences 'white-collar' there is no space for discussion of occasions when lower class offenders commit financial crime and why they may be the target for enforcement over others. 'White-collar crime' is often theorized as being committed through a breach of trust.³⁰ This is a fairly modern understanding of fraud, drawing on nineteenth century developments in deceptive crimes.³¹ The purpose of this thesis is to problematize the circumstances within which fraud was committed in the eighteenth century, and not to impose a twentieth century understanding of financial crime retrospectively to a time with a very different legal landscape.

As shall be demonstrated below, pre-existing research in this field has often focused upon financial crime committed by the middle-classes. There is often a logical and not unfounded assumption that certain forms of financial crime are more likely to be committed by the middle or upper classes.³² As already identified, the laws around fraud offences changed in the middle of the nineteenth century so as to define most frauds as being a breach of trust. In order to be in a position of trust, one often had to be of a particular class such as the lower-middle class clerk³³, or the upper-class banker.³⁴ Crimes committed by the middle classes are certainly an under-researched area, by taking an approach which uses court data as a central source, this will allow for a broader understanding of fraud, not linked primarily to class or job status.

In taking an approach which uses the offence prosecuted as a starting point, this thesis will separate the two questions of the types of fraud prosecuted, and who was prosecuted for fraud. Because of this separation of offender from offence, it would be counter-intuitive to begin this research with a definition of fraud which conflated

³⁰ Sutherland, *White Collar Crime*

³¹ 20 & 21 Vict

³² Rob Sindall, *Middle Class Crime in Nineteenth-Century England. Criminal Justice History* (1983) pp.23-40

³³ Gregory Anderson, *Victorian Clerks*, (Manchester University Press, 1976)

³⁴ James Taylor, 'Commercial fraud and public men in Victorian Britain', *Historical Research*, Vol.78 No.200 (May 2005); James Taylor, *Company fraud in Victorian Britain: The Royal British Bank Scandal of 1856. English Historical Review*, Vol.CXXII no. 497 (2007); Sarah Wilson, *The Origins of Modern Financial Crime. Historical foundations and current problems in Britain* (Routledge, 2014);

the two. Moreover, given the pivotal shift in legal definitions of fraud in the middle of the nineteenth century, it would be anachronistic to apply such definitions of fraud to the eighteenth century. Consequently, this thesis will not directly apply the concept of white-collar crime³⁵. However, in exploring the legal landscape of fraud prior to the changes of the nineteenth century, this thesis will illuminate the setting within which such alterations occurred. In particular, by exposing how the criminal justice system operated with regard to fraud prior to the changes of the mid-nineteenth century, this thesis provides a longer narrative for how fraud offences have been defined and enforced.³⁶

The Metropolis and the Criminal Justice System

London has long been the legal, economic, and political centre of England, a metropole from which knowledge, wealth, and power spread across the country. As shall be discussed in detail in Chapter 2, London has often formed the basis of research into assize-level courts due to the fortunate existence of the Old Bailey Proceedings (the 'Proceedings'), an archive that provides fascinating detail of the business of the Old Bailey over a number of centuries. This thesis will draw heavily upon the Proceedings thereby making the Old Bailey a focus of the study. These Proceedings were contemporaneously read across the country through their reproduction in regional media and thereby shaped the prosecution and perception of crime from London, across the nation.³⁷

This thesis will explore in detail the prosecution of fraud through all tiers of the eighteenth century criminal justice system, an undertaking never before attempted for any form of offence. By tracing fraud offences from summary to appellant court, this study reveals insight into the operation and mechanics of the criminal justice system not previously appreciated. Magistrates' courts in London were at the

³⁵ Particularly as the types of fraud being prosecuted at this time, as evidenced in Chapter 5, did not reflect a breach of trust but rather, an abuse of knowledge.

³⁶ The reasons for choosing this time period will be given in detail later in this chapter.

³⁷ For in-depth discussion of the Proceedings, see Chapter 2.

vanguard of criminal justice administration.³⁸ By analysing the workings of the magistrates' courts across London, greater insight into the development of the summary court system is revealed, in particular, the wider motivations for disposal of cases.³⁹

A further original contribution of this thesis comes from analysis of fraud prosecutions across the Metropolis, and not solely in one jurisdiction within London. Some excellent studies have been made of the summary and quarter sessions courts in the City of London, or in Middlesex and Westminster.⁴⁰ This thesis is original however in that never before has research into both of these jurisdictions been united in one study and in relation to one particular offence, thereby providing comparable analysis of one group of offences across the entire capital.

The Reign of George III: 1760-1820

The period under study rather neatly coincides with the reign of George III. However, this is not why these dates have been chosen. The period has been chosen for three reasons. First, because there is a clear gap in the literature regarding the laws and prosecution of fraud prior to the mid-nineteenth century. Second, and not entirely exclusive of the first reason, this period has been chosen because this thesis is seeking to explore the prosecution of fraud at a time before the great changes of the nineteenth century. As shall be discussed in more detail later in this chapter, there has understandably been great interest in the development of the modern company in the nineteenth century and the impact this had upon financial crime. Moreover, the nineteenth century saw great changes to the criminal justice system such as the development of evidence law, the increased role of the police, the increased

³⁸ Greg T. Smith, *Summary Justice in the City. A selection of cases heard at the Guildhall Justice Room, 1752-1781* (London Record Society, The Boydell Press, 2013) p.xi

³⁹ In particular, see Chapter 7 of this thesis.

⁴⁰ See for example: Ruth Paley *Justice in Eighteenth-Century Hackney: The Justicing Notebook of Henry Norris and the Hackney Petty Sessions Book* (London Records Society, 1991); Norma Landau, *The Justices of the Peace, 1679-1760* (University of California Press, 1984); Smith, *Summary Justice*; Drew D Gray, *Crime, Prosecution and Social Relations: The Summary Courts of the City of London in the Late Eighteenth Century* (Basingstoke, Palgrave Macmillan, 2009). For an excellent overview of the Surrey court system see, John Beattie, *Crime and the Courts in England, 1660-1800* (Oxford University Press, 1986)

presence of counsel in trials, and the creation of the Director of Public Prosecutions. This thesis picks up the narrative of the history of fraud before the pivotal changes of the nineteenth century, particularly the changes to joint-stock banking which occurred in 1826.⁴¹ These developments in investments and the market certainly demands attention and has a lot to offer modern-day understandings of financial crime.⁴² The literature around banking fraud in the nineteenth century has often queried whether there existed sufficient laws to prosecute the developing forms of fraud being committed post-1826. This thesis will demonstrate that yes, there were sufficient laws to criminalise banking and newer forms of fraud in the nineteenth century. Further, and in keeping with James Taylor's claim that the law was enforced or not depending upon political motivations, this thesis will demonstrate that fraud offences were prosecuted in the eighteenth century in such a way as to support commercial activity; frauds which threatened commercial dealings were prosecuted at the highest level. This is in contrast to the nineteenth century when a dearth of fraud prosecutions reflects a similar motivation, to maintain faith in systems of banking and investments⁴³; had all banking or investment fraud been prosecuted this may have resulted in a loss of faith in commercial investment and resulted in a collapse of the banking system. This is not to say that a high level of fraud prosecutions in the eighteenth century bolstered faith in commercial activity or that a lack of public exposure of banking fraud led to increased faith in the investments market, only that the actors within the criminal justice systems at this time believed this to be the case.

⁴¹ See in particular Shannon, H.A 'The Limited Companies of 1866-1883', *The Economic History Review*, Vol.4 No.3 (Oct 1933) pp.290-316; James Taylor, *Boardroom Scandal* (Oxford University Press, 2013); James Taylor 'Watchdogs or apologists? Financial journalism and company fraud in early Victorian Britain', *Historical Research* Vo.85, no.230 (November 2012); James Taylor, 'Commercial fraud and public men in Victorian Britain', *Historical Research*, Vol.78 no.200 (May 2005); James Taylor, Company fraud in Victorian Britain: The Royal British Bank Scandal of 1856. *English Historical Review*, Vol.CXXII no. 497 (2007); James Taylor, 'Creating Capitalism: Joint-stock enterprise in British politics and culture, 1800-1870'. *The Royal Historical Society*, (2006); Mark Freeman, Robin Pearson and James Taylor. 'Law, politics and the governance of English and Scottish joint-stock companies, 1600-1850'. *Business History*, 2013. Vol.15, No.4 pp633-649.

⁴² See in particular Wilson, *Origins*; Sarah Wilson, 'Fraud and white-collar crime: 1850 to the present' in *Histories of Crime: Britain 1600-2000*. Eds Anne-Marie Kildar and David Nash (Basingstoke, Palgrave, 2010)

⁴³ Taylor, *Boardroom Scandal*

This thesis aims to situate the changes of the nineteenth century by exploring both the laws of fraud prior to this time, and also how the criminal justice system responded to fraud offences in the newly emerging mode of economic development. In providing this context, researchers of the nineteenth century company and the consequences of modern corporate law can situate their research within a longer history of fraud.

The third reason 1760-1820 has been chosen as the basis of this thesis is because this time period has inherent significance for the development of fraud laws and prosecutions. As shall be returned to throughout this thesis, the eighteenth century saw a great change, both socially and economically⁴⁴. The population became far more mobile and the nature of economic markets became larger and more complex⁴⁵. It shall be demonstrated that these factors created greater opportunity for fraud which resulted in frauds, particularly those which threatened commercial relationships, being prosecuted at the highest level. These opportunities to commit fraud came at a time just before the Industrial Revolution, at a time of proto-capitalism when economic markets and the conditions for capitalism were expanding. It was these developments which directly created the conditions for many frauds. Just as researchers of nineteenth century company-related fraud highlight the significance of joint-stock banking and company law developments to the change in financial crime, so too does this thesis highlight the economic and social changes of the eighteenth century and this impact upon fraud and fraud prosecution.

A final consideration in the choice of time period for this thesis is a practical one. An in-depth reading of *all* fraud indictments heard at the Old Bailey during a certain period is preferable to the sampling of cases and gives an accurate overview of the indictments whether of one particular form of fraud or another. Had a longer time period been selected, the number of indictments would have been too great to read in-depth and to extract the range of significant data this thesis has covered.

⁴⁴ See in particular discussion in Chapter 7.

⁴⁵ Craig Muldrew, 'Interpreting the Market: The Ethics of Credit and Community Relations in Early Modern England' *Social History*, Vol.18, No.2 (May, 1993) pp.163-183 p.174

Theoretical underpinnings

This thesis will engage with theoretical explanations of how and why fraud was prosecuted in certain ways during this period. 1760 to 1820 marks out a time which is on the cusp of the Industrial Revolution, and which experiences what this thesis is referring to as the establishment of 'proto-Capitalism'. This concept will be explored in detail in Chapter 2, wherein this thesis will re-engage with the works of, amongst others, E. P Thompson and Douglas Hay. Such theorists seek to understand the operation of the law through structural, holistic lenses which situate subject matter in a wider socio-economic context. Adopting such an approach to explore the prosecution of fraud, will explain the changes to the prosecution of fraud using a structural framework and will seek to understand the criminal justice system in terms of the promotion of the interests of certain powerful social groups. Such theories have largely been side-lined in recent years as crime historians and legal historians have moved away from structural understandings of crime, the trial, and the law as a whole to individual lived experience of the justice system.⁴⁶ This methodological individualism produces excellent research, but does not seek to answer broader questions of how the law operated within a socio-economic context. This thesis will reconnect with structural theories, such as those of Thompson, in order to understand the prosecution of fraud within a wider context of the overall criminal justice system and beyond.

These theories will not be engaged with uncritically. The relevance of the law is often overlooked by Marxist historians who focus instead upon economic, political, and social relationships. This thesis will argue that law does not exist as a separate entity, distinct from the economic and the social. Rather, the law and its internal logic and application has an equally significant influence upon the structure of social and economic relations.⁴⁷ Edward Thompson was rightly scathing of historical and criminological approaches in which 'theory takes precedence over the historical

⁴⁶ This will be analysed in depth in Chapter 5 but scholars such as John Langbein have vociferously critiqued attempts at understanding the law in any terms of structure or systems of power.

⁴⁷ Peter King 'Decision-makers and Decision-making in the English Criminal Law, 1750-1800' *The Historical Journal*, Vol.27, No.1 (Mar, 1984) pp.25-58. p.58

evidence which it is intended to theorize'.⁴⁸ It is for this reason that a detailed methodology is given in Chapter 2, which will demonstrate the approaches and methods of this thesis, and the ways in which theory can help to understand the archival material.

In exploring the prosecution of one collection of offences, in this case fraud, this thesis is allowing for a wider exploration of the purpose and the utilisation of the criminal justice system in this period. By engaging with the works of Thompson, Hay, and others, this thesis is challenging a perception of the criminal law that has been perceived as a process of 'taking out the rubbish',⁴⁹ or an exercise in bureaucratisation. Perceptions of the criminal justice system as serving a narrow role, controlling unruly behaviour of the least wealthy in society, have been prevalent in legal and crime history.⁵⁰

The argument propounded in this thesis will challenge this view. The criminal justice system played a far-wider and more significant socio-political role. The criminal law, along with all other areas of law, formed a coherent whole that acted to protect particular social and commercial values. Hay asserts that the criminal law acted to protect and bolster a system which protected property and favoured property over the individual.⁵¹ This thesis will demonstrate this by exploring which groups' economic and proprietary interests were being protected by the criminal justice system during this period. To this end, fraud laws and how they were enforced, will be assessed in order to evaluate the extent to which the criminal law was used as a tool to define and enforce social and commercial values.

⁴⁸ E.P Thompson 'Eighteenth-Century English Society: Class Struggle without Class?' *Social History*, Vol.3 No.2 (May, 1978) pp.133-165, p.147

⁴⁹ John Langbein cited in King *The Historical Journal*, p.57

⁵⁰ In particular see the deeply influential works of John Langbein as cited throughout this thesis.

⁵¹ D. Hay, 'Property, Authority and Criminal Law' published in *Albion's Fatal Tree, Crime and Society in Eighteenth Century England*. Ed. Hey, Linebaugh et al. (Allen lane, 1975). See also Alan Norrie, *Crime, Reason and History. A Critical Introduction to Criminal Law*, 2nd edition (Cambridge University Press, 2001)

Pre-Existing Literature in the Field

As with all research topics, this thesis has both narrow and more wide-reaching questions. The central three questions relate directly to the definitions and enforcement of fraud and the mechanisms by which these offences were prosecuted in London between 1760 and 1820. But the wider issues addressed in this thesis include more critical and theoretical questions of who was using the criminal justice system and how certain forms of financial misconduct were treated within the law. Because of these wider questions, the literature in the field might be expected to be extensive. However, fraud and the criminalisation of certain financial behaviour is a greatly under-researched subject amongst lawyers and historians.⁵² Sociologists have dedicated more research to the field, particularly the ground-breaking work of Edwin Sutherland. However, Sutherland's work is rooted in the twentieth century and relies upon a definition of fraud that rests upon the perpetrator of fraud and the circumstances within which the crime was committed. As discussed above, this thesis is taking a different approach, and is focused upon the offence, rather than the offender.

Sutherland's work has formed the basis of further research in white-collar crime and financial crime, committed by the middle classes or through a breach of trust.⁵³ Whilst fascinating, this research only applies to the post-nineteenth century.⁵⁴ There have been ripples of academic interest in white-collar crime during the twentieth century, notably since the 1970s and 1980s.⁵⁵ However, these works were often inspired by a resurgence in contemporary financial fraud and make fleeting reference to the origins and developments of wider definitions of fraud, and the history of fraud and financial misconduct. Likewise there has been some excellent contemporary research into particular forms of financial misconduct and the challenges of the

⁵² George Robb, *White-Collar Crime in Modern England. Financial Fraud and Business Morality, 1845-1929*. (Cambridge University Press, 1992) p.6

⁵³ Sutherland, *White Collar Crime*

⁵⁴ In particular, post 1857, (20 & 21 Vict) when legislation was introduced which defined fraud in terms of breach of a fiduciary obligation.

⁵⁵ Robb, *White-Collar Crime* p.6 and see in particular Sindall, *Criminal Justice History*

twenty-first century,⁵⁶ although it tells us nothing of the definition and prosecution of fraud offences prior to the early nineteenth century.

The 1990s saw a smattering of interest in Victorian company law crime but again, the focus was predominantly on the development of the joint-stock company and the lack of regulation of companies and protection for shareholders.⁵⁷ In recent years, academics such as James Taylor and Sarah Wilson have been producing excellent research on nineteenth century corporate fraud and banking and joint-stock companies.⁵⁸ Both Taylor and Wilson frame their analysis around the opportunities created by the joint-stock company.⁵⁹ This approach provides a rarely before considered insight into the financial crime of the 'upper world'. Wilson has taken this research further in that she situates the developments of Victorian corporate fraud in a longer timeframe, making clear parallels with contemporary financial crime and providing direct lessons between the Victorian and the contemporary.⁶⁰

Rob Sindall wrote a much cited article on crime committed by the middle-classes in the nineteenth century.⁶¹ This was an innovative article in that few social or crime historians had considered crime from a middle-class perspective. The approach of crime historians had previously focused upon the working classes.⁶² Sindall's focus was upon the overall amount of crime committed by the middle classes in relation to national crime statistics and the types of offences most likely to be committed by the middle-classes. Sindall's research question is very different to the approach of this thesis. Sindall did not directly engage with the prevalence of fraud, and this was because the question related to the crimes of the middle-classes, not who was committing financial crime. In fact, Sindall's findings did not reflect fraud as a

⁵⁶ Examples include: Roman Tomasic, "The financial crisis and the haphazard pursuit of financial crime", *Journal of Financial Crime*, (Vol. 18 Issue: 1, 2011) pp.7-31; the collective works of Michael Levi including: Michael Levi, *Regulating fraud: white-collar crime and the criminal process*. (Tavistock Publications, 1987).

⁵⁷ See for example: Foreman-Peck, J, 'Sleaze and the Victorian Businessman', *History Today*, Vol. 45, No.8 1995.

⁵⁸ See above for a selection of these works

⁵⁹ Wilson, Sarah, 'Law, Morality and Regulation: Victorian Experience of Financial Crime' *British Journal of Criminology* (2006) 46 pp1073-1090; Taylor, *The Royal Historical Society*

⁶⁰ Wilson, *Origins*

⁶¹ Sindall, *Criminal Justice History*

⁶² *Ibid* p.23

prevalent crime for the middle classes which explains why his work does not engage with fraud. This finding would certainly align with the findings of this thesis, that fraud offences were not sophisticated organised crime but rather, every day and low-level misdemeanours.

Sindall's work was however rare in that few researchers have addressed the crimes of the middle-classes. As shall be discussed in depth in Chapter 2, since the first wave of crime history, the sub-discipline has been preoccupied with crime from below, focusing upon the history of social strata previously ignored more generally by historians. This focus on the working and lower classes has not extended to the study of fraud. This may be largely due to the preconception that fraud is a middle class crime, committed by social groups which are already considered by economic and business historians.⁶³ There have been some isolated exceptions where crime historians have examined the prosecution of fraud. These studies rarely involve in-depth analysis of court records, or problematize definitions of fraud.⁶⁴ Heather Shore's research into organised crime in the long eighteenth century includes some work on organised financial crime, in particular 'long-firm' frauds in the mid-nineteenth century⁶⁵. Shore argued that long-firm frauds⁶⁶ were particularly insidious as they were a non-traditional crime and involved non-traditional criminals.⁶⁷ This thesis will directly challenge such claims by shining a light on fraud trials appearing across the criminal justice system. This analysis will reveal the every-day nature of fraud during the eighteenth century, thereby allowing for a more nuanced and evidenced analysis of the types of fraud being heard during this period. This will be achieved through the imposition of an original typology of fraud, constructed through a close-reading of all fraud indictments heard before the Old Bailey between 1760 and 1820.

⁶³ G.R. Searle, *Morality and the Market in Victorian Britain* (Clarendon Press, 1998)

⁶⁴ Wiener, *Reconstructing the Criminal*

⁶⁵ H. Shore, *London's Criminal Underworlds, c. 1720 - c. 1930: A Social and Cultural History* (Palgrave Macmillan, 2015) Ch.6

⁶⁶ Fraud committed by establishing and running a seemingly genuine business, establishing systems of credit before closing the business overnight, absconding with the goods and monies owed to creditors.

⁶⁷ Shore, *Underworlds*

Chapter Outline

The following chapter of this thesis will outline the methodology by which the above research questions will be answered. It is still uncommon for scholars of the law to engage with methods beyond traditional legal methods⁶⁸ but as an interdisciplinary piece of research, this thesis will provide a long-overdue critique of interdisciplinary research uniting legal and historical studies.

The first central research question of this thesis concerns definitions of fraud. Chapter 3 identifies the most common forms of fraud offence and traces their development from Tudor times to the early nineteenth century. The position of fraud, existing between the criminal and the civil law will be assessed in order to better situate the prosecution of fraud within the entire legal system. The purpose of this chapter is to provide the reader with a clear understanding of the law in this area, before moving on to consider how this law was utilised. Chapter 4 will outline the choices available to those falling foul of fraud. This chapter in particular seeks to question why certain courts were used to pursue fraud, and follows on from Chapter 3 in that it questions why particular forms of fraud would be pursued in higher, rather than lower courts.

Chapter 5 further questions the definitions of fraud during this period by considering how the law was enforced. This chapter also acts as a bridge between the first two central research questions of what was fraud, and who was prosecuting fraud. Chapter 5 identifies the prosecutors of fraud at the Old Bailey by their occupation, and situates their complaints and the types of frauds being pursued by the imposition of a typology of fraud. This chapter asks not only who was prosecuting fraud at the Old Bailey, but what types of fraud, and in what circumstances were such frauds committed.

⁶⁸ Sir John Baker, Reflections on 'doing' legal history, in Anthony Musson and Chantal Stebbings eds, *Making Legal History: Approaches and Methodologies* (Cambridge University Press, 2015); Anthony Musson and Chantal Stebbings, Introduction, in Musson and Stebbings *Approaches and Methodologies*

Chapter 6 and 7 address the third of the research questions, the ways in which fraud was being prosecuted. In particular, how prosecutors used and negotiated the criminal justice system from the magistrates' courts to the Old Bailey. The interaction between the prosecutor and some of the central actors within the criminal justice system will be examined. These actors include magistrates, court clerks, the legal profession, and juries.

The question of how fraud was prosecuted acts to further explain the second question of who was prosecuting, by exploring the ways in which prosecutors of fraud at the Old Bailey. Chapter 7 explores which juries heard fraud complaints at the Old Bailey and brings the thesis full-circle back to how these cases found their way into the Old Bailey at all. This is carried out through a detailed analysis of fraud disposal within the magistrates' courts of the Metropolis. The thesis concludes with a final question regarding the use of specialist juries within the Old Bailey and some final thoughts regarding future research in the field.

Chapter 2 Methods and Methodology

The questions at the heart of this thesis – what was fraud during the period, who was prosecuting this fraud, and how fraud was prosecuted – will be answered using a range of archives which shall be discussed in detail in this chapter, as well as throughout the rest of the thesis. Attention will be paid to the inter-disciplinary nature of the thesis, particularly the differing, and sometimes conflicting approaches adopted by legal historians and crime historians. Methods and methodology in the discipline of history revolve around the archives used and the pitfalls or advantages these archives pose to the researcher.⁶⁹ This thesis will go beyond these parameters to critically engage with disciplinary approaches, and also to utilise analytical tools more commonly found in the sciences such as Statistical Package for the Social Sciences (SPSS).⁷⁰ Finally, the methods of analysis shall be explored, paying particular attention to the theoretical underpinning of the overall thesis, and the manner in which primary data was categorised and analysed to answer the central research questions. Particular consideration will be paid to the Old Bailey Sessions Papers (the Proceedings) and how these documents have been digitised.⁷¹ These archives form the basis of the data used throughout the thesis and as such, this source will be paid particular attention.

Alongside the Proceedings, other sources will be examined such as official court records of the quarter sessions, working documents of the summary courts, official government documents from such departments as the Treasury, legal practitioner texts, and many others. The reasons for the selection of these documents, alongside any methodological considerations which these archives present, will be considered as they arise. Whereas other archives and sources referred to in the thesis are used to answer particular research questions and appear in limited chapters, the Old

⁶⁹ Barry Godfrey, *Historical and Archival Research Methods*. In D. Gadd, S. Karstedt, & S. Mesner (Eds.), *The Handbook on Criminology Research Methods* (New York, Sage, 2011) p.158

⁷⁰ A statistical software tool which allows for more complex quantitative analysis.

⁷¹ It was from these digitised archives which data has been collected.

Bailey Proceedings form the evidential basis of all chapters. For this reason, this source requires and deserves in-depth consideration.

The Old Bailey Sessions Papers: Use as an Historical Source

In considering the prosecution of fraud during the eighteenth and nineteenth centuries, the most detailed surviving source of criminal trials is the Old Bailey Sessions Papers ('the Proceedings'). These Proceedings are the best accounts we have of the administration of criminal justice in England before the mid-nineteenth century⁷² and as such, any research surrounding criminal trials during this period must have at its bedrock, the Proceedings. However, the Proceedings are not without their limitations and undertaking any legal or criminal history research, based solely upon the Proceedings is to be avoided.⁷³ In so heavily utilising the Proceedings, a large amount of criminal and legal historical research looking at the seventeenth to nineteenth centuries has focused upon London, which certainly raises some questions about representativeness of research. Notwithstanding this limitation, when considering the criminal category of fraud, a focus upon London, Westminster and Middlesex – the jurisdiction of the Proceedings – is desirable. London was by far the biggest population centre in England at this time, containing a tenth of all people in England.⁷⁴ More significantly, '[London had] widespread economic, social, and political influence on the rest of the country. At least one person in six had lived there at some time in their lives...⁷⁵ London was of a similar social composition to other cities but was seen as the principal city in the country.⁷⁶ As the foremost city, London in its entirety, was a template for the rest of the country and it is in the prosecution of fraud within London that innovations and changes to these offences are revealed.

⁷² John Langbein, 'The Criminal Trial before the Lawyers' *The University of Chicago Law Review*. Vol.45, no.2. Winter 1978. pp.263-316. P. 271

⁷³ *Ibid* p. 271

⁷⁴ Gray, *Crime, Prosecution and Social Relations* p.6

⁷⁵ Lorna Weatherill, *Consumer Behaviour and Materials Culture in Britain, 1660-1760* (Routledge, 1988) p.47

⁷⁶ *Ibid* p.51

The Old Bailey Sessions Papers

The Proceedings are a written report of trials heard in the Old Bailey between 1676 and 1913. They were written eight times a year, one issue for each sitting of the Old Bailey.⁷⁷ Supposedly, barring two brief periods of time, absolutely all cases appear within the Proceedings.⁷⁸ These two exceptions are the first ten years of the life of the Proceedings when not all cases were covered⁷⁹, and second, between 1790 and 1793 when only cases which resulted in conviction were reported.⁸⁰ However, research carried out for the purposes of this thesis has revealed a number of cases reported elsewhere, which almost certainly appeared at the Old Bailey, but which are missing from the Proceedings. The case of *R v Vincent Wright, Anne Fagan and William Elson*⁸¹ is well documented in the summary court accounts, and details are given of the trial at the Old Bailey. However, no reference to this case appears in the Proceedings.⁸² A further case, *The King v Benjamin Lara*⁸³, was a Crown Case Reserve case, the report of which clearly states the matter to have initially tried at the Old Bailey. Again, no reference to this trial appears within the Proceedings. These findings illustrate that, contrary to common belief, the Old Bailey Proceedings do not record *all* cases heard at the Old Bailey.

The methodology of this thesis has allowed for such omissions to be discovered. Due to the digitisation of the Proceedings⁸⁴, research on the Old Bailey has focused on the big data possibilities of such a resource and perhaps it is unsurprising that it took this form of research, the closer reading of all indictments relating to one form of

⁷⁷ Tim Hitchcock and Robert Shoemaker 'Digitising History from Below: The Old Bailey Proceedings Online, 1674-1834' *History Compass* 4/2 (2006) pp.193-202 p.193

⁷⁸ Langbein, *The University of Chicago Law Review* p. 272; Robert B Shoemaker 'The Old Bailey Proceedings and the Representation of Crime and Criminal Justice in Eighteenth-Century London' *Journal of British Studies* 47 (July 2008) pp.559-580; T. P Gallanis 'The Mystery of Old Bailey Counsel' *Cambridge Law Journal*, 654(1) March 2006 pp.159-173; Simon Devereaux 'The City and the Sessions Paper: "public justice" in London 1770-1800' *Journal of British Studies*, Vol.35, No.4 (Oct. 1996) pp.466-503.

⁷⁹ Dawn Archer 'Historical Pragmatics: Evidence from the Old Bailey' *Transactions of the Philological Society*, Vol.112:2 (2014) 259-277 p.264

⁸⁰ Devereaux *Journal of British Studies*, p. 481

⁸¹ National Archive records: T38/675

⁸² See Chapter 7 for more details of this case.

⁸³ 1 January 1794 (1794) 2 Leach 647 168 E.R. 425

⁸⁴ See below in this chapter

offence, to reveal missing trial reports within the Proceedings. In slicing through vast amounts of data to focus upon the prosecution of a particular offence, a more nuanced picture of the accuracy and completeness of the Proceedings can emerge. Moreover, in this thesis, court and official records from other courts and offices were used to illustrate a bigger and more detailed picture of the prosecution of fraud, which allowed for the identification of missing trials. The Proceedings should not be analysed in isolation as additional records have revealed the missing cases from the Proceedings.

Due to the focus of this thesis, it is not possible to estimate the number of missing trials from the Proceedings. Moreover, the complimentary records explored alongside the Proceedings are themselves incomplete.⁸⁵ It is possible that the reporting of some fraud offences was due to the nature of fraud prosecutions primarily being misdemeanours rather than capital felony cases⁸⁶; offences which could result in transportation at worst may not have resonated with public bloodlust. However, this argument is undermined by the otherwise extensive reporting of fraud offences.⁸⁷ It is more likely that cases were sometimes missed for reasons beyond the substance or procedure of the offence itself. These reasons included the nature of the reporting itself and the purpose of the Proceedings.

Publishers and Shorthand Writers

From the inception of the Proceedings, the Lord Mayor of London approved of the publication⁸⁸ but on the condition that the publisher paid the Lord Mayor for the privilege.⁸⁹ After 1775, the licence for the Proceedings was transferred from the Lord Mayor to the City of London and the publisher did not have to pay to publish the Proceedings.⁹⁰ By 1778, the City of London was subsidising the publication of the Proceedings on the condition that they gave a 'true, fair and perfect narrative' of the

⁸⁵ See below in this chapter

⁸⁶ For further exploration of the types of offences categorised as fraud see Chapter 3

⁸⁷ For further exploration of reporting of fraud trials see below.

⁸⁸ Archer, *Transactions of the Philological Society*, p.264

⁸⁹ Devereaux, *Journal of British Studies*, p. 468

⁹⁰ *Ibid* p. 482

trials.⁹¹ This requirement greatly extended the length of the Proceedings, sometimes resulting in one edition having a number of volumes. The length of the Proceedings also increased in the nineteenth century for a range of reasons, partly because of a growing population and partly as trials became more complicated. This is not to say that the Proceedings were, to any extent, a verbatim account. The narratives of the trials were taken down by shorthand writers and copy (the text) was then handed to the editor to decide what to include within the particular edition. For practical as well as political, social and commercial purposes, the details of the trials reported are highly selective.

The greater issue for the researcher is what the writers chose to leave out of their reports.⁹² As stated above, these political, commercial, and social considerations were far more influential upon what writers chose to include in their reports than any practical limitation. However, there is suggestion that writers did not work alone when attending the Sessions and rather, at least pairs, if not teams of writers would share the burden between them thereby increasing the possibility of capturing all details of the trial.

A more significant influence upon the depth of detail reported in the Proceedings was the involvement of counsel, for either the prosecution or the defence. This provided a further source of detail regarding the case as counsel would either take their own notes, or employ their own shorthand writers, presumably for the purposes of case management. There is evidence to suggest that these accounts were offered to the editors of the Proceedings to include in their reports. The editors appeared happy to accept this additional copy, even if these reports were biased in favour of whichever side counsel were representing. This contribution from counsel provided additional material for the editors and provided publicity for counsel.

One glaring omission from the Proceedings, which will be discussed in more detail below, is the request by editors that legal and procedural argument be ignored by

⁹¹ *Ibid* p. 468

⁹² John H Langbein, 'The prosecutorial origins of defence counsel in the eighteenth century: the appearance of solicitors' *Cambridge Law Journal* 58(2) July 1999, pp.314-365 p. 319.

the shorthand writers.⁹³ This was for a range of reasons including not wishing to lose the public's interest by including drier material of the trials and also the belief that revealing too much about criminal processes could act as a guide to the more cunning criminal.⁹⁴ Details of legal or procedural matters were omitted for a non-lawyer reading public in the belief that they would be too technical or boring.⁹⁵ Perhaps a more practical explanation might be the limited role of lawyers in the criminal trial until 1836 when barristers were allowed, as of right, to represent prisoners.⁹⁶ This alienation of lawyers from criminal litigation naturally extended to their role in the compiling and publishing of criminal trial materials, including the Proceedings.⁹⁷ Consequently, the tone and content of the Proceedings is lacking in legal detail and focus. However, as explored in detail in Chapter 3, the majority of fraud trials at the Old Bailey related to misdemeanours, for which defence counsel were permitted. Moreover, as demonstrated in Chapter 6, this permission for counsel was taken up by those accused of fraudulent offences.

The Proceedings and the Identification of Counsel

In Chapter 6 of this thesis, the number, the role, and the significance of counsel involved in fraud prosecutions at the Old Bailey will be explored. As with other researchers in the field, this study is estimating the number of counsel present based upon the Proceedings.⁹⁸ There are particular methodological considerations when seeking evidence of counsel in the Proceedings. Langbein has voiced some concern with the under-representation of counsel, which he demonstrates through comparing the Proceedings with the diaries of Justice Ryder which reflects far more

⁹³ Langbein, *The University of Chicago Law Review* p. 264

⁹⁴ Devereaux, *Journal of British Studies*, p. 492

⁹⁵ Gallanis, *Cambridge Law Journal*, p.161

⁹⁶ Cerian Charlotte Griffiths 'The Prisoners' Counsels Act 1836: Doctrine, Advocacy and the Criminal Trial' *Law, Crime and History* (2014) 2 pp.28-47. p.28

⁹⁷ Langbein, *The University of Chicago Law Review* p. 264

⁹⁸ See for example: Langbein, *University of Chicago Law Review*; John H Langbein, *Origins*; John H. Langbein, The Origins of Public Prosecution at Common Law, *American Journal of Legal History* 17, 313 (1973); John Beattie, *Crime and the Courts*; John Beattie, 'Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' *Law and History Review* 9 (1991) pp.221-267; David J. A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial* (Clarendon Press Oxford, 1998); Allyson May, *The Bar and the Old Bailey, 1750-1850* (The University of North Carolina Press, 2003)

involvement of counsel in trials.⁹⁹ The Proceedings may have omitted the details, or indeed the presence of counsel, for a number of reasons. These include the refusal to report examples of defiance or contempt for the court shown by the prisoner whether through their own speeches or through counsel¹⁰⁰, reluctance to reveal how crimes were committed, and the desire not to complicate narratives regarding the criminal system by publicising exculpatory evidence. At a time when defence counsel for felony was only technically allowed to present legal argument, it is likely that a publication which excluded legal argument would equally exclude reference to the counsel making such argument.

There may have been a less cynical reason for leaving out defence counsel involvement such as the mistaken belief by short-hand writers that they needed the permission of counsel before publishing details of their speeches.¹⁰¹ The dearth of reference to counsel may also have been due to innocent, though frustrating, poor short-hand writers who missed a lot of detail from the trials. When Edmund Hodgson took over writing the Proceedings in September 1782, the length and quality of the reports increased significantly.¹⁰² As seemingly did the presence of counsel. This can only be a tentative connection however as the 1780s saw a great increase in counsel within the Old Bailey.¹⁰³

A further factor which may have effected rates of counsel reporting was the offence forming the subject of the trial. Different offences were represented to greater and lesser extents within the Proceedings. This was for a number of reasons such as public interest. Forgery cases were well reported due to the high execution rates which attracted public attention.¹⁰⁴ It has been suggested that fraud, as well as arson, were also well reported¹⁰⁵ and there is certainly suggestion from some of the longer Proceedings' accounts of fraud trials that there was a public appetite for fraud trials.

⁹⁹ Langbein, *University of Chicago Law Review*, (1983) p.126

¹⁰⁰ Robert B Shoemaker 'The Old Bailey Proceedings and the Representation of Crime and Criminal Justice in Eighteenth-Century London' *Journal of British Studies*, Volume 47, Issue 3 (2008) p. 569

¹⁰¹ Shoemaker *Journal of British Studies*, p. 571

¹⁰² Shoemaker, *Crime, Courtrooms and the Public*, p.81

¹⁰³ May, *The Bar*, p.29

¹⁰⁴ King, *Crime, History and Society*, (2009) p. 99

¹⁰⁵ *Ibid* (2009) p. 113

Of course, just because the Proceedings omit details of counsel does not mean that counsel were not present.¹⁰⁶

In identifying counsel in fraud trials a range of approaches have been taken. As detailed above, keyword searches are problematic when identifying counsel due to the lack of consistency in to how they were referred. However, even when reading all fraud cases between 1760 and 1820, it is not always clear when counsel are present. From the 1780s it is far clearer when counsel are present due to such phrases as 'counsel for the prisoner'. After 1783 counsel were named within the Proceedings¹⁰⁷ and given the very few number of counsel appearing at the Old Bailey, even where words such as 'counsel' are not used, it is clear who these counsel are.¹⁰⁸ Counsel such as Adolphus, Silvester, Garrow, and Fielding (William) are present in fraud trials time and time again.¹⁰⁹

The Functions of the Proceedings

Throughout the life of the Proceedings, these reports had a range of functions. These functions depended on the aims of the publisher, the political climate of the day and the readership. The Proceedings needed to be financially viable as a commercial enterprise, they played a procedural role in that they were used for appellant and sentencing purposes, and as a semi-regulated publication the Proceedings inevitably played a political role in the wider discourses surrounding criminal justice. All of these functions impact upon how the researcher should read this source.

Commercial Venture

From the publisher's perspective, the Proceedings were a commercial venture like any other newspaper or pamphlet. The 1770s saw a collapse in the commercial viability of the Proceedings, as the number of newspapers grew and these newspapers increasingly published crime news. This competition may explain why

¹⁰⁶ T.P Gallanis, *Cambridge University Law Journal*, p.161

¹⁰⁷ May, *The Bar*, p.34

¹⁰⁸ May claims there were only ten barrister regularly appearing at the Old Bailey and this is borne out from the fraud trials under consideration. May, *The Bar*, p.35

¹⁰⁹ *Ibid* p.35

the publishers so readily accepted subsidies from the City of London in the 1770s. Whilst one printer of the Proceedings in 1727 claimed the Proceedings were not ‘to please the vulgar part of the town with buffoonery, this not being a paper of entertainment’.¹¹⁰ The publisher of the Proceedings could never escape the practical requirement that the Proceedings had to sell enough copies to allow for printing and, post-official subsidy, to justify public expenditure of funds. One method whereby the publishers periodically catered for the more ‘vulgar part of town’ was in the phonetic printing of witness testimony, particularly of Irish witnesses, the effect of whose accents the Proceedings would make much comedic value.¹¹¹ In later years, the City of London would uncharacteristically prohibit such low methods of entertainment.¹¹²

The publication of the Proceedings required a careful balancing of differing aims and objectives. Clearly, the Proceedings needed to appeal to the general public and needed to be entertaining. Consequently, sensational and shocking cases relating to murder, sodomy and rape would be expected to be well reported.¹¹³ As today, cases of lethal violence received more attention and the Proceedings detail these more than other offences.¹¹⁴ However, as today, murder was relatively rare and thus, other more shocking offences which might interest the public, were focused upon.¹¹⁵ The selection of the trials has been attributed to the sentencing of the offence rather than because of the actual crime; capital offences received more press coverage than non-capital offences.¹¹⁶ Consequently, trials of forgers and arsonists received much coverage as forgery in particular attracted higher execution rates.¹¹⁷

A further significant shortcoming of the Proceedings is the way in which trials were condensed. John Langbein has rested great faith in the completeness of the Proceedings but he overlooks the attention and detail given to some offences over

¹¹⁰ Detailed in Shoemaker, *Journal of British Studies*, p.564

¹¹¹ Langbein, *The University of Chicago Law Review* p.271

¹¹² Shoemaker, *Journal of British Studies* p.564

¹¹³ Archer, *Transactions of the Philological Society*, p.263

¹¹⁴ King, *Crime, History and Society* (2009) p.91

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

¹¹⁷ McGowen, R. Managing the Gallows: The Bank of England and the Death Penalty, 1797-1821. *Law and History Review*, Vol 25, No.2 (Summer 2007)

others. Shoemaker has raised grave, and well-founded concerns, that in every sessions, three to six days of trials were being compressed into eight to twenty four pages.¹¹⁸ Such compression leads to a false impression of the length of trials, or the severity with which such offences were perceived by the courts.

Procedural Tool

Between at least 1775 and 1837, the Proceedings played a procedural role in the administration of justice. The Recorder of London used the Proceedings to construct lists of those convicts sentenced to death who were recommended for mercy to the monarch.¹¹⁹ These recommendations would be passed to the Privy Council before being presented to the monarch. Simon Devereaux has uncovered convincing evidence to suggest the use of the Proceedings by the Recorder in presenting his recommendations to the monarch; on several occasions direct page references to the Proceedings appear in the Recorder's notice.¹²⁰ The Recorder used the Proceedings as a concise resource in order to get an overall picture of the particular trial he was considering.¹²¹ With eight sessions of the Old Bailey per year, the Recorder would have been under pressure to decide the cases in good time, partly to have one Sessions completed before the next began, partly because in the interim, the condemned prisoner was left languishing in prison.¹²² To the modern historian, and certainly to the modern lawyer, the use of the Proceedings as a tool for deciding any judicial matter is surprising. These reports were not verbatim and more significantly in this instance, did not contain any of the legal or procedural argument.¹²³ However, the Proceedings did contain evidence as to the character of the prisoner and it was this evidence which was used in deciding when to lessen the sentence.

¹¹⁸ Shoemaker, *Journal of British Studies* p.560

¹¹⁹ Devereaux, *Journal of British Studies*, p.472

¹²⁰ *Ibid* p.473

¹²¹ For further details of the process of presenting this information to the monarch, see Douglas Hay, 'Writing about the Death Penalty', *Legal History* (2006) Vol.10

¹²² Devereaux, *Journal of British Studies*, p.479

¹²³ Langbein, *The University of Chicago Law Review* p.264

The Proceedings also played a role in the limited appeals process of the day. There is evidence the Lord Chancellor used the Proceedings to inform himself of cases when deciding upon appeals.¹²⁴ The Proceedings acted as guidance to the lower courts, in particular the summary courts. There is evidence of magistrates, particularly in Middlesex, regularly purchasing the Proceedings.¹²⁵ Whilst the use of the Proceedings to the magistrates is not apparent, assumedly one purpose would be to keep magistrates abreast of the work of the assize court and also, to monitor how cases referred to the Old Bailey by their offices were reported.

Political Tool

The Proceedings were a significant political instrument. During the 1770s, radicals such as John Wilkes, the Sheriff of London, called for more transparency in office and particularly in the courts. Wilkes believed that the administration of justice should be open to the public and took a range of steps to make the Old Bailey more transparent with some being more successful than others.¹²⁶ Wilkes saw the Proceedings as the means by which the Old Bailey could be opened up and all trials could be reported.¹²⁷ Thus, in 1775, the City of London began to publish the Proceedings on an authoritative footing and the requirement that the Proceedings be a 'fair, true and perfect narrative' description of trials was evidently fulfilling a number of requirements, including the purpose of making transparent the wheels of justice.

Of course, this opening up of the courts did not play a purely democratic role, it also acted to demonstrate to the populace the consequences of crime. It is perhaps no coincidence that the City of London authorities took over the publication. Clearly the City governors such as the Aldermen saw the importance of the criminal justice system and related publications, and the declaratory and normative role reporting of the criminal justice system could play. As shall be revisited throughout this thesis, with particular focus in Chapter 7, to understand the prosecution of fraud, an understanding of the political and economic motivations of the City of London and

¹²⁴ Devereaux, *Journal of British Studies*, p.473

¹²⁵ Treasury Department Accounts – Hatton Garden – Police Office at National Archive ref T38/676

¹²⁶ Devereaux, *Journal of British Studies*, p.486

¹²⁷ *Ibid* p.487

its aldermen is essential. With regard to the Proceedings themselves, it is significant that the City of London aldermen recognised the value of publicising the administration of justice.

The Proceedings: Methodological Considerations

Bias and Partiality

As a publication subsidised and guaranteed by the City authorities, it would be tempting to conclude that the Proceedings were no more than state propaganda. But this conclusion would be too simplistic.¹²⁸ The government subsidised newspapers in much the same way as the City of London subsidised the publishing of the Proceedings and thus, some parallels can be drawn between the two. Historians largely agree that these subsidies were often too low to actually influence the commercial decisions of the publishers and the press regularly published material which opposed the government such as criminal trials which reflected the failings of the Bloody Code and the justice system as a whole.¹²⁹ This is not to say however that the Proceedings were not influenced by the government or the City authorities. Whilst Devereaux suggests there to be 'no evidence that anyone in the City government ever sought to influence the Sessions Paper¹³⁰', the Proceedings were not published entirely at the will of the editor. The Recorder had a lot of influence over the Proceedings and this partly explains why the reports became so uniform following the 1770s.¹³¹

The Recorder and the City authorities wanted the Proceedings to reflect the successful functioning and justice of the criminal trial system. Examples of prisoners not showing due reverence for the law by arguing with judges or not taking the proceedings seriously were very rarely published within the Proceedings.¹³² Moreover, details of any defence were frequently excluded or curtailed. One reason

¹²⁸ *Ibid* p.501

¹²⁹ Devereaux 'From Sessions to Newspaper? Criminal Trial Reporting, the Nature of Crime, and the London Press, 1770-1800' *The London Journal*, Vo.32, No.1 March 2007. 1-27 p.9

¹³⁰ Devereaux, *Journal of British Studies*, p.490

¹³¹ Archer, *Transactions of the Philological Society*, p.266

¹³² Shoemaker, *Journal of British Studies* p.569

for this may be to give more of an impression of the clarity of the prosecution.¹³³ In a time of private prosecutions, reflecting a smooth prosecution process may have acted to encourage more lay prosecutors to utilise the criminal courts. Perhaps more significantly, the focus upon the prosecution case may reflect how the authorities wished to legitimise the sentencing of criminals, which frequently involved their transportation and at times, execution. The speeches made by prisoners, asking the court to spare their lives, were very rarely reported. Again, this is most likely due to the desire of the authorities to justify the harsh sentences and Bloody Code which underpinned the criminal justice system.¹³⁴

In 1790, the City of London requested that the Proceedings only publish the convictions secured at the Old Bailey and make no reference to the acquittals. This only lasted for three years before the publishers of the Proceedings demanded to be allowed to publish acquittals alongside convictions; the public were seemingly less interested in the Proceedings when they only listed the convictions.¹³⁵ Why the Proceedings became less popular during this period of restriction is not entirely clear however. One explanation might be that the public became aware of this censoring and lost respect for the Proceedings as they knew them to be less than objective. There is certainly evidence that the public were actively involved in correcting the mistakes published in the Proceedings which is demonstrated by a number of corrections which had to be published in relation to previous editions.¹³⁶ These public complaints reflect the reality that people were attending the Old Bailey to watch the trials and when the Proceedings published inaccurate details, they were quick to vocalise this. The decision to only publish the convictions of the Old Bailey must have been immediately apparent to a public who had witnessed a day of trials, an average of thirty-nine percent of which would have resulted in acquittal.¹³⁷

¹³³ Archer, *Transactions of the Philological Society*, p.266

¹³⁴ Shoemaker, *Journal of British Studies* p.570

¹³⁵ Devereaux, *Journal of British Studies* p.493

¹³⁶ Shoemaker, *Journal of British Studies* p.576

¹³⁷ *Ibid* p.573

Old Bailey Online (OBO): the Digitisation of the Proceedings

From 2000 to 2005, the Old Bailey Sessions Proceedings were digitised and this digitisation project, Old Bailey Online (OBO), has transferred all of the Proceedings onto a database.¹³⁸ This process required the digitisation of 190,000 pages of the Proceedings alongside 4000 pages of the Ordinary's Accounts.¹³⁹ In their entirety, the Proceedings consist of 134 million words.¹⁴⁰

The Process of Digitisation

Until digitisation, the Proceedings were recorded on microfilm and it is from these films that the OBO project obtained their data.¹⁴¹ Due to the Proceedings being so inconsistent in layout and form, optical character read software could not be used, preventing any automated method for digitizing the Proceedings.¹⁴² Instead, all of the content of the Proceedings was manually entered into the OBO database.¹⁴³ To limit error, all content was double rekeyed – entered into the database twice – and then the two versions were checked against each other using recognition software.¹⁴⁴ Errors cannot be wholly eradicated through this method, partly because of the human element involved in the transcription of the Proceedings. However, for every paper, a link to the original image of the report is attached. This is designed to allow users to check and confirm the text themselves.¹⁴⁵ If users identify an error in the transcription, they are encouraged to contact the OBO team in order to rectify this.

Ostensibly, the OBO project appears to have taken a number of steps to ensure that the transcription of the Sessions Proceedings has been accurate and the use of crowd

¹³⁸ <http://www.oldbaileyonline.org> (accessed 7th January 2017)

¹³⁹ <http://www.oldbaileyonline.org/static/Project.jsp> (accessed 7th January 2017)

¹⁴⁰ Archer, *Transactions of the Philological Society*, p.259

¹⁴¹ John Bradley and Harold Short 'Texts into databases: the evolving field of new-style prosopography' *Literary and Linguistic Computing*, Vol.1 (2005) p.13

¹⁴² For a detailed overview of another legal history digitization project see: Jason Eiseman et al, 'Litchfield Unbound: Unlocking Legal History with Metadata, Digitization, and Digital Tools', *Law and History Review*, November 2016, Vol.34, No.4

¹⁴³ Hitchcock and Shoemaker, *History Compass* 4/2 p.194

¹⁴⁴ *Ibid*

¹⁴⁵ *Ibid* p.199

sourcing to identify errors and problems ensures the accuracy of the OBO as an ongoing project. However, there are several potential concerns of which the researcher should be aware of when using the OBO and whilst safeguards have been put in place by the project, these reduce inaccuracies but do not eradicate them.

The first is the use of the double re-key approach to transcribing the Proceedings. This approach will undoubtedly highlight a number of the typographical errors caused directly by the transcribers. Typographical errors are inevitable and by using two different transcribers to input one trial report, it is assumed that these transcribers will make different errors, thereby highlighting mistakes in both transcriptions. This approach however does not address the potential for both transcribers to miss-read the original trial reports in the same way. The character and potential concerns regarding the Proceedings themselves have been addressed above but one concern for the modern day transcriber is not the substance of the Proceedings, but the form. Given the number of the Proceedings, there must be a number of these which have typographical or spelling errors. There has yet to be a comprehensive study as to the extent of these errors, however, the researcher must assume these errors to be present. How does the transcriber address these errors? One approach is that the digitized versions of the Proceedings ought to be a true reflection of the original source as the source itself is greatly significant to the academic, if not to the family genealogist and the wider public. However, transcribing the Proceedings, warts and all, creates potential for problems in searching the OBO for specific keywords or names.

Digitisation of Archives

Traditionally, databases have been used as an interim aim, to create a tool through which future research can be conducted.¹⁴⁶ This is certainly true of the OBO, which includes several statistical tools and searchable material for the researcher. When translating historical sources into databases, one of the most striking problems can be maintaining consistency between entries.¹⁴⁷ This can be due to a number of

¹⁴⁶ Bradley and Short *Literary and Linguistic Computing* p.3

¹⁴⁷ *Ibid* p.4

factors such as the original source material being in different forms and layouts and more problematically, an inconsistency in spelling. The Proceedings create a further cause for inconsistency in the substance of the source itself, such as information being laid out in different parts of the Proceedings, or being absent.

A recent critique of the use of digitisation of historical sources suggested that this process removes the researcher from the source itself and prevents the reader from engaging with the nuances of the document as a whole.¹⁴⁸ This would certainly be the case were the Proceedings to be read as isolated trial reports as the Proceedings were a commercial as well as a quasi-official publication and, as such, much can be gleaned from reading individual trial reports within the context of the document as a whole. It is partly for this reason that the OBO attached a link to a photograph of the original page of the report to every trial record. However, only the specific page of the original document is attached to the trial transcript and so, reading a case within the context of the document as a whole is not straightforward. It is possible to see a Sessions Paper in its entirety on the OBO if the researcher searches through the 'browse' function by date.¹⁴⁹ Whilst it is true that digitisation physically removes the researcher from the source, having images of the material allows for the reading of the document as a whole, including the reading of handwritten notes which may be written upon the document.

Digitising sources captures the substance of the text but not the form. It is possible through OBO date searches to see the layout of the Proceedings and an image of the original document.¹⁵⁰ A digital image will not reveal the quality of the paper upon which the text is written or printed, nor will it always reflect the different uses of ink which may allow the research to draw some conclusions about the order in which handwritten notes are made upon the document. For example, in the case of letters sent during the eighteenth century, the quality of the paper may be indicative of the wealth of the writer or the esteem with which the writer holds the recipient. In the

¹⁴⁸ Richard Ireland 'Why everything we know about criminal justice history is wrong' *Law, Crime and History* (2015) 1 p.132

¹⁴⁹ Hitchcock and Shoemaker, *History Compass* 4/2 p.199

¹⁵⁰ *Ibid*

case of a document which has a number of entries from different authors, the level to which the ink may have faded may indicate the times at which the entries were made. The second of these examples does not impact upon the use of the OBO *per se* however, historians of newspaper and print may be interested in the quality of the paper used in the Proceedings and thus, a digital record will not reveal this information. Form aside, the content of archives, and the OBO in particular, are generally made available in their entirety for the researcher and such records will have the same advantages and limitations as paper-based sources.¹⁵¹

A further concern with the digitisation of archives lies in the requirement to categorise information so as to allow searches, both qualitative and quantitative, of the material. This concern is greatly aligned with the wider issue of how historical documents can and ought to be read. There is a growing dialectic in thought surrounding the reading of historical material and within the wider humanities community, with the reading of big data.¹⁵² The process of digitising any material and imposing searchable terms, inevitably involves the ‘squeezing’ of data into pre-defined categories.¹⁵³ This process of categorisation will be explored further below.

Search Tools and Tagging

The OBO used a method of text encoding whereby XML (extensible mark-up language) tags were used to code specific details of the Proceedings such as the defendant’s name, gender, and age along with a number of other variables.¹⁵⁴ These were then linked together through a process of concatenation, bringing all of this data into distinct but connecting files.¹⁵⁵ This method is now being superseded by more cutting-edge programmes and methods but XML encoding has been used to

¹⁵¹ Tim Hitchcock, Robert Shoemaker and James Winters ‘Connected histories: a new web search tool for British historian’ *The Journal of the Historical Association*, 2011. p.355

¹⁵² For example see Franco Moretti, *Graphs, Trees and Maps: Abstract Models for Literary History* (Verso, 2005)

¹⁵³ Bradley and Short *Literary and Linguistic Computing* p.16

¹⁵⁴ Anne Helmreich, Tim Hitchcock and William J. Turkel ‘Rethinking inventories in the digital age: the case of the Old Bailey’ *Journal of Art Historiography*, 11 (Dec 2014) p.8

¹⁵⁵ *Ibid*

great effect in a number of projects up to the current day.¹⁵⁶ The OBO method allows the researcher to search by a range of categories either singularly or through a bespoke search of their making.¹⁵⁷ This tagging also facilitates both qualitative and quantitative methods of searching within the Proceedings.

Data-Mining

Data-mining is a process whereby data can be searched to locate specific information. The best example of this would be using search terms to locate the number of times such terms appears across the Proceedings. This can be very successfully achieved for legal historians in particular as the Proceedings are very regular in form.¹⁵⁸ There are however, potential pitfalls to data-mining. First, and as Ted Underwood has pithily summarised: ‘in a database containing millions of sentences, full-text search can turn up twenty examples of anything’.¹⁵⁹ However, it is not the false positives that the researcher should be concerned with, it is the data that several searches will lose. The process of searching acts to filter out alternative hypotheses: ‘If scholars use the wrong search terms, they literally misread their sources, and might not read them at all’.¹⁶⁰

To the legal historian, it may be tempting to agree that technical legal language makes data-mining searches unproblematic as largely legal language overcomes the problem of changing meanings and context of language in other sources.¹⁶¹ However, as shall be demonstrated below, when searching for fraud prosecutions, the formulaic use of such language in indictments as ‘fraudulent’, become deeply problematic.

¹⁵⁶ James Bradley, Rebecca Kippen, Hamish Maxwell-Stewart, Janey McCalman and Sandra Silcot ‘Research note: the Founder and Survivors Project’ *The History of the Family*, 15:4, 467-477. p.472. See also, the Digital Panopticon Project: <https://www.digitalpanopticon.org/>

¹⁵⁷ Bradley and Short *Literary and Linguistic Computing* p.13

¹⁵⁸ Joanna Innes and John Styles. ‘The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England’ *Journal of British Studies*, Vol.25, No.4, Re-Viewing the Eighteenth Century (Oct, 1986) pp.380-435. p.389

¹⁵⁹ Cited in Stephen Robertson, Searching for Anglo-American Digital Legal History, *Law and History Review*, (November, 2016), Vol.34, No.4 p.1052

¹⁶⁰ Robertson, *Law and History Review* p.1052

¹⁶¹ *Ibid* p.1050

Searching for Fraud Offences within the OBO

The biggest challenge in using the OBO to research fraud offences comes in identifying which cases are to be defined as fraud. In Chapter 3, the definitions of fraud offences and the development of their underlying doctrines will be explored in depth. It shall become apparent that a small number of particular frauds were pursued in the Old Bailey and that, as in other courts, these offences closely aligned with other property and deception offences. This has caused the categorisation of fraud offences to be deeply problematic.

The OBO separates trials into a number of categories relating to offence: Breaking Peace, Damage to Property, Deception, Killing, Miscellaneous, Royal Offences, Sexual Offences, Theft and Violent Theft. These larger categories are then separated into sub-categories such as Deception-Fraud. When transcribing the Proceedings, the OBO team produced guidelines as to how the transcribers should categorise the trials into these offences.¹⁶² The transcribers were instructed to categorise the trial by the description of the indictment that was generally contained within the first paragraph of the trial report. If the indictment was not present or unclear, the transcribers were to categorise the offence based upon the testimonies of the witnesses within the Proceeding. Indictments were usually written to a formula. Due to this *pro forma*, these indictments do not contain much information¹⁶³ but they should contain enough to roughly categorise the offence.

This approach is, for many if not most offences, unproblematic as it is clear which offence applied. However, there are examples within the Proceedings of offences being described ambiguously. As shall be shown below, deception, fraud, embezzlement and forgery cases are the most common offences to have unclear indictments.

¹⁶² 'Proceedings of the Central Criminal Court 1834-1913. Welcome to the CC project Wiki!' <http://crimpleb.group.shef.ac.uk/wiki/pmwiki.php>

¹⁶³ Robert B Shoemaker 'Using Quarter Sessions Records as Evidence for the Study of Crime and Criminal Justice' *Archives*, 20, 90 (1993), 147, 155–6, p.149

Upon first glance, the categorisation of offences within the OBO appears straightforward. There is a category of 'deception' and within this there is a subcategory of 'fraud'. However, these categories are unfortunately far less useful than they appear. The category of 'Deception' itself within the OBO includes forgery, fraud, perjury and bankruptcy offences.¹⁶⁴ This categorisation appears to be somewhat of an afterthought of the OBO in that it is difficult to clearly link all of these offences. It is not the case that all of the offences are connected in that they require an element of 'deception'. For example, many bankruptcy offences involved people not surrendering themselves to Commissioners in good time, with no accusation of deception levelled against them.

This categorisation has two fundamental flaws. There is no engagement with the ontological parameters of fraud offences or the interaction between these offences and other property offences. There is great overlap between crimes such as embezzlement, larceny, cheating by false pretences and other such offences¹⁶⁵ both in substance and in the manner in which they were prosecuted. Because of this, in searching all fraud indictments between 1760 and 1820, there are a number of false positives within the results identified by the OBO. If conducting simple statistical searches of the number of fraud offences, an inaccurate picture would be gleaned. For example the 1819 prosecution of Alexander Lauder has been categorised by the OBO as a Deception-Fraud. The transposing of the trial by the shorthand writer is a more complete reflection of the indictment and at first glance does appear to be a fraud. However, a closer reading of the text reveals that this case was in fact relating to theft:

ALEXANDER LAUDER was indicted for that he, on the 30th of August , being servant to David Vines ,did, upon trust and confidence, deliver unto him four sacks of flour... his property, safely to keep the same to the use of the said David Vines ; and that he, the prisoner, after such delivery, and while he

¹⁶⁴ 'Proceedings of the Central Criminal Court 1834-1913. Welcome to the CC project Wiki!' <http://crimpleb.group.shef.ac.uk/wiki/pmwiki.php>

¹⁶⁵ J H Beale, The Borderland of Larceny. *Harvard Law Review Vol.6 No.5* (December 1892) pp.244-256, p.244

was such servant, did feloniously withdraw himself from his said master, and go away with the said goods, with intent to steal the same, and defraud his said master thereof, contrary to the trust and confidence in him put by his said master, against the statute.

This indictment is clearly larceny firstly, because it stipulates ‘intent to steal’ and secondly, because it states the offence was a felony which statutory fraud offences were not. Another common error in categorisation of fraud came in the relationship with forgery. The trial of Joseph Marks demonstrates that such mis-categorisation can not only categorise non-frauds as fraud, but can also mis-label frauds as other offences. The trial of Joseph Marks¹⁶⁶ has been categorised by the OBO as a forgery, when in fact it is a fraud, carried out through the use of a document.¹⁶⁷

A potential method to overcome these categorisation errors may be the use of search terms such as ‘swindlers’, ‘cheats’ or ‘artful device’, but again, we must be very careful to recognise that the shorthand writers themselves had so much influence over the reporting of the trials, that in most cases the reader hears not the voice of the actors within the trial, but the reporter. This does not result in such searches being useless as word searches may reflect the lexicon of the day. However, any statistical conclusions about the prosecution of fraud at the Old Bailey need to be significantly couched in the context of the Proceedings and their ultimate digitization. It was decided that a sample with a very limited number of false positive results was significantly more accurate than using keyword searches which would certainly result in false positives. Because of this the OBO system of categorisation has been accepted for this thesis, as it is preferable to any alternative approaches.

¹⁶⁶ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 17 April 2011), September 1796, trial of Joseph Marks (t17960914-110)

¹⁶⁷ This distinction will be explored further in Chapter 3

Additional Archives

Court Records

In order to gain a more accurate impression of the prosecution of fraud, this thesis looks in depth at the disposal of fraud by magistrates, and to a lesser degree, the presence of fraud accusations heard at the quarter sessions. The official records of the Old Bailey are also considered, including the numerous records for the differing functions of the Old Bailey.¹⁶⁸

Beginning at the most senior court, the official records pertaining to the Old Bailey and the Middlesex Sessions are unusually complicated. This was due to the four different overlapping types of judicial sessions held within the Sessions: quarter sessions, sessions of oyer and terminer, gaol delivery, and quarter sessions for the City and Westminster.¹⁶⁹ Official assize records across the country are themselves, not entirely reliable. One essential reason for this is that so many records have been lost, both within London and across the country: 'The survival pattern of some documents is inexplicably uneven'.¹⁷⁰ Whilst the records are relatively well preserved, where they exist, there are a number of these records which are either too fragile for researchers to access, or are yet to be cleaned and so are, for the present time, mostly unreadable.¹⁷¹

Where records do exist, they are idiosyncratic in their methodological challenges. Assize records are being increasingly researched and this research is revealing the unreliability of much of the information held within these records. J.S Cockburn sardonically claimed this research to have varying effects for researchers:

¹⁶⁸ For an overview of the Middlesex Sessions and the wider role of the Old Bailey see P.S King, *Guide to the Middlesex Sessions Records, 1549-1889* (Greater London Record Office Middle Records, 1965)

¹⁶⁹ King, *Middlesex Sessions Records* p.12

¹⁷⁰ J.S Cockburn 'Early-modern assize records as historical evidence' *Journal of the Society of Archivists* 5 (1975) p.217

¹⁷¹ The London Metropolitan Archive is the process of cleaning Old Bailey Gaol Delivery archives and more information can be found at: <https://www.cityoflondon.gov.uk/things-to-do/london-metropolitan-archives/Pages/default.aspx>

*Legal historians will welcome the slow unlocking of these [assize record] laconic formulae which conceal the early history of our legal processes. But for the social historian the operation may well be painful. For it seems to reveal that one of the most attractive bodies of early-modern legal material is of limited value as a basis for the naïve sociological analysis to which it has most often been subjected.*¹⁷²

The Reporting of Fraud: Summary Courts

In order to ascertain both how fraud accusations were reported, and how a portion of these indictments arrived in the Old Bailey, it is necessary to use summary court records to estimate the frequency with that fraud accusations were made, and how they were consequently disposed of at summary level. Sadly, the information required to answer these questions does not exist in an easily accessible or complete archive. The two main archives that record summary justice within the City of London are the Minute and Rough Books from the Mansion House and the Guildhall. There are also records pertaining to prisons such as the Bridewell, but these only record those cases that resulted in a conviction and imprisonment, missing any complaints which resulted in dismissal or committal to a higher court.

The Minute and Rough Books of the City however make reference to cases that were dismissed as well as tantalising and often colourful detail of how the complaints were addressed by the magistrates and their clerks. For example, in the information given by Robert Cuzons against George Snyder and John Hamot for a false pretence, the defence against which was that the whole episode had been an elaborate April Fool's joke.¹⁷³

As courts of no record, the Guildhall and the Mansion House records served no official purpose. Rather, the books were kept for the clerks' own records and so they were taken untidily and are often difficult to decipher. Fortunately Greg Smith has

¹⁷² Cockburn *Journal of the Society of Archivists* p.231

¹⁷³ Mansion House Justice Room – Minute Books found in the London Metropolitan Archive, reference CLA/004/02/019

transcribed a number of the Guildhall Minute Books, and a small number of the Lord Mayor's Waiting Books.¹⁷⁴ Like the Mansion House Minute Books, the Guildhall Books record approximately a month per book and surviving records run from May 1752 to 1796. These records are not complete however and Smith estimates that approximately fifty-five books remain, of which the first surviving fifteen he has transcribed.¹⁷⁵ These books run from 1751 to 1781. In assessing the frequency and disposal of fraud-related cases within the Guildhall, a further six Minute Books¹⁷⁶ have been assessed along with ten Mansion House Minute Books.¹⁷⁷ In total, twenty-one Guildhall Minute Books have been analysed for the purpose of this thesis. There are far fewer records pertaining to the Middlesex Sessions. However, there exists a number of accounts from individual offices to the Treasury, as well as some remaining collections of informations and recognizances from petty sessions that detail fraud-related hearings. As there are no equivalent records to the City Magistrates for Middlesex, this makes comparisons between the two jurisdictions problematic.

For the quarter sessions, quantitative research of court records is blighted by the fact that often the offence, the parish of residence and the occupation of the defendant were all unreliable.¹⁷⁸ More significantly, like the summary courts, the quarter sessions records have not been digitised and so any research, including that conducted for this thesis, requires sampling of the records rather than any comprehensive analysis. Many of these sources may be in a good enough condition to be digitised, particularly after cleaning. However, archives such as the quarter sessions, and indeed any court roll, will prove deeply problematic for digitization. This is primarily due to the bulking and difficult manner in which these archives were recorded, with multiple pieces of paper hand-sewn together and then attached to the vellum which would be wrapped around the outside. The result is a large number of documents which would take a very long time to photograph and considerably

¹⁷⁴ Smith, *Summary Justice*

¹⁷⁵ *Ibid* p. xxviii

¹⁷⁶ Guildhall Justice Room – Minute Books at the London Metropolitan Archive reference
CLA/005/01

¹⁷⁷ LMA CLA/004/02

¹⁷⁸ Shoemaker *Archives*, p.145

longer to key into a database. It is not a coincidence that the Proceedings were chosen for digitization. These records were originally printed onto sheets and had been transferred onto microfiche before the digitization took place. Consequently, it is unlikely that any archives in roll form will be digitised in the near future.

As shall be explored in detail in Chapter 7, the summary court records are the most problematic of all in that these courts were courts of no record and consequently the archives which have survived are rough notes taken by clerks and for no official purpose. This results in the records being ad hoc and without *pro forma*, resulting in the research being significantly more difficult than for other court records that were kept in a rigidly formulaic manner (in form rather than in substance).

Newspaper and Parliamentary Papers

A commonly utilised source of archives by crime historians is newspapers. This thesis uses newspapers very little, and for two reasons. First, regional newspaper editors during this period shamelessly copied the text of the more substantial Metropolis newspapers. If trying to ascertain details of an Old Bailey case, the best place is undoubtedly the Proceedings themselves. Where newspapers do reference the Old Bailey, the text is often directly lifted from the Proceedings.¹⁷⁹ The second reason for not relying upon newspapers is that only nineteenth century newspapers have been digitised.¹⁸⁰ Consequently, researching pre-1800 is extremely difficult and given the tendency for newspapers to duplicate copy from the Proceedings, such an arduous task would reap few rewards. Newspaper accounts of the fraud accusations in the magistrates could be of potential use and the publications of Bow Street Magistrates, The Hue and Cry have been consulted for the early part of the period.

Parliamentary records during this period have not been researched in detail. Parliamentary records for the time directly preceding this period, in particular the time around the passing of the 1757 Act that codified fraud offences¹⁸¹, would

¹⁷⁹ King, *Crime, History and Society*, (2009) p.111

¹⁸⁰ <http://www.britishnewspaperarchive.co.uk>

¹⁸¹ See Chapter 3

certainly be significant. Sadly manuscript records of the House of Commons before 1770 were destroyed.¹⁸² However, analysis of the jurisprudence surrounding such legislation provides insight into how the Act was assimilated into pre-existing case law.¹⁸³

A number of other archives have been explored including a cache of records belonging to a prosecution association within the City of London¹⁸⁴ and a number of miscellaneous documents belonging to and used by court clerks and other legal professionals.¹⁸⁵ In addition to these, multiple contemporary practitioners' texts and sources of black letter law are explored in order to identify the doctrines and enforcement of fraud-related laws.

Disciplinary Approaches

There is much discussion regarding the value of interdisciplinary approaches to research.¹⁸⁶ This type of approach can bridge two very different disciplines such as law and history. This interdisciplinary awareness does not always require stepping outside of wider disciplines however as there is much fragmentation within disciplines, particularly within historical research.¹⁸⁷ Crime history is generally thought of as a sub-discipline of social history that has developed more within the discipline of history, than across other disciplines such as sociology, criminology, and law.¹⁸⁸ There are notable exceptions in the form of individual researchers¹⁸⁹, but for the most part, crime history stands within a traditional context of historical research.

This thesis is taking a wider interdisciplinary perspective, uniting both traditional legal history with cutting-edge crime history. This approach is bringing together

¹⁸² Innes and Styles, *Journal of British Studies*, p.427

¹⁸³ See Chapter 3

¹⁸⁴ See Chapter 6

¹⁸⁵ See Chapter 6

¹⁸⁶ John Tosh, *The Pursuit of History*. (Pearson, 2010, 5th Ed) p.331; Innes and Styles, *Journal of British Studies*, p.427; King, *Brit Journal of Criminology*.

¹⁸⁷ For an overview of this fragmentation see Tosh, *Pursuit*

¹⁸⁸ Peter King 'Locating histories of crime. A bibliographical study' *Brit Journal of Criminology*, vol. 39. No.1 1999 p.161

¹⁸⁹ For example, see the works of Barry Godfrey, Pamela Cox, Helen Johnson et al.

fundamental legal research in the form of black letter law searches and also wider texts traditionally used by legal historians, those being sources written by or for the legal practitioner. This will be further complimented by methods more commonly found in crime history research such as data-mining and quantitative research of big data.

Legal History

The methods of legal history are utilised throughout this thesis, from the tracing of the substantive law in Chapter 3, to the use of legal secondary sources such as justices' notebooks and wider court records. As a sub-discipline, legal history is slowly growing in both scope and popularity. However, this niche area of research is not homogenous and there is a significant difference between *legal* history and *legal history*.¹⁹⁰ The first is more traditional, focusing upon the development of precedent and substantive law. The second sub-discipline has a broader scope and seeks to situate legal developments in a wider legal or social system. More traditionally, legal history has been confined to the history of black letter law, the development of legal precedent and, to a lesser extent, the development of the legal profession. Legal historians are moving away from the traditional approach of 'what law is' to 'how the law works'¹⁹¹ and since the 1970s, has increasingly focused on the relationship between law and society, what is commonly called 'The law and...' approach.¹⁹² This thesis is questioning the ontological definitions of fraudulent offences but is also seeking to answer the question of 'what was fraud in practice?'

However, legal history approaches remain a source of potential tension falling between history and law.¹⁹³ Crime historians have criticised legal history as having an internalist explanation for legal change, and not considering the social influence of the law.¹⁹⁴ Innes and Styles argued that in looking to the minutiae or detail of legal

¹⁹⁰ Rosemary Hunter 'Legal Histories in Context' *Law and History Review*, Vol.21, no.3 (Autumn 2003) pp.607-614 p.613

¹⁹¹ Anthony Musson and Chantal Stebbings, Introduction, *Making Legal History*, p. 5

¹⁹² Robertson, *Law and History Review* p.1050

¹⁹³ Musson and Stebbings, *Making Legal History* p.4

¹⁹⁴ Innes and Styles, *Journal of British Studies*, p.387

procedure, legal history stops being able to answer the big social questions posed by the likes of Edward Thompson or Douglas Hay. Questions such as ‘in whose interest is the law?’ and ‘against whom is the law enforced?’ John Langbein has been criticised for this very limitation but both crime historians and legal historians appear more guided by Langbein than the likes of Thompson and Hay.¹⁹⁵ However, where Langbein can appear blinkered in his view of the law and its operation, this thesis is seeking to actively address the perception of legal history as being an inward looking and self-contained discipline. ‘Law cannot be treated purely as an intellectual system’.¹⁹⁶ Rather, the law must be appreciated for the way it is couched within society, and how the law is used, in this case by prosecutors.

Other legal historians are keen to look outside of the strict confines of ‘the law’. There are a number of schools within legal history, primarily differentiated by the larger law schools in England and North America. One such is the ‘Wisconsin School’ of legal history, pioneered by J. Willard Hurst, which promoted the message that law must be seen in its social and economic context, not as an autonomous entity.¹⁹⁷ Such approaches acknowledge that there is a gap between formal law and actual practice, mediated by customs, social norms, and popular views. This gap however is not at all surprising and we ought not to be preoccupied with stating its existence. Rather, we ought to question why there is this gap; does practice differ from law in order to conform to some economic imperative or dominant social discourse?¹⁹⁸ This thesis does not directly engage with any school of legal history as such but it repeatedly engages with the gap between the laws of fraud and how they were applied.

Crime History

Crime history is distinct from legal history and there is surprisingly little interaction between the two. Crime history is a relatively new sub-discipline, emerging in earnest

¹⁹⁵ *Ibid*, p.407

¹⁹⁶ David Ibbetson ‘Comparative legal history – a methodology’ in Anthony Musson and Chantal Stebbings eds, *Making Legal History: Approaches and Methodologies* (Cambridge University Press, 2015) p.135

¹⁹⁷ Cited in Rosemary Hunter *Law and History Review* p.611

¹⁹⁸ Rosemary Hunter, *Law and History Review* p.612

from the 1960s onward.¹⁹⁹ This sub-discipline grew out of a desire to study history ‘from below’, ‘the need to explore and imaginatively to reconstruct the experiences of the dispossessed and inarticulate’.²⁰⁰ This approach certainly moved away from more traditional approaches to history that focused upon powerful actors such as politicians and monarchs. However, there are two central criticisms to this ‘history from below’. First, such history from below approaches have been ‘curiously blind to the size and importance of the large middling groups in English society and to their influence on the way in which the criminal law was used’.²⁰¹ Second, whilst earlier approaches to crime history continued to engage with wider sociological theory, particularly the works of Marx and Weber²⁰², these approaches have gradually separated and crime historians seem reluctant to engage with structuralist or positivist approaches to history, though both approaches do seek to use the criminal law as a lens through which to understand wider society.²⁰³

Crime history is currently moving forward on a wave of digitisation.²⁰⁴ This enthusiasm for digitisation is not unproblematic and has been explored critically earlier in this chapter. However, one very important positive of digitising archives is the extension of the opportunities for quantitative research.²⁰⁵ Recent years have seen an increase in critical approaches to digital humanities and new technologies, and their use in historical research tends to be described in utopian or dystopian narratives.²⁰⁶ However, like any new method, digitisation has both advantages and limitations. As shall be detailed below, digitisation and the opening up of quantitative

¹⁹⁹ For an overview of the developments of crime history see: Innes and Styles, *Journal of British Studies*; King, *Brit Journal of Criminology*; Godfrey, *Handbook on Criminology*; Barry Godfrey, ‘Future perspectives on crime history as ‘connected history’ (currently unpublished article)

²⁰⁰ Innes and Styles, *Journal of British Studies* p.382

²⁰¹ *Ibid*

²⁰² *Ibid* p.383

²⁰³ *Ibid* p.384

²⁰⁴ Rosalind Crone, Crime – and its Fabrication: A Review of New Digital Resources in the History of Crime, *Journal of Victorian Culture*, 14(1) pp. 125–133; Godfrey refers to this as the ‘second wave’ of digitisation as a follow-on from the movement in the 1990s see Godfrey, ‘Future perspectives’

²⁰⁵ For a particularly vociferous criticism of digitisation see Richard Ireland, *Law, Crime and History*

²⁰⁶ Andrea Sartori, Towards an intellectual history of digitization: myths, dystopians, and discursive shifts in museum computing, *Digital Scholarship in the Humanities*, vol.31, No.2, (2016) p.428

analysis of big data can be extremely positive and provide far more accurate analysis of research questions allowed for by than methods involving sampling data.

One aspect of crime history that requires more attention is the dearth of the use of theory in analysing the vast quantities of data to which digitisation has led. As shall be demonstrated throughout this thesis, it is not enough to have collected and quantitatively analysed big data. To optimise the use of this data, it is necessary to analyse it in a broader context and to use it to test and explore larger theoretical standpoints. One theory that crime historians have utilised is that of Grounded Theory. This approach is not unproblematic and shall be critically explored before demonstrating how it has been utilised in data collection for this thesis.

Grounded theory

Grounded theory emerged in the 1960s, 'discovered' by Glaser and Strauss.²⁰⁷ Grounded Theory is a form of qualitative analysis that seeks to bridge the gap between theory and method by beginning research 'knowing nothing, in contrast to the typical research plan of knowing the problem beforehand.'²⁰⁸ Grounded Theory has since been applied to quantitative methods.²⁰⁹ The main rationale behind Grounded Theory was that it is a 'no preconceptions method'.²¹⁰ Barney Glaser has stated that when using Grounded Theory: 'I discovered that writing up data was much faster than thinking up conjectures to suit a perspective which could be very irrelevant'.²¹¹ This seductively simple approach is unsurprisingly popular as it appears to allow for a straightforward methodology permitting mere description of how data was collected.²¹² Glaser himself argues that Grounded Theory 'suits a methodology

²⁰⁷ For a brief history of Grounded Theory see Barney G. Glaser, *The Grounded Theory Perspective: Its Origins and Growth*, *The Grounded Theory Review* Volume 15, Issue 1 (2016)

²⁰⁸ Glaser, *The Grounded Theory Review*

²⁰⁹ Barney Glaser, *Doing Quantitative Grounded Theory* (Mill Valley, CA, Sociology Press, 2008)

²¹⁰ Glaser, *The Grounded Theory Review*

²¹¹ *Ibid*

²¹² Tina L. Johnson, *Doing Quantitative Grounded Theory: A Review*, *Grounded Theory Review*, issue. 3, Vol.7 (2008)

for the PhD dissertation, since it automatically provides the desired original contribution required for the PhD'.²¹³

However, Grounded Theory really is too good to be true. There are some pointed criticisms of Grounded Theory and the most significant is levelled against the claim that data collection can be carried out without any prior agenda or initial theories or research questions. The idea of 'raw' data has been labelled 'naïve'²¹⁴, and the idea that data can be merely 'discovered' is problematic. There is emerging literature on Critical Grounded Theory, which is drawing on critical realism to counter the assumptions of Grounded Theory.²¹⁵ Whilst this thesis is not greatly engaging with critical realism, it is certainly the case that any thesis that seeks to make conclusions about large social, economic, legal, or political reality requires a methodology that is capable of engaging with the relationship between the structural and the material.²¹⁶ Critical Grounded Theory has yet to be applied in historical research but this thesis embraces an approach closer to this critical approach in that 'proto-theories' were utilised in data collection.²¹⁷

The main criticism of Grounded Theory is that the discovery of 'raw' data is not possible and this is equally applicable to any historical research. If we accept that archives are the methods by which crime historians answer research questions, then it is the political and theoretical stance of historians which dictates the sources they use.²¹⁸ An historian interested in researching the everyday experiences of the lower-classes has made a conscious decision that this is an area worthy of time and study. Even historians who do not think they have a clear standpoint or polemic should be aware that their approach can 'all too easily be the unconscious vector of values taken for granted by people of their own background'.²¹⁹ Historians must engage in

²¹³ Glaser, *The Grounded Theory Review*

²¹⁴ N.L Sum and B. Jessop, *Towards a Cultural Political Economy: Putting Culture in its place in Political Economy* (Cheltenham, Edward Elgar, 2013)

²¹⁵ Claes Belfrage and Felix Hauf, The Gentle Art of Reproduction: Critical Realism, Cultural Political Economy and Critical Grounded Theory, *Organization Studies* (2016) pp.1-21.

²¹⁶ *Ibid* p.5

²¹⁷ This will be further explained below

²¹⁸ Godfrey, *Handbook on Criminology* p.159

²¹⁹ Tosh, *Pursuit* p.207

reflexivity otherwise they will miss the assumptions and values which they themselves impart upon the method of their research.²²⁰

As presented in the introduction to this thesis, a theoretical approach aligned with Marxist understandings of the legal and economic world of the eighteenth century has been utilised for this research. This approach has informed both the data collection and the analysis of this data. The central research questions of the thesis are designed to explore and reveal much larger issues pertaining to the use of the law during this period. Most notably, for whom the criminal law acted and the way in which the entire legal system operated to protect property and to secure the conditions necessary for trade and the extension of markets through the bolstering of credit relationships. These larger issues did not only appear from the data collected, but the very questions asked and the data sought acted to shape the process of data collection.

Consequently, this thesis does not utilise Grounded Theory which has been identified as problematic. Rather, the data for this thesis has been collected through an iterative process which has primarily been led by the data and informed by theory. For example, it was clear during the early stages of this research that the Proceedings held little information regarding the accused. However, in order to answer the question of whether fraud was committed by a particular class, other information was sought and interpreted from the Proceedings which allowed for the typology of fraud to be imposed onto the cases heard at the Old Bailey. This example demonstrates how rather than accepting the archives available at face-value and using the data to form research questions, such questions were developed both from the available data, and from the current historiography surrounding the eighteenth century criminal justice system.

As argued in the introduction to this thesis, this theoretical underpinning is essential to truly engage with the relationship between the law and the socio-economic context of the time, namely the continuation of the introduction of capitalism

²²⁰ *Ibid* p.218

through the bolstering of the conditions required for proto-capitalism.²²¹ This thesis also engages with approaches from both crime history and legal history, uniting the exciting methodologies of big data with a contextualised understanding of the wider legal system and its operations.

Legal History and Crime History: Bridging the Divide

As Godfrey recently argued ‘crime historians are promiscuous [and] work across the boundaries of contagious disciplines’.²²² It is certainly the case that crime historians are increasingly working with disciplines such as criminology, the wider social sciences, and geography. However, little collaboration is being conducted between crime historians and lawyers, legal historians or otherwise. Perhaps this is because law is not traditionally what Godfrey describes as a ‘contagious discipline’ and is more an inward-looking discipline. However, there is great scope for collaboration between the fields of crime history and legal history and this collaboration can be most successful when converging under the umbrella of theoretical approaches. This theory may continue to be Grounded Theory, but there are many other options, as demonstrated by this thesis. More traditional legal historians are as keen to embrace Grounded Theory as crime historians. Sir John Baker has suggested that the optimal method of research is one which prioritises beginning with archives and forming research questions based around what the researcher uncovers.²²³ Whilst Baker does not actively engage, or indeed identify, a grounded theoretical approach, he is clearly advocating researchers to secure familiarity with an archive before identifying the research questions that will flow from such familiarity.

Engaging with wider theory may include engaging with methods and theories derived from the social sciences. There is a resistance amongst historians to interact with the social sciences but collaboration with social scientific research methods and wider theoretical perspectives should be encouraged. The tension partly arises due to the use of history by social sciences as a testing ground for their theories of the present

²²¹ This claim will be argued throughout the thesis

²²² Godfrey, *“Future perspectives*

²²³ Baker, *Making Legal History*

day.²²⁴ The tension is also partly due to the discussion above, that as a discipline, history is less engaged with methods than the social sciences. Some crime historians are increasingly using social science methods but it is still widely believed that an historian's methods are her sources.²²⁵ However, much can be learned by adopting wider methodologies, particularly the use of theory as an analytical tool. Interdisciplinary research must be a discussion between disciplines, not the uncritical adoption of external methods to legal sources.²²⁶ This applies to any interdisciplinary research. Richard Ireland has recently highlighted the weaknesses in crime historians uncritically referring to the law without reference to the underlying doctrines.²²⁷ Likewise, Edward Thompson was extremely critical of sociologists using historical examples to support larger theories, without giving equal thought to the historical aspect of the research: '...it is only too often the case that the theory takes precedence over the historical evidence which it is intended to theorize'.²²⁸

This thesis strives to strike a balance between focused historical method and broader questions: 'questions that are better specified theoretically, better articulated archivally, and better grounded in an understanding of the complexities and ambiguities of the administration process'.²²⁹

Methods of Analysis

Theory as Methodology

As highlighted in the Introduction to this thesis, there is a strong theoretical underpinning to this thesis, both to the research questions, and to the method by which research findings are analysed and explained. The relationship between the emergence of capitalism and the prosecution of fraud will be revisited time and again throughout this thesis. Archives will be explained and contextualised through the

²²⁴ Tosh, *Pursuit* p.220. This is a criticism which could be levelled at theorists such as Michel Foucault, in particular his *Discipline and Punish. The Birth of the Prison* (Penguin Books, 1991, first published 1977).

²²⁵ Godfrey, *Handbook on Criminology*

²²⁶ Musson and Stebbings, *Making Legal History* p.2

²²⁷ Ireland, *Law, Crime and History*

²²⁸ E.P Thompson, *Social History*, p.147

²²⁹ Innes and Styles, *Journal of British Studies*, p.387

works of E.P Thompson and Douglas Hay, alongside a raft of other primary and secondary sources that recognise the relationship between commerce and the law.

To some extent, this thesis is a revisiting of the works of Hay and Thompson, through a demonstration of the importance and relevance of applying structural theory to legal phenomenon such as the prosecution of fraud. To answer bigger questions about society, we must take a structural approach.²³⁰ Whilst this study is partly exploring why and how certain individuals prosecuted fraud offences at the Old Bailey, these individuals did not exist in a vacuum and to understand their choices, we must understand the choices available to them and the conditions and context within which such choices were made:

*So let us look at history as history – men placed in actual contexts which they have not chosen, and confronted by indivertible forces, with an overwhelming immediacy of relations and duties and with only a scanty opportunity for inserting their own agency – and not as a text for hectoring might-have-beens.*²³¹

For this reason, the structural confines that shaped and sculpted the choices and behaviours of prosecutions of fraud in the eighteenth century will inform the analysis of the data underpinning this thesis. We therefore need to embed the theoretical into the practical.²³²

Constructing a Fraud Database

This thesis is taking a mixed-methods approach to the many archival sources utilised. A large amount of the analysis is qualitative, particularly that relating to the tracing of the doctrines of fraud and how these were interpreted and developed by contemporary practitioners and court officials. However, in keeping with crime

²³⁰ Thompson *Social History*, p.152

²³¹ E.P Thompson *The Peculiarities of the English* (1965), *The Poverty of Theory and Other Essays* (London, Merlin Press, 1978) p.69

²³² Godfrey, *Handbook on Criminology* p.159

history methods, this thesis also draws heavily upon quantitative data, derived primarily from the Proceedings, as digitised by OBO.

The majority of the quantitative analysis has been categorised and collated into a database, bringing together the data derived from the Proceedings. The database was constructed from the cases categorised as fraud by the OBO. Between 1760 and 1820, 469 indictments for fraud were heard at the Old Bailey.²³³ There were fewer *cases* of fraud, but there were 469 *indictments*. The distinction between cases and individual indictments has been made because it was fairly common for a prisoner to be accused of a number of offences within one trial. Of the sample, 23.7 percent of reports contained multiple indictments. A typical example is that of John Williams, charged with three counts of fraud in the spring of 1779.²³⁴ Some of these trials contained multiple charges of fraud and some contained multiple charges of differing offences, with one or more being for a fraud as well as another offence such as theft. For example, in 1774, Charles Nangle and Mark Love were indicted on two charges, one for fraud and one for forgery. This would not be unusual as often a financial note or, in this case, a bill of exchange was forged and then attempted to be passed off through the use of deception.²³⁵ The prevalence and significance of multiple indictments will be discussed in Chapter 4 but when the '469 cases' are referred to, this is not to say 469 separate offenders but rather, 469 different counts of fraud between 1760 and 1820.

The manner of prosecutions at the Old Bailey during this period was such that a number of different complainants could bring separate charges against one prisoner at one time, and these would all be heard together and recorded within one report of the Proceedings. Elizabeth Rufley was tried in 1760 for three separate counts of fraud by three separate complainants and for three separate quantities of goods obtained, ranging from sixteen to thirty-seven shillings in value.²³⁶ Consequently, if

²³³ See Chapter 1 for discussion relating to categorisation of offence both within the Old Bailey Session Papers and in the categorisation process of digitisation of the records.

²³⁴ *OBP*, May 1779, trial of John Williams (t17790519-46)

²³⁵ *OBP*, September 1774, trial of Charles Nangle and Mark Love (t17740907-66). The relationship between different property offences will be explored in depth in Chapter 3.

²³⁶ *OBP*, April 1760, trial of Elizabeth Rufley (t17600416-38)

an approach were taken whereby all charges relating to one individual were conflated, valuable information about the type of complainant or the value of the goods obtained would be lost.

A wide range of information was collected in the database including information relating to gender, occupation of the prosecutor, offences, method of execution of the offences, the value of the goods obtained, and so on. For the most part, collection of this data was unproblematic, although, as results are revealed throughout this thesis, it will become clear that some cases were reported in more depth than others. It is in the construction of the database that the data-led approach of this thesis becomes apparent. Some of the data was collected in response to very deliberate research questions such as the gender of the prosecutor or the value of the goods obtained. Other questions emerged iteratively as the data-collection process progressed. Questions such as the method by which the frauds were committed became necessary as it was discovered that the offence itself was not always apparent. Likewise, garnering information about the defendant was rarely possible and so this typology of fraud allowed for a better understanding of how, and to some extent who, was committing these offences. Such additional research questions arose through the data-collection process.

This iterative process allowed for flexibility in the collection of the data that ultimately forms the basis of this thesis. By taking a data-led approach, the creation of this database developed according to both original research questions and questions that arose from the data collection itself. For example, the 'type' of fraud committed was not initially considered but through analysing the Proceedings, it became clear that a typology of fraud, imposed upon the more generic details of the indictments, would result in a far clearer understanding of the forms of fraud appearing at the Old Bailey.²³⁷ This typology brought together both data collection and analysis in so far as the wider understanding of the 469 indictments allowed more detailed categorisation of the data.

²³⁷ This typology is explained and explored in Chapter 5

Because of the depth with which these 469 indictments are being analysed, the period of 1760 to 1820 is an ideal timeframe as it reflects a broad era of socio-economic change and allows for some significant quantitative analysis of a large number of indictments. The scale of the indictments is however not so great as to prohibit close-reading analysis of each indictment. Moreover, the timeframe and the number of indictments forming the basis of the database allows for research into other court archives such those pertaining to magistrates' courts and the quarter sessions²³⁸. Research into these archives allows for a more holistic study of the prosecution of fraud.

Having described the methods through that data has been collected and analysed, the following chapter will outline the laws and doctrines of fraud and fraud-related offences in the years proceeding our period.

²³⁸ For discussion of the magistrates' courts see Chapter 7 and for the quarter sessions, Chapter 4.

Chapter 3 Fraud: Offences, Ontology, and Connections

As a collection of offences, fraud is ontologically problematic. Fraud offences have existed at the interface of civil law and criminal law for hundreds of years and it is this interconnectedness that has resulted in fraud and financial misconduct being viewed with ambivalence in the twenty first century.²³⁹

Upon the introduction of the Fraud Act in 2006, the Attorney-General claimed the law had previously been ‘too precise, overlapping and outmoded to give effective coverage over the breadth of frauds committed today’.²⁴⁰ Certainly by the twenty first century, fraud and financial misconduct were legislated for in great detail. Increased opportunities and mechanisms for committing contemporary frauds are simultaneously mirrored by the increased criminalisation of financial misconduct, which is far greater than in the eighteenth century. However, the dislocation between the existing laws against fraud and how these were applied to everyday offending was no less apparent in the eighteenth century. As shall be demonstrated in this chapter, fraud’s existence in legal no man’s land has caused great confusion for both the public and legal professionals since the twelfth century.

In the eighteenth century, there were accusations that the laws surrounding fraud were as equally outmoded as expressed by the Attorney-General in 2005. In a 1753 open correspondence to the Duke of Newcastle, the famous magistrate, Henry Fielding lamented:

“Trade being alarmed, complained to the above magistrate, who apprehended many of these cheats. But as the laws then in being were insufficient to bring them to justice, they mostly escaped punishment; and

²³⁹ For modern discussions of fraud and white collar crime see: John P. Locker and Barry Godfrey, *Ontological Boundaries and Temporal Watersheds in the Development of White-Collar Crime. British Journal of Criminology* (2006) 46, 976-992; Shapiro, *American Sociological Review*; Sutherland *American Sociological Review*; Sarah Wilson, *Origins*; Wilson and Wilson, *Journal of Criminal Law*.

²⁴⁰ Speech to Annual Financial Crime Conference, 15 November 2005 <https://publications.parliament.uk/pa/ld200506/ldhansrd/vo050622/text/50622-04.htm> (accessed 2nd January 2016)

the tradesman, beside the loss of their goods, were put to additional, fruitless expenses".²⁴¹

The central focus of this chapter is to identify the defining characteristics of fraud offences during this period. Furthermore, this chapter will also explore how the law developed from the Tudor period to the eighteenth century, illustrating how these laws undulated between very narrow, and very broad application. In exploring these changes, this chapter will go on to explain why these laws changed in the way that they did, and will contextualise the state of the law and the offences available to prosecutors of fraud from 1760 to 1820.

In exploring the central offences that made up the laws of 'fraud', this chapter will further demonstrate why the law was not always fit for purpose during the eighteenth century. The enforcement and operation of these laws will then be explored alongside how these fraud offences operated within the wider law. Through more traditional legal methods of researching statutory and case law, the central doctrines and ontology of fraud offences will be identified in order to better demonstrate how fraud was positively defined. Fraud offences will then be negatively defined by comparatively drawing out the contrasts with other criminal offences of the time.

An even wider contextualisation of fraud offences will be illustrated through an exploration of the laws of fraud in comparison with civil law doctrines, particularly those relating to contract law. It will reveal that pre-1757 law resulted in many prosecutors being left without recourse to the criminal law due to the limitations of the doctrines underpinning fraud, or due to the lacunae created where fraud intersected with other areas of law.²⁴² This will in turn demonstrate how the laws developed post-1757 in order to extend the application of fraud offences and provide greater recourse to the criminal courts for prosecutors. This will begin to

²⁴¹ John (and Henry) Fielding: *An Account of the Origin and Effects of a Police set on Foot by the Duke of Newcastle 1753*, p.17

²⁴² Thorsten Beck, Asli Demirguc-Kunt and Ross Levine "Law and finance: why does legal origin matter" *Journal of Comparative Economics* 31 (2003) 653-675

demonstrate how these developments reflect a shift in jurisprudence, with the sympathies of the court beginning to favour particular actors, namely shopkeepers and those extending credit.

In first exploring the definitions and blackletter law surrounding fraud offences, this chapter will introduce the foundations of knowledge necessary to answer the three central questions of this thesis. The first question - what was fraud? - is partially answered in that the doctrines and offences of fraud will be identified. As stated in the introduction to this thesis, an initial doctrinal approach to the definition of fraud will be taken in order to define fraud offences. In identifying the black letter laws of fraud and then seeking to understand how these laws developed by identifying the underlying doctrinal framework shaping this jurisprudence, this allows for a second stage in the identification of eighteenth century fraud, that being how was fraud enforced. In the chapter following this one, the choices of litigation open to prosecutors of fraud will be considered and this can only be done having first identified the types of fraud offences.

The second central thesis question of who was prosecuting fraud, will also require a foundational understanding of the development of the law in this area. How the jurisprudence developed reflects the social, economic, and political priorities of the time. Many of the cases explored in this chapter were decided in the appellate court, known as the Twelve Judges. There were very limited opportunities for appeal within the English legal system and the Twelve Judges was the only available forum within the system where points of law could be clarified and the common law honed.

These judges sat in trials of first instance across the justice system, and in all courts, both civil and criminal. This multiple jurisdiction of the judicial system is significant as those individual judges had a firm grasp of the legal developments across all areas of law. Consequently, developments in contract law, or property law, may have influenced the jurisprudence relating to the criminal law, and vice versa. This cross-pollination of doctrines is particularly relevant to fraud offences that, as argued in the introduction to this thesis, sat at the interface between the criminal and the civil

law. In explaining this interconnection in more detail, we can better understand how the laws of fraud developed and why.

Fraud: Offences and Ontologies

The identification and tracing of fraud offences across the centuries requires a use of traditional legal method techniques used by today's legal practitioners such as the use of law reports and online legal library resources²⁴³. However, due to the English doctrine of implied repeal, it is difficult to trace law backwards, particularly if there has been decisive legislation which impacts upon a particular offence. In the case of fraud, the Theft Act 1968, the Theft Act 1978, and the Fraud Act 2006 all radically redefined fraud through the addition of the dishonesty element to the *mens rea*, and then in 2006 by streamlining types of fraud a smaller number of core offences. Because of this doctrinal break in fraud offences, the tracing of these offences before this time requires legal historical methods rather than legal methods²⁴⁴. The radical redefinition of fraud offences acted to overrule the majority of corresponding case law and subsequently, when trying to identify such case law, it was necessary to pick up the threads of the law using historical methods. These methods required using sixteenth to nineteenth century sources such as Justice of the Peace records and contemporary practitioner texts.²⁴⁵ By identifying central statutory and common law in the seventeenth and eighteenth centuries, this acted as a touchstone from which further statutes, cases, and commentaries were identified.

Once contemporary legislation and cases had been identified, these sources of law were analysed by first identifying the relevant *ratio decidendi* and *obiter dicta* of

²⁴³ Such as Westlaw: <https://legalresearch.westlaw.co.uk/> ; and LexisNexis: <https://www.lexisnexis.com/uk/legal/>

²⁴⁴ Fortunately, whilst there were some radical re-defining changes to the laws of fraud in the twentieth century, a large amount of precedent relating to fraud, both in criminal and contract law, remains good law and could be traced through modern legal research techniques.

²⁴⁵ Williams, Thomas Walter, *The Whole Law Relative to the Duty and Office of a Justice of the Peace, Vol.1* (London, 1793); Joseph Chitty, *A Practical Treatise on the Criminal Law Vol.3* (Messrs Butterworth and Son, 1816)

judgments²⁴⁶, and then identifying the common themes and characteristics of fraud held in the judgments. This analysis resulted in the identification and classification of fraud offences from the Tudor to the Georgian era.

Eighteenth century fraud offences can be defined both positively and negatively; what fraud was, and what fraud was not. The act of positively defining fraud resulted in the identification of five central doctrines of fraud: that a fraud must be conducted through the use of an 'artful device'; the law does not act to protect 'a fool'; a criminal fraud must have some public harm; a criminal fraud must be something other than a contractual misrepresentation; in either contractual or criminal fraud, the tricked party must have taken steps to protect themselves. These five doctrines themselves interconnect. For example, a 'public fraud' could be that which 'such...common prudence would not be sufficient to guard against'.²⁴⁷ At this level, it can be seen that it is the prudent person, not the fool who is protected by the criminal law, and that reasonable steps would not have protected the prudent person. Where possible these five doctrines will be addressed separately but due to the ontological closeness of the doctrines, examples will be provided which could apply to one or more of the doctrines.

A sixth doctrine of fraud has been identified and this relates to frauds against public offices and officials. This doctrine has been deliberately separated from the central five as it is this doctrine which makes fraud offences in the eighteenth century a felony rather than a misdemeanour and consequently was legislated for specifically.²⁴⁸ The main example of this felonious fraud is the fraudulent obtaining of naval prize monies and as a felony, this offence will be considered alongside, but separately, to the misdemeanours which made up the majority of fraud laws.

²⁴⁶ The *ratio decidendi* of a judgment is the part which forms the basis of the decision. The *ratio decidendi* is the part which forms precedent for future cases. The *obiter dicta* of a case is the part of the judgment other than the *ratio decidendi* and which is considered in addition to the heart of the judgment. *Obiter dicta* can form future precedent and are considered to be persuasive for future judicial decisions.

²⁴⁷ R v B. Lara, 6 Term Reports 565; 101 E.R. 706

²⁴⁸ The distinction and significance between a felony and a misdemeanour will be referred to repeatedly throughout this thesis.

Having illustrated the application of the five doctrines of fraud to the main fraudulent offences, this chapter will then consider fraud as negatively defined. Fraud offences significantly interconnected with other criminal offences and, by the nineteenth century, the law surrounding wider dishonest property offences and financial misconduct was complex and interlocking. There was potential for interconnection between a number of offences including, but not limited to, larceny, embezzlement, forgery and uttering, as well as offences more recognisable as fraud such as cheating, obtaining goods by false pretences, false personation and fraudulent obtaining of naval prize money.

The process of identifying fraud offences through the centuries is an exercise in detection. As in other areas of law, Parliament legislated hastily and sporadically throughout the eighteenth and into the nineteenth century. Often legislation was so specific in its application that dozens of separate pieces of legislation related directly to the same offence. However, individual pieces of legislation would be used to apply these offences specifically to individual subjects²⁴⁹. For example, the law of forgery developed over hundreds of years as specific documents became the subject of forgery laws.²⁵⁰ The volume of law surrounding fraud offences is not as great as forgery but there was still a large amount of interlocking and overlapping legislation and common law and it shall be demonstrated how such a piecemeal approach to the creation of the criminal law caused confusion and lacunas throughout the law.

Before considering the interaction of fraud offences with other crimes, the central offences of fraud will now be outlined and explored within the original framework of the five underlying doctrines of fraud as identified within this research.

Cheating and Obtaining Goods by False Pretences: the Roots and Branches of Fraud

The most common form of fraud committed during this period was obtaining goods by false pretences ('false pretences'). To fully contextualise fraud by false pretences,

²⁴⁹ Randall McGowen, 'From Pillory to Gallows: the Punishment of Forgery in the Age of the Financial Revolution' *Past & Present* No.165 (Nov.1999) pp.107-140, p.129

²⁵⁰ The laws of forgery will be expanded upon below.

the more general crime of cheating must be understood. The common law offence of cheating was the predecessor of false pretence and formed the basis of fraud by false pretences. Cheating required the presence of all of the five central doctrines of fraud identified above. The common law offence of cheating pre-dated the later offences, forming the majority of the precedent for fraud by the eighteenth century. As a distinct offence, cheating was an ancient common law misdemeanour that can be found scattered throughout the history of the common law. It was from the common law offence of cheating that the doctrines underpinning later fraud offences. Cheating and fraud by false pretences are being considered together as the offences are so closely linked that the doctrines apply equally to both.

‘Cheats’ and ‘cheating’ were common shorthand for fraudulent offences from the sixteenth to the nineteenth century, as well as existing as an offence in its own right. Cheating was in many ways a catch-all offence. There is much evidence from practitioner texts and guides of the eighteenth and nineteenth centuries that cheating was treated as a generic offence falling under the broad umbrella category of ‘fraud’.²⁵¹ Whilst ‘fraud’ was not a specific offence in itself, those administering the law during this period often considered cheating and fraud as being two sides of the same coin, if not the same side of the same coin.²⁵² This legal shorthand has been discussed in Chapter 2 and the multiple examples below will further illustrate how the language surrounding fraud can be methodologically problematic.

The first doctrine of fraud to be considered is the ‘artful device’. This doctrine underpins cheating and consequently also fraud by false pretences.

The Artful Device

Sergeant Hawkins²⁵³ described cheating as “deceitful practices in defrauding or endeavouring to defraud another of his known right by means of some artful device

²⁵¹ See as an example Williams, *The Whole Law*

²⁵² For example see *Ibid* p.389

²⁵³ Sergeant William Hawkins was an important leading commentator on the criminal law in the early eighteenth century.

contrary to the plain rules of common honesty".²⁵⁴ Later legislation defined cheating as a crime used by 'evil disposed persons, to support their profligate way of life, have, by various subtle stratagems, threats, and devices, fraudulently obtained money, goods, etc'.²⁵⁵ Such a device is not merely physically seizing property²⁵⁶ but is rather, some deceitful method, or 'crafty means'²⁵⁷ by which property is obtained. The definition of an 'artful device' was flexible, allowing for the accommodation of a range of possible offences but generally it has been held that mere lying was not sufficient.²⁵⁸ The use of the artful device was often associated with some element of planning rather than an opportunistic crime. In the 1782 case of *R v John Patch*, the method by which the crime was committed was deemed "an artful and preconcerted (sic) scheme"²⁵⁹ and was thereby held to be fraud by false pretences.

Judges were flexible in their application and interpretation of the 'artful device' but this is not to say that it was not central to the establishing of a cheat:

*"That the deceitful receiving of money from one man to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie."*²⁶⁰

The methods by which frauds were carried out will be explored in detail in Chapter 5. Of these methods, all entail an artful device such as the exploitation of information to trick shopkeepers into handing over goods or extending credit. This artful device could also entail the extraction on information to later use to swindle third parties. Such forms of artful device have been historically perceived as particularly invidious as they involved 'those who trick you out of your knowledge, by what they commonly

²⁵⁴ 1 Hawk c.71 s.1 quoted in Cited in J.W Cecil Turner (ed), *Russell on Crime* Vol.2 11th Ed. (London, Stevens & Sons Limited, 1958) p.1330

²⁵⁵ 41 Geo. 3, c. 70

²⁵⁶ The crime of larceny shall be outlined later in this chapter.

²⁵⁷ *R v B. Lara* (1795) 6 Term Reports 565; 101 E.R. 706

²⁵⁸ Robert Shoemaker, *Prosecution and Punishment* (Cambridge University Press, 1991)

²⁵⁹ 168 E.R. 221; (1782) 1 Leach 238

²⁶⁰ As cited in *R v B. Lara*, 6 Term Reports 565; 101 E.R. 706

call ‘sucking your brains’.²⁶¹ This crafty device of obtaining information or knowledge to then use in a fraud will be returned to and illustrated throughout this thesis.

The term ‘artful’ had a moral as well as a legal use. In 1753, Henry Fielding voiced concern about ‘a body of artful, designing men, called Gamblers, [who] stood in need of reformation’.²⁶² ‘Artful’ was often used in literature to refer to the cunning and dishonest. The most famous of these characters is the ‘The Artful Dodger’ who appears in Charles Dickens’ *Oliver Twist*.²⁶³ Consequently, the artful device was a flexible term but remained an essential doctrine should a cheat or accusation of fraud by false pretences be proven.

The second essential doctrine of fraud was that of the law not acting to protect the foolish.

The Fool

A well-established doctrine of the criminal law was to offer little protection against cheating as it was not a crime for one man to make a fool of another.²⁶⁴ To the modern consumer, protected by a raft of measures, this doctrine may seem alien. It may be argued that the law’s very *raison d’être* with regard to fraud is to protect people against the unscrupulous cheat. However, historically the law placed greater emphasis upon individual responsibility, with the criminal law in practice resembling the modern civil law.²⁶⁵ Prior to the eighteenth century, the criminal law was more a forum of dispute resolution.²⁶⁶ This understanding of the early modern criminal

²⁶¹ John Fielding, *Extracts from such of the penal laws as particularly relate to the peace and good order of the Metropolis* 2nd ed.- (T.Cadell, 1763)

²⁶² John (and Henry) Fielding, *An Account of the Origin and Effects of a Police set on Foot by the Duke of Newcastle* (1753) p.28

²⁶³ Charles Dickens, *Oliver Twist* (Penguin Classics, 2003) First published in 1838

²⁶⁴ F T Giles, *The Criminal Law* (Penguin Books, 1954) p.218 and relied upon in the 1703 anonymous King’s Bench case, 87 E.R. 863; (1703) 6 Mod. 105.

²⁶⁵ The relationship of these criminal doctrines to contract law shall be considered in detail later in this chapter.

²⁶⁶ For a comprehensive overview of the common law see Langbein, John H et al, *History of the Common Law. The Development of Anglo-American Legal Institutions* (Wolters Kluwer Law & Business, 2009)

justice system is different to other views such as those posited by John Langbein although even this view changes by the mid-eighteenth century.

As with fraudulent misrepresentation in modern contract law, the victim of a cheat pre-1757 would have to show they had not been foolish when falling foul of the cheat. This is very much in keeping with the liberal tradition underpinning the English law²⁶⁷. Individual responsibility has long been at the heart of the English legal system, whether this be in relation to obligations such as contracts or with regard to criminal responsibility²⁶⁸. There are still very few positive duties on people in the criminal law and generally individuals have no legal duty to one another²⁶⁹, although there are some limited exceptions such as when one has entered into a contract or when statute imposes a duty²⁷⁰. Areas of law such as tort have opened up some limited positive duties on citizens but with regard to fraud offences, the majority of duties during this period were negative: to not actively cheat someone out of a benefit. However, until the mid-eighteenth century, there persisted a strong judicial belief that individuals, in particular contracting individuals, were responsible for their own decisions. This is very closely connected to the contractual doctrine of *caveat emptor*, buyer beware.²⁷¹ Michael Lobban has claimed that, even by the nineteenth century, there existed no underlying doctrine of *caveat emptor* and rather, judicial decisions were made on a case-by-case basis.²⁷² The significance of the doctrine that the law should not act to protect a fool directly challenges Lobban's thesis and the case law laid down in this chapter consistently reflect how the judiciary applied such doctrines

²⁶⁷ P.S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon, 1979) Chapters 3, 5, 8, and 10.

See also Norrie, *Crime, Reason and History*, Chapter 2

²⁶⁸ *Ibid*

²⁶⁹ A legal duty would impose on the individual a positive responsibility to act and a standard by which one is expected to perform. For example, there is a legal duty on drivers toward other road users and the standard to which the driver is held is that of the reasonable driver, as partly dictated by the Highway Code, see *Nettleship v Weston* [1971] 2 QB 691

²⁷⁰ Criminal law experts such as Andrew Ashworth have written extensively on the role of omissions and the significance of positive duties to act. In particular see: Andrew Ashworth, 'Manslaughter by omission and the rule of law', *Criminal Law Review*, 8 (2015), pp.563-577; Andrew Ashworth, 'The scope of criminal liability for omissions' *Law Quarterly Review*, 105 (July, 1989) pp.424-459

²⁷¹ For more detail on *Caveat Emptor* see Michael Lobban, 'Misrepresentation' in William Cornish et al, eds, *The Oxford History of the Laws of England, Volume XII: 1820-1914 Private Law* (Oxford Scholarship Online, 2010)

²⁷² Michael Lobban 'Nineteenth century frauds in company formation: *Derry v Peek* in context' *Law Quarterly Review* 112(Apr, 1996), 287-334

to accusations of frauds and cheats. It shall be further demonstrated later in this chapter how the laws of contract increasingly embraced individual responsibility through the doctrine of *caveat emptor*, and how the criminal laws of fraud were broadened in order to move such frauds into the criminal courts.

Significantly connected to, if not inseparable from, the doctrine that the law did to act to protect a fool was the doctrine that the fraud needed to be of a public nature. Whilst the law would not protect a fool, the judiciary were also aware that frauds and cheats that affected the wider public needed to be contained.

Public Nature

A fraud had to be of a public nature in that anyone could fall foul of the cheat. The crime was thereby one that required a wider social harm. 'Wider social harm' referred to frauds that could have been committed against any reasonable person taking reasonable steps to protect him or herself. This doctrine was consistent with the doctrine that the law did not act to protect a fool in that the victim of a cheat could only bring a successful case if there was no way of verifying the cheat for themselves.²⁷³ This pivotal requirement spoke to the defining of a cheat as a public harm, rather than a mere private transgression. This doctrine was altered and developed throughout the eighteenth century to shift the burden of proof of harm to the accused and thereby widen the definition of a criminal cheat.

A complainant of a cheat must have shown that the accused did 'effectuate his fraudulent intent, such as common prudence would not be sufficient to guard against'.²⁷⁴ Effectively, the prosecutor needed to successfully argue that the cheat could have fooled members of the wider public. There is no direct jurisprudence regarding the gullibility of the average member of the public and it is in this area that the jurisprudence surrounding fraud would develop.

²⁷³ *Young v the King* (1789) cited in William Holdsworth, *A History of English Law*, Vol XI, 1st Ed (Metheun & Co, 1938) p.533

²⁷⁴ *R v B. Lara*, 6 Term Reports 565; 101 E.R. 706

The distinction between private and public harm goes to the heart of the purpose of the criminal law, to act as a protection for wider society, rather than the civil law which acted to resolve disputes between individuals. Not every instance of cheating or obtaining goods by false pretences was a criminal offence but the common law was widely used to punish behaviour seen as immoral or deceptive, that was injurious to the public or caused a public mischief.²⁷⁵

By the eighteenth century, the judiciary was becoming more sympathetic to the victims of cheats and frauds. They recognised the need to extend the application of the criminal law in this area in order to provide more access to the criminal courts. Counsel for the defendant in the 1788 case of *R v Young*, pleaded: 'That this was not an offence at common law, but a bare naked lie, against which the common prudence of the prosecutor, if he had exerted it, was sufficient to guard [and not public nature]'²⁷⁶ This narrow view of the application of cheating, whilst reflective of the law of cheating, was not accepted in later cases. In a 1789 case, Ashurst J, in reference to the 1757 Act which codified cheating, held that: 'The Legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind.'²⁷⁷ In the same case, Lord Kenyon addressed the strict doctrine of the law not protecting a fool:

*he [the complainant] was perhaps too credulous, and gave confidence to them, and advanced his money; and afterwards the whole story proved to be an absolute fiction. Then the defendants, morally speaking, have been guilty of an offence. I admit that there are certain irregularities which are not the subject of criminal law. But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away.*²⁷⁸

Lord Kenyon's judgment reflects the alteration in attitude to the application of the offence of cheating. Historically the common law was stretched to great lengths to ensure that cheating was defined as creating a public mischief and thus, indictable

²⁷⁵ *R v Higgins* (1801) 2 East 5

²⁷⁶ *R v Young and Others*, 168 E.R. 354; (1788) 1 Leach 505

²⁷⁷ See below

²⁷⁸ *John Young, S. Randal, W. Mullins, and J. Osmer v The King*, 3 Term Reports 98; 100 E.R. 475

under the law. An illustrative example of this is the 1704 prosecution of two individuals who agreed to the outcome of a foot race in order to defraud a third person.²⁷⁹ This was deemed a public nuisance as it undermined the trust assumed in every day gambling and was ‘publick [sic] in its consequences’.²⁸⁰ This very early example of match fixing reflects how enthusiastically the common law doctrine of cheating was applied. Consequently, whilst a public interest requirement for the common law of cheating ostensibly reduced its application, in practice ‘public interest’ was very broadly interpreted, with cheating limited to the cheating of or by public officials. Common law cheating was also applied to a range of circumstances which were deemed in the public interest and were contingent either upon the position of the cheater or the position of the cheated. For example, some professions or positions of trust such as doctors²⁸¹, those providing foodstuffs²⁸² or those working for a parish.²⁸³ Particular forms of cheating at common law were common in relation to manufacturing, gaming,²⁸⁴ trade and many other areas. There were dozens of formulations of cheating at common law, the existence of which illustrate how significant, in practice, the suppression of deceptive practice was within the common law.

The transference of judicial sympathies toward the credulous member of the public is significant. It demonstrates how the judiciary were beginning to perceive fraud offences less in terms of breach of contract and more as a criminal offence, requiring the protection of all members of the public, not just the economically astute. The doctrine that criminal fraud had to be distinct from contract law contrived alongside this change in jurisprudence.

²⁷⁹ R v Orbell (1704) 6 Mod.42

²⁸⁰ R v Orbell 87 E.R. 804; (1703) 6 Mod. 42

²⁸¹ Dr. Groenvelt’s Case (1700) 1 Ld. Raym. 213.

²⁸² R v Dixon (1814) 3 M & S. 11

²⁸³ R v Tarrant (1767) 4 Burr.2106

²⁸⁴ 8 & 9 Vict. c.109

In particular, judges were open to extending the definition of a public harm to instances that threatened commercial relations. The public nature of a fraud was often interpreted as being a fraud that caused some socio-economic harm:

'It is well known that a very considerable share of the money transactions in the commercial world is carried on by means of the credit given to drafts upon bankers; and therefore any fraud which tends to impeach such a security is a matter of public concern, as it must necessarily impede the usual course of circulation'.²⁸⁵

This judicial desire to protect trade was reflected in later legislation which defined cheats and obtaining goods by false pretences as those which led 'to the manifest prejudice of trade and credit'²⁸⁶

The case law surrounding cheats is preoccupied with the distinction between criminal and civil law. In simplistic terms, the key distinction, as explored above, between the two was the public nature of the fraud. Lying and cheating between individuals was deemed to fall under other areas of law such as contract, not criminal law,²⁸⁷ and those believing themselves cheated were equally, if not more likely, to pursue their claim in the civil courts.²⁸⁸

The distinction between the public or private nature of a cheat is not easily discerned, although the case law explored demonstrates that fraudulent sale of goods to the public were likely to be interpreted as cheats, perhaps because the courts were keen to protect the wider community as consumers. Cheats which undermined day-to-day commercial activities were far more likely to be deemed criminal than civil. As shall be repeatedly demonstrated through this thesis, the courts were quick to criminalise and punish those who committed frauds that undermined commercial activity. The interpretation and enforcement of the common law of cheating demonstrates that this motivation to protect conditions of commercialism had existed in the law before

²⁸⁵ R v B. Lara (1795) 6 Term Reports 565; 101 E.R. 706

²⁸⁶ 41 Geo. 3, c. 70

²⁸⁷ J.W Cecil Turner, *Russell* p.1334

²⁸⁸ See Chapter 4 and Chitty, *A Practical Treatise* p.994

the period of this thesis and, as shall be demonstrated below, continued in earnest well into the nineteenth century.²⁸⁹

Pretences and Misrepresentations: Criminal Meets Contract Law

The offence of obtaining goods or monies by false pretences is perhaps the clearest illustration of an offence which existed at the interface between fraudulent criminal offences and the civil law. Inducing a party to enter into a contract under a fraudulent misrepresentation could be pursued either under the civil or the criminal law. A contractual fraudulent misrepresentation could be, in practice, the same as a false pretence given to obtain property. Examples of obtaining through false pretences include pretending to be 'merchants of fortune' in order to acquire credit, to trick a buyer into buying falsely weighted goods or giving a false residence.²⁹⁰

During the sixteenth century the Star Chamber created a raft of precedent concerning fraudulent activities, in particular the criminalisation of fraudulent misrepresentation made during the formation of contracts.²⁹¹ This intersection between criminal and contract law is an understandable one and the doctrines underpinning both contract law and criminal law lend themselves to each when applied to false pretences. These doctrines include the requirement in contract law for any contractual representation to be of existing fact and not merely a promise to act in the future. The practical application of this doctrine can be best seen in the case of *R v Jennison* in which a man promised to marry a wealthy spinster.²⁹² Jennison took money from the woman in order to set up house for the two of them for when they would be married. It later transpired that Jennison was in fact married and never had any intention of marrying the woman. The court found Jennison to have obtained money through a false pretence, not the pretence that he was going to marry the woman, but the pretence that he was single and in a position to marry. The promise

²⁸⁹ James Taylor, *Historical Research*

²⁹⁰ Joseph Chitty, *A Practical Treatise* p.1006

²⁹¹ William Holdsworth, *A History of English Law*, Vol V, 3rd Ed (Metheun & Co, 1945)

²⁹² 1862 L & C. 157

to marry was a statement of future fact and thus could not be a false pretence; the pretence that he was unmarried however was a statement of existing fact.

Case law across the criminal courts consistently demonstrates that judges were keen to distinguish between fraud and breaches of warranties which they felt ought to be pursued in the civil courts. Lord Ellenborough in particular delivered a series of judgments in which he stressed the need to distinguish between criminal false pretences, and breaches of contract.²⁹³ Lord Mansfield²⁹⁴ was equally aware of the interconnection of criminal and contractual actions and was loath to 'sustain an action simply upon misrepresentation'.²⁹⁵

In 1733, Chief Justice Raymond held that even in cases of deliberate deceit as to the weight of goods, this constituted a private contract and was therefore not indictable.²⁹⁶ There was a significant shift in jurisprudential attitudes to the distinction between contractual and criminal fraud. This shift occurred gradually through the middle of the eighteenth century. Prior to this development, judges were inclined to find contractual fraud a civil rather than a criminal matter. One explanation for this distinction can be found in the 1719 case of *Wilders* in which the possibility of mistake by the seller played a central role in the reluctance to use indictments to tackle false weights and measures.²⁹⁷ However, the eighteenth century saw a shift in judicial approaches to the extension of the criminal law in this area, and a broadening in the willingness to interpret sale of goods frauds as criminal. This change in jurisprudence continued as the judiciary acted to secure the condition required for commercial activity. By using criminal sanctions to address dishonesty in commercial dealings, the judiciary was declaring such actions to be of such social

²⁹³ See in particular: *Emanuel v Dane*, 170 E.R. 1389; (1812) 3 Camp. 299; *R v Pywell and others*, 171 E.R. 510; (1816) 1 Stark. 402.

²⁹⁴ Lord Mansfield was a deeply influence lawyer and politician in the eighteenth century, acting as both Solicitor and Attorney General. For an overview of Mansfield see Kayman, Martin A, 'The Reader and the Jury: Legal Fictions and the Making of Commercial Law in Eighteenth-Century England' *Eighteenth Century Fiction*, Vol.9, No.4 (July, 1997) pp.373-394.

²⁹⁵ *Hamar v Alexander*, 127 E.R. 618; (1806) 2 Bos. & P. N.R. 241

²⁹⁶ *R v Pinkney*, 25 E.R. 593; (1733) Kel. W. 244

²⁹⁷ 88 E.R. 1057; (1719) 11 Mod. 309

and economic harm, to the extent that they affected the entire community, and not just the individual.

This is not to say that all judges began to find a crime where fraudulent misrepresentation had been used to induce a contract. An illustrative example can be found in the 1775 case of *R v William Bower* regarding the knowing exposure to sale, and selling of wrought gold under a sterling alloy.²⁹⁸ *Bower* reflects how courts were generally keen to find a public cheat in cases of trade. However, one of the bench in *Bower*, Justice Aston, believed there was an important distinction between selling by false measure and selling under the standard; selling by false measure was harder to check, but merely delivering a lesser amount and the complainant not checking was a matter of contract. Cheating was regularly applied to cases involving false weights and measures²⁹⁹ as purchasers rarely had the opportunity to verify their purchases at the point of sale. Because of this, if a cheat was carried out during a trade, it was mostly treated as a public ill and thus, an indictable cheat.³⁰⁰ The commonly used authority for this distinction was the case of *R v Wheatly*, as decided by Lord Mansfield³⁰¹:

*'And that the fact here charged should not be considered as an indictable offence, but left to a civil remedy by an action, is reasonable and right in the nature of the thing: because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not.'*³⁰²

Again, it is significant that the doctrines which places onus on the deceived to take steps to protect themselves. If the cheated had an opportunity to verify the fraudulent representation and failed to, this was more likely to be considered a civil

²⁹⁸ 98 E.R. 1110; (1775) 1 Cowp. 323

²⁹⁹ *R v Jones* (1704) 2 Lt Raym 1013

³⁰⁰ *R v Wood* 93 E.R. 81; (1742) Sess. Cas. K.B. 80

³⁰¹ The significance of Lord Mansfield will be returned to in Chapters 2 and 7

³⁰² *R v Wheatly*, 97 E.R. 746; (1761) 2 Burr. 1125

breach. However, had the cheat been unverifiable, this would be more likely to be interpreted as a crime of which any person may have fallen foul.

A further distinction separating a criminal fraud from a contractual fraudulent misrepresentation was the *mens rea* of the criminal offence. Alan Norrie's research engages with the significance of *mens rea* in the criminal law. Norrie, like Douglas Hay, has argued that the construction of the criminal laws surrounding property was designed to specifically protect the property of the upper classes against the lower orders.³⁰³ This was achieved primarily through the strict construction of the *mens rea* of property offences, that being the need for dishonesty and intent.³⁰⁴

According to Norrie, the narrow, and essentially objective definition of dishonesty was specifically defined so as to prevent the motive for committing property offences being relevant to any substantive element of the criminal trial; the purpose being to prevent the poor from claiming any justification for their misappropriation of property due to their poverty. This played a significant function in the silencing of the accused within the trial as until sentence was passed, there were very few substantive defences available to the accused. Norrie is quite right that the substantive law offered no opportunity for the accused to speak to the motive for their actions but this does not mean that courts were unwilling to allow the accused to explain themselves.³⁰⁵ Rather, this explanation went to the sentencing of the accused.

Cheating and fraudulently obtaining goods by false pretences required the intent of the accused. Intent is elaborated upon by such phrases as 'deceitfully intending'.³⁰⁶ There is little case law or jurisprudence that defines 'deceitful intent' but commonly variations in the used wording within indictments at the time included: 'unlawfully, knowingly, and designedly³⁰⁷'; 'that he, being a wicked and evil disposed person,

³⁰³ Norrie, *Crime, Reason and History*

³⁰⁴ *Ibid*

³⁰⁵ Although, the probability of the accused effectively representing themselves is arguable. For more discussion on this see Langbein, '*Origins*'; Greg Smith, Allyson May and Simon Deveraux (eds) *Criminal Justice in the Old World and the New*, (University of Toronto, 1998)

³⁰⁶ R v B. Lara, 6 Term Reports 565; 101 E.R. 706

³⁰⁷ *OBP*, February 1760, trial of John Ambery (t17600227-19)

intending to cheat and defraud³⁰⁸; 'being an ill designing person, of dishonest conversation, not minding to gain his livelihood by honesty, did falsely pretend³⁰⁹'. Lord Ellenborough restated the need to show the *mens rea* of fraud, that being 'knowingly and designedly', and went on to detail how: 'A man may innocently obtain goods on a pretence which is false, if he do not know that it is false: as if a servant, ignorant of the deceit, be sent by his master for goods upon a false pretence, which he directs him to make.'³¹⁰ This judgment clearly restates that intent must be present but also, that the act may be carried out through an innocent third party without negating the intent of the principle actor.

By the nineteenth century, contract law had developed to allow for a scale of knowledge when committing on fraudulent misrepresentation.³¹¹ In eighteenth century criminal law however, the *mens rea* of a cheat or fraud was simple intent with knowledge that the representation was a fraud.³¹²

The Offence of Obtaining Property by False Pretences

Obtaining goods by false pretences was primarily defined by two statutes, one passed during the reign of Henry VIII and the other passed just before the start of our period, in 1757. It is important to note that obtaining property by false pretences continued to exist as a misdemeanour in common law, punishable by a fine and/or imprisonment.³¹³

The first of the statutes that criminalised the fraudulent obtaining of goods, stipulated the need for the goods to be obtained through the use of 'privy tokens and counterfeit letters'.³¹⁴ The Act was limited in its application because in order to be prosecuted, it had to be shown that the goods had actually been received and thus,

³⁰⁸ *OBP*, June 1769, trial of John Lutmore (t17690628-63)

³⁰⁹ *OBP*, December 1769, trial of Roger Prate (t17691206-47)

³¹⁰ Per Lord Elenborough in *R v Tomkins* (1807) 8 East 180; 103 E.R. 311

³¹¹ Lobban, *Law Quarterly Review*

³¹² Examples of the wording from indictments is given earlier in this chapter.

³¹³ H F Stephen and J Stephen, *New Commentaries on the Laws of England* (Partly Founded on Blackstone), Volume IV (Butterworths 1853) p.213

³¹⁴ 33 Hen.8 c.1

it was not an offence to attempt to obtain goods through false pretences.³¹⁵ A further limitation was that the act by which the goods were obtained could not be a verbal representation³¹⁶ or a 'bare naked lie'.³¹⁷ As has been demonstrated earlier in this chapter, this doctrines of the 'artful device' and the need for a representation beyond a mere lie continued to be of significance into the eighteenth century.

Judges consistently ruled throughout the eighteenth century that unless the fraud was carried out using 'false tokens', the action amounted to no more than 'making a fool of another'.³¹⁸ Again, we see the liberal heart at the centre of the English law.³¹⁹ The individual was required to show that any member of the public could have fallen foul of the cheat, while the law added a caveat that the cheat had to be carried out through the use of a false token. Clearly the courts would not allow for credulous members of the public to use the criminal justice system having been tricked by merely a few carefully chosen smooth words.

Judges were unsympathetic to those tricked by frauds carried out by mere words as it was felt that precautions should have been taken against such a fraud, mainly the asking for some written evidence or token.³²⁰ Not only was the presence of a token a requirement, it also had to be a sufficiently convincing token and not just anything written.³²¹ For example, a scrupulous shopkeeper would have been expected to further question a terribly written, semi-literate scrawl purporting to be from a gentleman sent with his servant. This application of the doctrine requiring a public wrong introduces and overlaps with the doctrine that the tricked should have taken steps to verify the statement. Again, it appears that the law before the eighteenth century made prosecuting fraud difficult. However, in 1757, Sir John Fielding introduced a new Act into Parliament through his patron, the Duke of Newcastle, and

³¹⁵ Thomas Walter Williams, *The Whole Law* p.587

³¹⁶ Joseph Chitty, *A Practical Treatise* p.997

³¹⁷ Per Chief Justice Holt, *R v Grantham*, 88 E.R. 1002; (1709) 11 Mod. 222

³¹⁸ *Domina Regina v Jones*, 91 E.R. 330; (1703) 1 Salk. 379

³¹⁹ Atiyah, *Rise and Fall*

³²⁰ Edward Hyde East, *A Treatise of the Pleas of the Crown* (A. Strahan, 1803) p.819

³²¹ *R v B. Lara*, 6 Term Reports 565; 101 E.R. 706

this Act resulted in the further extension of the laws of fraud in order to make prosecutions easier.

In 1757, the 'Obtaining money by false pretences etc' Act was passed.³²² This Act took a step in the consolidation of false pretences, both in its definitions and applications. S.1 of the Act defined the elements of obtaining goods by false pretences to be the intentional obtaining of 'money, goods, wares or merchandizes, with intent to cheat or defraud'.³²³ 'False pretences' are very loosely defined in the 1757 Act, allowing pretences of future as well as present promises.³²⁴ However, the Act contained some significant limitations. One such limitation was that the 1757 Act only applied to monies, goods and chattels but not to securities or *chose in action*.³²⁵ While this was addressed in 1812³²⁶, the Act was eventually repealed in 1827³²⁷ and replaced the same year by legislation³²⁸ which sought to address defects in the eighteenth century Act.³²⁹ During our period however, where *chose in action*, or some of the newer financial instruments of the time were misappropriated, obtaining goods by false pretences could not be utilised.³³⁰

Before exploring why this Act was introduced, the individual elements of the offence warrant attention in order to demonstrate how the offence operated. By exploring the *actus reus* of the offence, it will become clear that the Act widened the offence of obtaining goods by false pretences, thereby giving the cheated greater recourse to the criminal law.

³²² 30 Geo II c.24

³²³ S.1 30 Geo II c.24

³²⁴ Joseph Chitty, *A Practical Treatise* p.997

³²⁵ R v William Humphry Hill, 168 E.R. 754; (1811) Russ. & Ry. 190

³²⁶ 52 Geo c.3

³²⁷ 7 & 8 Geo IV c.27

³²⁸ 7 & 8 Geo IV c.29

³²⁹ James Fitzjames Stephen, *A History of Criminal Law of England* Vol. 3 (Cambridge University Press, 1883) p.161

³³⁰ However, larceny and embezzlement offences were extended to apply to such misappropriations. This shall be discussed further below.

Pretences

It is in the definition of ‘pretences’ that the change in jurisprudence surrounding fraud during the eighteenth century becomes apparent. Prior to the 1757 Act, ‘pretences’ was very narrowly defined thereby limiting the scope for prosecutions. However, by the eighteenth century there was an extension of the definition of pretences, and thus, the manner by which frauds could be committed in order to be brought before the criminal courts. As one commentator of the period highlights:

*The term false pretence is of great latitude, and was used...to protect the weaker part of mankind, because all were not equally prudent...but still it may be a question whether the statute extends to every false pretences, either absurd or irrational upon the face of it, or such as the party has at the very time the means of detecting at hand...*³³¹

This illustrates the changing sympathies towards a need to protect more credulous members of society, as was present in judgments regulating cheats. Notwithstanding this shift, a successful complainant would need to demonstrate that they believed the pretence, and were not wholly irrational to do so. Again, there is significant overlap between the doctrines of fraud. Here the connection is between the requirement to show some steps of verification of the representation, and that the law does not operate to protect a fool.

Following the introduction of the 1757 Act, which allowed for false pretences to be in the form other than a token, there was a continuance of jurisprudential wrangling to define what constituted a ‘pretence’. The presenting of a cheque, the value of which the presenter knew to be worthless, constituted a pretence, even if words were not spoken.³³² Likewise, presenting a counterfeit note could be a false pretence.³³³ A false pretence could even be found where the accused failed to correct another’s false assumption. This was illustrated in the case of John Story who tried

³³¹ Edward Hyde East, *Treatise* p.828

³³² R v Jackson and Another, 170 E.R. 1414; (1813) 3 Camp. 370

³³³ R v Henry Freeth, (1807) Russell and Ryan 127; 168 E.R. 718

to innocently collect his own post at a post office but was given a money order for a 'John Storey', which he then accepted without correcting the postal worker.³³⁴ Another example is given by the commentator, East, who refers to the case of *R v Skirrett* in which it was held that reading false words to an illiterate person in order to execute a deed using his signature was a false pretence.³³⁵

Reliance and Reasonable Steps

Whilst it would seem that the courts were happy to extend the definition of false pretences to capture a wide range of fraudulent behaviour, the prosecution of obtaining of goods by false pretences was not straightforward. The prosecutor had to show that he or she was induced to part with their money or goods because of the false pretence. This is very similar to the requirement in cases of fraudulent misrepresentation in contract law.³³⁶ This placed the prosecutor in an unusual position because they had to show they had been duped by the ruse even though they had taken steps to verify the pretence.

This of course required admittance on the part of the prosecutor that they had been duped by the accused and had consequently handed over the goods. Often prosecutors were unwilling to admit this, especially in open court where they would potentially expose themselves to ridicule.³³⁷ In demonstrating that they had been deceived by the false pretence, a prosecutor would have to show that this behaviour was not merely a sales trick or some form of trap into which they, the gullible individual fell. Rather, as with cheats, they had to demonstrate that this offence had a public dimension and any person could have fallen foul of it, and that they were not asking the law to protect a fool. This doctrine was also consistent with the contractual doctrine of *caveat emptor* in that the onus was placed upon the buyer to take reasonable steps to ensure the contract into which they entered was beneficial.³³⁸ Again, there is emphasis placed upon prosecutors to protect

³³⁴ *R v John Story, Russell and Ryan* 81; 168 E.R. 695

³³⁵ Edward Hyde East, *Treatise*, p.823

³³⁶ *Redgrave v Hurd* (1881) 20 ChD 1 (CA)

³³⁷ F T Giles, *Criminal Law* p.223

³³⁸ Lobban, *Oxford History*

themselves against fraud, rather than for the criminal law to apply to all fraudulent offences, regardless of the behaviour of the prosecutor.

Obtaining Property by False Personation

The third most common form of fraudulent misdemeanour was obtaining goods by false personation. In essence, this offence was a form of fraud carried out by pretending to be someone else. An early-eighteenth century justice held that personating a man is no harm, unless it be for an ill intent.³³⁹ However, pretending to be someone else in order to commit a fraud was a widespread form of fraud which was criminalised in both the common law and statute. Similar to obtaining goods by false pretences at common law, obtaining property by false personation was defined as a misdemeanour.³⁴⁰ Due to the imprecise language often used when recording prosecutions for fraud offences, the specific offence is often recorded purely as 'fraud' which may explain why many believed false personation to be synonymous with cheats.

When such behaviour was prosecuted it often fell within the offence of conspiracy.³⁴¹ This was to be expected as many cases involved more than one offender. For example, in the case of *R v Robinson*³⁴², a servant conspired with another man to personate her master so as to solemnise a marriage that was used as the basis of a rather audacious claim upon her master's property. This was therefore both a cheat and a conspiracy. False personation was also similar to deceptive practices relating to documents and financial instruments and as such, Chitty argued that "false personation...is nearly allied to forgery".³⁴³ A range of offences have similarities to obtaining goods by false personation. Commentators claimed that false personation, 'is in its nature nearly allied to forgery, with which it is usually accompanied, to give it efficacy'.³⁴⁴ Assumedly that was because perpetrators would falsely personate a

³³⁹ *R v Makarty et Fordenborough*, 92 E.R. 280; (1705) 2 Ld. Raym. 1179

³⁴⁰ 2 East PC 1010 s.5 referenced in H F Stephen and J Stephen, *New Commentaries* p.212

³⁴¹ J.W Cecil Turner, *Russell* p.1492

³⁴² (1976) 1 Leach 37

³⁴³ Joseph Chitty, *A Practical Treatise* p.1081

³⁴⁴ Edward Hyde East, *A Treatise* p.1004

credible or trustworthy person in order to pass off a forged document.³⁴⁵ Obtaining goods by false personation required the jumping of the same doctrinal hurdles as cheating and false pretences and all five doctrines had to be satisfied.

Public Harm

Obtaining property by false personation was widely criminalised by statute. In keeping with the flurry of legislation created by parliament in the eighteenth century³⁴⁶, and the piecemeal approach through which this legislation was adopted, false personation was legislated according to whom the prisoner had impersonated. For example, the offence of impersonating a soldier to obtain wages³⁴⁷ fell under different legislation to the offence of impersonating a sailor³⁴⁸ or impersonating a South Sea stock owner.³⁴⁹ Personating the master or mistress of a servant in order to give a reference was also criminalised.³⁵⁰ Such an approach applied to a seemingly unending list of officials and office holders including Inland Revenue officers³⁵¹ and even teachers.³⁵²

The clearest examples of public cheating can be found in relation to cheats against public officials. Such acts were indictable offences³⁵³ and there is a suggestion that, where possible, fraud against a public officer has been preferred to an action of private fraud or cheating. An illustrative example of this is *R v Blackbourne*³⁵⁴ in which a woman pretended to be a widow in order to execute a bail bond. This was interpreted as being a fraud upon a public officer acting in the course of justice.³⁵⁵

³⁴⁵ See below in this chapter for an exploration of forgery.

³⁴⁶ Hay, 'Property, Authority and Criminal Law' p.19

³⁴⁷ 7 Geo. IV.C.16 S.38 and 2 Will. IV. C.53 s.49

³⁴⁸ 11 Geo IV & 1 Will IV c.20 s.84

³⁴⁹ 11 Geo IV & 1 Will IV c.66 2.7

³⁵⁰ 32 Geo III c.56

³⁵¹ 53 & 54 Vict. c.21

³⁵² 61 & 62 Vict. c.57

³⁵³ *R v Ward* (1727) 2 Ld.Raym. 1461.

³⁵⁴ (1685) Trem.P.C. 101

³⁵⁵ Cited in J.W Cecil Turner, *Russell* p.1322

As shall be illustrated in Chapter 5, obtaining goods by false personation is more frequently found at the Old Bailey alongside the fraudulent obtaining of naval prize monies. It is to this offence that we now turn.

Prize Money Fraud

Naval frauds differed from other types of fraudulent offence in one key respect, that they were felonies rather than misdemeanours. Moreover, they were capital felonies. The methods by which naval frauds were carried out will be discussed in Chapter 5, as will the important issue of who was prosecuting these offences. The criminalisation of fraudulently obtaining prize monies (naval frauds) was greater than other forms of fraud offence. It was the target of the fraud, the Navy and its agents, which gave this type of fraud the sixth doctrine, being carried out against a public authority.

Fraud offences relating to prize monies were codified in such a way as to apply to different methods of obtaining these monies. For example, 31 Geo. II. c. 10, s. 24 (extended to marines by 32 Geo. III. c. 33, s. 23) stated:

“That whosoever willingly and knowingly takes a false oath to obtain the probate of any will or wills, or to obtain letters of administration in order to receive the payment of any wages, pay, or other allowances of money or prize-money due, or that were supposed to be due, to any officer, seaman, or other person who has really served, or was supposed to have served, on board of any ship or vessel in the King's service, shall be guilty of felony without benefit of clergy.”

This Act also extended the method of fraud to other instruments used to commit naval fraud.³⁵⁶ There are distinct interconnections between naval fraud and forgery or uttering. These offences will be considered below. However, what is apparent for naval frauds is that the law was constructed in such a way as to take account of the customary payment methods observed by the Navy and to avoid any of the

³⁵⁶ 31 Geo. II. c. 10

ontological and procedural complexities associated with prosecutions for obtaining goods by false pretences or forgery. In doing so, it ensured a more straightforward prosecution and also, that the offence was unquestionably prosecuted as a felony. The policies surrounding the defining naval fraud as a felony will be discussed in Chapter 5, but for current purposes, it is apparent that the laws surrounding naval fraud were distinct from more traditional fraud and deception offences. That is not to say that courts did not recognise the connecting doctrines of naval frauds with other offences such as forgery and perjury.³⁵⁷ However, unlike fraud offences, where it was apparent that a fraud had been committed with regard to prize money, there was less confusion, or indeed flexibility, as to which offence could be pursued by the prosecutor.

Naval frauds were legislated for more thoroughly than other areas of fraud. These frauds were defined as capital felonies due to the huge economic, social, and political significance of the Navy to the economic growth of the nation. The Navy, whether fighting or merchant, allowed for the expansion of trade and the growth of the empire. Moreover, the Navy held an important symbolic place at the heart of British culture.³⁵⁸ Prize money frauds were seen as crimes against the navy and all those who were employed by the Navy. As shall also be detailed later in this thesis, sailors were very popular with the general public and it was widely known and condemned that the Navy often did not pay its sailors regularly. Those who committed fraud against the navy were seen as taking resources from hard-working and brave sailors. As highlighted in a 1795 case of *Turtle v Hartwell*:

'The Legislature have anxiously provided for those most useful and deserving bodies of men, the seamen and marines of this country; for this purpose they have made regulations to protect their earnings from those impositions which are too frequently practised upon them; and have for their own benefit

³⁵⁷ R v Thomas Brady, 168 E.R. 267; (1784) 1 Leach 327

³⁵⁸ John Brewer, *The Sinews of Power: War, Money, and the English State, 1688-1783* (Cambridge University Press, 1986)

imposed various restrictions upon the modes by which they might transfer their property'.³⁵⁹

As the only felonious version of fraud, prize money frauds will be considered separately to other forms of fraud in this thesis. However, as shall be demonstrated in later chapters, the key distinction between different types of fraud was the prosecutor. As the form of fraud prosecuted by the navy, prize money fraud is a significant example of fraud found within the Old Bailey during this period.

Fraud and the Wider Criminal Law

This chapter has so far positively defined the central offences surrounding fraud and the corresponding doctrines, in that it has explained which offences and behaviour constituted a fraud offence. This chapter will now negatively define fraud, in that those offences which closely interlocked with fraud offences shall be explored. These were the offences between which counts had to distinguish instances in which property had been obtained but it was *not* another offence. The offences most closely aligned with fraud were larceny, forgery, and uttering. These offences will be explored in relation to the doctrines of fraud identified above. In order to demonstrate how closely they were aligned, and also where they were delineated.

Larceny: by Trick and by Servants

Larceny has a winding and intricate history passing through both multiple statutes and innumerable cases. To trace this path in its entirety is not required for the purposes of exploring offences relating to fraud. Nevertheless, in considering the offences which sat at the peripheries of fraud, a more nuanced understanding of deceptive and fraudulent offences might be gained by paying heed to the most common property offences of the period.

The relationship between larceny and fraud stretches back to the twelfth century, and the two areas of law developed and altered through the ages in both a symbiotic

³⁵⁹ 101 E.R. 630; (1795) 6 Term Rep. 426

and juxtaposed nexus. The historic laws creating and surrounding theft have widely been seen as a maze of arbitrary distinctions between a range of offences from larceny to embezzlement to obtaining property by false pretences.³⁶⁰ Robert Peel thought larceny and the common law of cheating were so similar, particularly the *mens rea*, that in 1827 he introduced a bill into Parliament to bring the two offences together.³⁶¹ However, before this unification there continued to be interlocking and conflicting doctrines between larceny and fraud. In light of this, and to understand the operation of the laws surrounding larceny and fraud, these shall be considered in some depth.

Limitations of Larceny and the Need for the Artful Device

Bracton defined larceny as being “*the fraudulent dealing with another man’s property with the intent of stealing it against the will of its owner*”.³⁶² ‘Fraudulent dealing’ was derived from the Roman concept of ‘*contractatio*’ that, whilst a vague doctrine, always demanded the change of possession of the goods alleged to have been stolen.³⁶³ The *mens rea* of larceny was not only concerned with *contractatio* but also *animus furandi*. *Animus Furandi* injected a further requirement of dishonesty and deception into the offence of larceny.

In the simplest terms, the offences of larceny required that without the consent of the owner, a thing must be seized (*cepit*) and then carried away (*asportavit*).³⁶⁴ The need for both these elements acted to greatly limit the application of larceny. Ultimately, resulted in the creation of a range of other property offences such as larceny by a trick, theft by servants and embezzlement and fraudulent offences such as cheats and obtaining goods by false pretences. Even considering the most basic definition of larceny, it is apparent how fraud and larceny interacted: where it

³⁶⁰ G. Fletcher, *The Metamorphosis of Larceny*. *The Harvard Law Review*. Vol.89, no.3 (Jan 1976) pp.469-530, p.469

³⁶¹ For an overview of this Act and also the consequential interconnection between false pretences and larceny see Catharine MacMillan ‘Rogues, Swindles and Cheats: The Development of Mistake of Identity in English Contract Law’ *The Cambridge Law Journal*, Vol.64, Issue 3 (Nov 2005) pp.711-744.

³⁶² William Holdsworth, *A History of English Law*, Vol II, 4th Ed (Metheun & Co, 1935) p.360

³⁶³ *Ibid*, p.361

³⁶⁴ J.W Cecil Turner, *Russell*, p.1002

appeared that the goods were seemingly willingly handed over to the accused, larceny could not apply.

Consequently, the fundamental distinction between obtaining goods by false pretences and larceny is the requirement in larceny for the seizure of goods. As stated by Justice Gould in 1789, '*...to constitute the crime of larceny the property must be feloniously taken from the possession on the owner*'.³⁶⁵ There is extensive case law from the sixteenth century demonstrating the relationship between fraud offences and larceny. The 1783 case of *R v Richard Horner* demonstrated how obtaining goods by false pretences, if carried out with a pre-concerted 'plan to rob', could in fact be a larceny, particularly if the jury can find there was *animus furandi*.³⁶⁶ Likewise, a case heard by the Twelve Judges in 1820 demonstrated how cases could appear as a conspiracy to defraud, but was in reality a theft due to the pre-arranged nature of the theft, concealed as a gambling fraud.³⁶⁷ This is one of the few examples in which the facts of a case could have been framed as larceny but was addressed as a fraud. This is significant as the prosecutors chose to pursue a misdemeanour rather than a felony.³⁶⁸

There have been a number of significant cases that have tried to extend the definition of 'seized' within larceny. Moreover, there were many occasions in which proving larceny was difficult as the goods had been handed over to the accused freely. A common example of this was when someone sought to buy some goods and asked to try or examine these goods before buying or later going on to steal the goods.³⁶⁹ The most significant example of such a situation is *Pear's Case*.³⁷⁰ In *Pear's*, a horse was hired with the intent to take the horse and not return it. The court interpreted the law such that this behaviour fell under larceny. The defence was that the owner had consented to giving the horse to Pear and consequently, there had been no seizure. The court rejected this claim, holding that even though the owner had

³⁶⁵ *R v John Wilkins*, 168 E.R. 362; 1 Leach 520

³⁶⁶ *R v Richard Horner*, 168 E.R. 237; (1783) 1 Leach 270

³⁶⁷ *R v Robson, Gill, Fewster, and Nicholson*, 168 E.R. 873; (1820) Russ. & Ry. 413

³⁶⁸ The choices available to prosecutors will be explored further in Chapter 4

³⁶⁹ Example given in W. Nelfon, *Authority*, p.280

³⁷⁰ 1 Leach 211, 168 Eng. Rep. 208 (1779)

consented to the passing of the possession of the horse, he had not consented to the passing of the title of the horse and thus, the horse was not legally transferred, but merely bailed to Pear. Thus, by taking the horse in its entirety, both the actual horse and the title to the horse, Pear had seized the horse and therefore committed larceny. This distinction has frequently been referred to as 'larceny by a trick'.³⁷¹ Such reasoning was applied by the law and the courts into the nineteenth century with case law supporting the doctrine that licencing of goods, as bailment of goods, does not equate to the free transfer of those goods. Therefore, the intentional and dishonest taking of those goods still amounts to larceny.³⁷²

Whilst Pear's case may have ostensibly squared the circle and broadened the offence of larceny to cover the theft of goods not physically seized, this conceptual manipulation of the laws of larceny created yet further overlap between larceny and other deception offences such as obtaining goods by false personation. Cases such as *R v Atkinson*³⁷³ in 1799 which established that in situations in which only the possession and not the title of goods had passed, this would be obtaining goods by false pretences and not larceny by a trick.

Giles succinctly illustrates these close ties between the offences, stating that larceny by a trick "...in its very nature is so closely akin to fraud that at times upon the same facts it is possible to launch a prosecution either for stealing or for false pretences".³⁷⁴ Thus the seemingly straightforward ontological difference between larceny and obtaining goods by false pretences being whether the goods were taken without the owner's consent, is blurred to the point of uselessness.

In 1812, Chitty went so far as to argue false pretences to be a 'species of larceny'.³⁷⁵ This close connection and overlap between false pretences and larceny created a confusing number of options for prosecutors. James Fitzjames Stephen highlighted

³⁷¹ R W G 'Larceny, Embezzlement and Obtaining Property by False Pretences' *Columbia Law Review*, Vol.20, No.3 (Mar 1920) pp.318-324, p.319

³⁷² *Reeves v Cooper* (1838) 6 Bing NC 136

³⁷³ (1799) 2 East P.C 673

³⁷⁴ F T Giles, *Criminal Law*, p.225

³⁷⁵ Joseph Chitty, *A Practical Treatise*, p.998

the very real problems of such interconnection between the two offences when he stated that: 'a failure of justice frequently arises from the subtle distinction between larceny and fraud'.³⁷⁶ This subtle distinction between fraud and other offences was not only limited to larceny, but also existed between fraud offences and forgery.

Forgery and Uttering: the Continued Need for Public Harm

Chitty also believed there to be an indistinguishable connection between forgery and fraud, claiming: 'Forgery, at common law, seems only to have been a species of fraud, and is therefore, often intermingled with false personating and other means of defrauding'.³⁷⁷ Experts in the history of forgery equally agree that forgery was closely connected to the fraudulent offence of obtaining goods by false pretences.³⁷⁸ Often forgery was the method by which the goods were obtained. Just as Tudor legislation regarding false pretences required these pretences to be in the form of a token, so too did forgery offences require the imitation or doctoring of some document. The similarities between the two forms of offences extended to the underlying doctrines of fraud at the centre of this analysis: that the offence could affect any member of the public and thus was a public harm, and that the complainant had taken steps to protect themselves against this offence.

Forgery, far more so than fraud offences, was codified by innumerable statutes and by the middle of the nineteenth century. This was because statutory forgery was composed of a myriad of legislation arrived at via the process of criminalising the forging of particular writings, on a document by document basis.³⁷⁹ At statute, there were dozens, if not hundreds of individual pieces of legislation which criminalised specific forgery of specific writings. Listing all of this legislation would be a thankless task in that such specificity would only reflect that a piecemeal approach had been

³⁷⁶ H F Stephen and J Stephen, *New Commentaries* p.213

³⁷⁷ Joseph Chitty, *A Practical Treatise* p.1022

³⁷⁸ Randall McGowen 'Forgery and the Twelve Judges in Eighteenth-Century England' *Law and History Review*, February 2011, Vol.29 No.1

³⁷⁹ William Holdsworth, *English Law*, Vol XI, p.534; Forgery was codified under one statute in 1861: Forgery Act 1861 c.98

taken, but which would not really explain why such legislative steps had been taken.³⁸⁰

Statutory offences of forgery that closely aligned to fraud offences included the forgery of writings relating to the supply of goods;³⁸¹ the felony of forging the mark on silver or gold³⁸², forging or uttering the will of a seaman³⁸³, forging a marriage licence³⁸⁴, forging any document of an attorney and any writing which affects, trespasses or conveys shares in public companies.³⁸⁵

By examining a select few of the Forgery Acts, it becomes apparent how even the larger pieces of forgery legislation was very specific in its application, such as the Forgery Act of 1562 which extended forging to 'false and untrue charters, evidence, deeds and writings.'³⁸⁶ Elizabethan legislation introduced a wide range of forgery offences including the forging of wills, which would previously have been considered private documents and therefore, would not have been indictable as a forgery. Here again we see the keen distinction deployed in the early modern era between private and public harms. Again, there is a gradual move in jurisprudence to relocate previously defined private trespasses into the criminal courts.

The doctrine of public harm is most significantly recognised in common law forgery. Forgery at common law was an ancient offence but one that, by the eighteenth century, was used far less frequently than statutory forgery.³⁸⁷ This was perhaps because of the continuing limitations of common law forgery. As with other forms of deceptive offences at common law, it was a requirement that the forgery in question related to documents of a public nature such as deeds or public records.³⁸⁸ The forging of private documents was deemed to be a civil rather than a criminal offence,

³⁸⁰ Randall McGowen 'Making the 'bloody code'? Forgery legislation in eighteenth-century England' in Norma Landau ed, *Law, Crime and English Society, 1660-1830*. (Cambridge University Press, 2002)

³⁸¹ 7 Geo II c.22

³⁸² S.14 31 Geo II c.32

³⁸³ 31 Geo II c.10

³⁸⁴ 26 Geo II c.33

³⁸⁵ 8 Geo I C.22 (s.1)

³⁸⁶ 5. Eliz c.14

³⁸⁷ W. Nelfon, *Authority* p.320

³⁸⁸ Thomas Walter Williams, *The Whole Law* p.573

much like private cheats and obtaining goods by false pretences with only a private affect.³⁸⁹

The Quality of the Forgery

As with fraud offences, the doctrines of not protecting a fool and the need to show reasonable steps to ascertain the truth of the deception extended to forgery. In 1806, a Crown Case Reserved case confirmed that a forgery could not be indicted if the attempt to forge was so poor as to not be distinguishable as any particular type of financial instrument.³⁹⁰ Here we see the similar approaches between false pretences and forgery, in particular the tension between not protecting a fool, but equally not forsaking the credulous but innocent. This mirroring of doctrinal underpinning further demonstrates the extent of the interconnection between fraud and forgery.

Uttering

With regard to fraud offences, the uttering of false coin or banking notes was a different species of offence to forgery as the forging of coin was deemed a Royal offence. This separate categorisation is significant as Royal offences were tried very differently in that they were prosecuted by the state. However, there are parallels with the uttering of other forms of forged documents or financial instruments. Uttering was a far easier offence to prosecute as mere possession of the forged document was often enough to convict whereas for forgery, the tools of forgery also needed to be produced³⁹¹. Similarly to many forms of forgery, uttering was defined by legislation as needing to be carried out toward a certain type of person or within a particular manner and could not apply to the general presentment of a document.³⁹²

³⁸⁹ J.W Cecil Turner. "Documents" in the Law of Forgery' *Virginia Law Review*, Vol.32 No.5 (Aug 1946) pp.939-954 p.9433

³⁹⁰ R v Joseph Cartwright, Russell and Ryan 106; 168 E.R. 707

³⁹¹ Donna T. Andrew and R. McGowen, *The Perreaus and Mrs Rudd: forgery and betrayal in eighteenth-century London*. (Berkeley, University of California Press, 2001) p.35

³⁹² 13 Geo. 3 c.79 s.2

Uttering could be carried out through an innocent agent.³⁹³ For example, if an individual handed a forged banknote or document to an unknowing servant and instructed the servant to exchange the note or document for a benefit, then the individual would still be held culpable of the uttering. The servant would be an innocent agent and as such would not be treated by the court to have broken the chain of causation between the individual and the ultimate passing off of the forged document or note. This is similar to the jurisprudential discussion surrounding fraud offences which showed specific understanding of the potential use of innocent third parties to conduct fraud. Of course, if the servant were aware of the forgery, he or she would still not prevent both parties being culpable of uttering as the initial uttering would have occurred when the document was given to the servant.

The Operation of the Law: Fraud alongside other Offences

Forgery was utilised in a similar way to fraud offences, with an interconnection between various statutes and the common law:

*“when a case arose which would not exactly fit a statute, recourse was had to the alleged common-law crime; but this was nearly always done in order to override arguments of a narrow technical character on the exact description of a particular document...”*³⁹⁴

Fraud offences, such as the obtaining of goods by false pretences could not be merely tacked on to the end of a forgery indictment as the clerk of indictment’s insurance policy. Rather, the fraud offence needed to be as clearly laid out as if the whole case rested upon it, even if the fraud offence really was a secondary offence to the forgery.³⁹⁵

Both common law and statute were the requirement that the thing forged must be a ‘writing’. This was a wider definition than a ‘document’ and in the mid-nineteenth century, the definition of a ‘writing’ was very broadly interpreted. A notch on a

³⁹³ R v Giles (1827) 1 Mood. 166

³⁹⁴ Cecil Turner, *Virginia Law Review* p.948

³⁹⁵ R v Benjamin Rushworth, 168 E.R. 822; (1816) Russ. & Ry. 317

baker's wooden tally falsely representing, that bread had been delivered, was deemed a writing.³⁹⁶ As such, there are definite parallels between the extension of the definition of pretences with regard to fraud offence, and the definition of a document. Here it is apparent that the courts were equally willing to widen the tests for forgery they were for fraud offences.

Uttering, like forgery, related to specific types of documents and writings and where an offence had been committed using an instrument outside of one of the many statutes, the courts were disinclined to accept a use of fraud offences as an alternative to uttering.³⁹⁷ This was most likely because uttering was a Royal offence and of particular significance to the state.

Forgery and uttering were closely aligned with obtaining goods by false pretences; it was the uttering of the forged document which acted as the pretence to obtain the goods. Forgery was codified and clarified to a much greater extent than any of the fraud offences, perhaps more significantly, forgery offences were increasingly defined as felonies, with all the prosecutorial benefits which came with such status.³⁹⁸ In light of this dedicated legislation it is perhaps to be expected that forgery would be more popularly selected as an offence if a prosecutor had an option between false pretences and forgery.³⁹⁹

Conclusion

Both before and during this period, the laws of fraud were varied and multiple. The most commonly seen fraudulent offence at the Old Bailey, obtaining goods by false pretences, evolved from the ancient common law misdemeanour of cheating. Obtaining goods by false pretences continued applying the five central doctrines of cheating: that a fraud must be conducted through the use of an 'artful device'; the law does not act to protect a fool; a criminal fraud must have some public harm; a criminal fraud must be something other than a contractual misrepresentation; in

³⁹⁶ Example given in Cecil Turner, *Virginia Law Review* p.951

³⁹⁷ R v Field, 1 Leach 383; 168 E.R.294

³⁹⁸ See Chapter 4

³⁹⁹ *Ibid*

either contractual or criminal fraud, the tricked party must have taken steps to protect themselves. These doctrines shaped the types of frauds appearing in the Old Bailey during this period, and had significant impact upon wider doctrines and areas of law including contract law and larceny.

The laws surrounding fraud during the early eighteenth century were very narrowly construed, making it difficult to pursue a criminal prosecution for fraud offences. In particular, the doctrines that the law did not protect a fool and that a criminal fraud needed to be a public harm, were construed to limit criminal frauds until the eighteenth century. As financial markets and commercial relationships become larger and more complex throughout the eighteenth century, the judiciary and the legal system acted to allow more prosecutions for fraud. This was achieved by altering the scope of the five doctrines of fraud.

This willingness to find criminal culpability for fraud that, in previous centuries may have not been heard in either criminal or civil court, can be explained by the shifting purpose of the criminal justice system over the civil jurisdiction with regard to contract law. By the eighteenth century, the criminal justice system was acting to bolster the favourable conditions for trade and the developing complexity of the markets. This period is what this thesis is referring to as 'proto-capitalism'. Alongside the economic transformations that were taking place, the eighteenth century was also a period of change in the construction and ontology of fraud offences. From a narrowly defined set of offences, the mid-eighteenth century sees a widening of the doctrines of fraud, particularly a softening of the standard to which the prosecutor was held, allowing for increased prosecution of fraud in the criminal courts.

This chapter has also explored in depth how fraud offences interacted with other offences. As shall be demonstrated throughout this thesis, offences such as obtaining goods by false pretences operated in a dual manner, as an independent and significant offence in its own right, and also to a lesser extent, as an alternative count to other indictments for larceny or forgery. This dual usage demonstrates the flexibility of fraud offences, as well as how erroneous it would be to consider fraud

offences in a vacuum, removed from other property laws of the time. Prosecutors and the courts were fully aware of the interconnectedness of offences during this period, and the interdependent relationship between areas of law and the courts within which these laws were heard. In the following chapter, the options open to complainants of fraud will be considered, revealing why particular routes within the legal system were chosen over others in the attempt to resolve claims of fraud.

Chapter 4 Disposal of Fraud Accusations: To Prosecute, To Litigate, or To Walk Away?

The previous chapters have explored the definitions and forms of fraud offences in place during this period. Significantly, it has been established that fraud sat at the interface between the criminal and the civil law. Victims of frauds could sometimes pursue a number of criminal offences, or they could be barred from using the criminal courts due to the failure to establish one of the five underlying doctrines of criminal fraud as defined in this thesis. However, failure to establish one of these doctrines did not always mean that the defrauded had no further recourse to justice and, as illustrated in Chapter 3, judges would often hold that these cases should have been pursued in the civil courts.⁴⁰⁰

Having earlier established that accusations of fraud could be pursued in a number of different ways, this chapter explores the mechanisms and motivations for utilising these options. Using archival data from a range of courts, some conclusions are drawn regarding which courts or method of disposal were more frequently used with regard to fraud and why this might be. First, the interaction between the criminal and civil court systems is explored, alongside discussion of why either system may be preferred for disposal of fraud accusations at this time. Second, attention is paid to occasions when prosecutors chose to use the criminal justice system to pursue their accusation of fraud. In particular, whether fraud accusations were made in the summary or quarter sessions courts and, if such accusations were pursued in the summary courts, what types of fraud were being reported to the magistrates' courts.⁴⁰¹

It will become clear in this chapter that both the civil and the criminal courts had attracting and repelling characteristics for those pursuing accusations of fraud. This

⁴⁰⁰ For example per Lord Ellenborough, *R v Pywell and others* 171 E.R. 510; (1816) 1 Stark. 402

⁴⁰¹ As accepted in Chapter 2, the Magistrates' records across London are minimal and primarily relate to the City of London rather than Middlesex. However, as also stated in Chapter 2, this does not prevent some conclusions being made about the type of offences being reported in these lower courts.

chapter identifies a pivotal question: given the litigation and prosecution choices available⁴⁰², why did 469 indictments of fraud appear at the Old Bailey between 1760 and 1820? This question clearly intersects with the three over-arching questions of this thesis: What was fraud during this period?; Who was prosecuting fraud?; How were frauds prosecuted at the Old Bailey? By exploring the litigation options available to the those believing themselves to have fallen foul of a fraud, a step is taken in ascertaining the types of fraud heard across the entire judicial system, who would choose the Old Bailey over other juridical options, and what procedural or practical measures might entice the prosecutor to pursue their grievance in the Old Bailey.

It shall be demonstrated how extraordinary it was that so many indictments for fraud offences should appear at the most public and senior criminal court in the Metropolis. Moreover, a further and significant step in this thesis is taken by demonstrating that given the financial incentives and ramifications in the prosecution of these 469 indictments, the choice of using the Old Bailey for many of these indictments appears astonishing. This chapter argues that these indictments should really have been heard either in civil courts, or in much lower criminal courts. The reason for the appearance of these indictments at the Old Bailey is returned to throughout this thesis, but in this chapter, the focus is upon demonstrating how surprising it is that these indictments appear at the Old Bailey at all.

Civil or Criminal? Fraud within the Wider Court System

When pursuing an accusation of fraud, what choices were available to the complainant? What factors motivated complainants to employ one avenue of the justice system over another? During this period, a complainant of fraud had many options to pursue.

During the eighteenth century, and well into the nineteenth century, prosecutions were initiated, organised, and paid for by private citizens.⁴⁰³ Whilst there were the

⁴⁰² 'Prosecution' is the verb used throughout this thesis for criminal legal actions whereas 'litigation' is being used to signal litigation in the civil courts.

⁴⁰³ John Langbein, *The Origins of Adversary Trial* (Oxford University Press, 2003) p.11

beginnings of police forces within the metropolis, their role was primarily focused upon deterring street crime and executing warrants for arrest⁴⁰⁴; the police played no official role in the prosecution of crime until well into the nineteenth century.⁴⁰⁵ A Director of Public Prosecutions (DPP) would not be created until 1898 but the role of the DPP was limited to a handful of cases.⁴⁰⁶ There also existed an Attorney-General, but during the eighteenth century⁴⁰⁷ this office was to act as lawyer to the Monarch and not to represent the state or individual victims.⁴⁰⁸ As such, the criminal justice system was one of personal confrontation rather than state-initiated bureaucratic procedure.⁴⁰⁹ If someone believed they had been a victim of crime, it was left to that individual to conduct a prosecution.

However, there were significant obstacles in pursuing private prosecutions in this manner, most notably the great expense of prosecution in terms of both the direct financial costs and subsequent loss of earnings. The state therefore needed to impose a system whereby citizens would either be persuaded or compelled to pursue their claims through the criminal courts. The Crown and the government provided 'episodic reinforcement' of criminal prosecutions in the early-eighteenth century.⁴¹⁰ As well as alleviating the financial burden upon prosecutors, the state also provided a range of rewards and incentives to encourage the use of the criminal courts.⁴¹¹ For

⁴⁰⁴ For further details and a comprehensive history of the police see J.M Beattie, *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror* (Oxford University Press, 2001); King, *The Historical Journal*; Gregory J Durston, *Burglars and Bobbies: Crime and Policing in Victorian London* (Cambridge Scholars Publishing, 2012)

⁴⁰⁵ The exception was the Bow Street Runners which shall be returned to in Chapter 7.

⁴⁰⁶ Douglas Hay and Francis Snyder, 'Using the Criminal Law, 1750-1850. Policing, Private Prosecution, and the State' in D. Hay and F. Snyder (eds), *Policing and Prosecution in Britain 1750-1850*, Oxford, Clarendon Press, 1989 p.37

⁴⁰⁷ The significance of the Attorney-General in the prosecution of complex fraud cases certainly altered during the nineteenth century. For further discussion of the Attorney-General in the nineteenth century see in particular: Taylor, *Boardroom Scandal*; James Taylor, *Historical Research* and Taylor, *English Historical Review*.

⁴⁰⁸ For an in-depth discussion on the role of the Attorney-General see Guy Lurie, The Attorney-General in Eighteenth-Century England. *J. JURIS* 125 (2013)

⁴⁰⁹ King *The Historical Journal*, p.25

⁴¹⁰ Langbein, 'Origins' p.120

⁴¹¹ Norma Landau, *Law & History Review* (1999) p.507

example, the Reward System was introduced in 1692⁴¹², which awarded up to £40 for successfully prosecuting a felony.

The state also utilised a series of measures to coerce such enforcement. All courts had the right to bind over prosecutors through recognizances in cases of serious felony. This was to ensure that, once instigated, they continued with the prosecution and did not either come to an out of court settlement or discontinue the case once they realised the cost implications.⁴¹³

Magistrates in particular were bound by statute to prevent the compounding of felonies, whereby a felony was disposed of through methods other than the assize courts.⁴¹⁴ In Chapters 7, it will become apparent that London Magistrates, in particular Middlesex Magistrates, did not abide by such laws and in fact, were eager to use methods of alternative dispute resolution to dispose of many cases, often felonies, which came before their benches.

People had a number of choices when believing themselves to have been a victim of crime. These included putting into motion the wheels of the criminal justice system, using informal community sanctions, or not reporting the matter at all.⁴¹⁵ Within these broad headings of response, there were a number of more specific choices available. Informal community sanctions will not be considered in depth here⁴¹⁶, but the decisions made available by the criminal justice system deserve greater consideration as it is through the analysis of these that insights can be achieved regarding the practical and theoretical workings of the criminal justice system.

The Intersection between the Criminal and Civil Law

Before exploring some of the motivations of complainants in favouring the criminal justice system over the civil, or *vice versa*, some context is required to explain the

⁴¹² 4 & 5 Wil & Mar c.8 s.2

⁴¹³ Landau, *Law & History Review* (1999) p.507

⁴¹⁴ 2&3 Phil. & Mar., c.10 (1555)

⁴¹⁵ King *The Historical Journal*, p.27 and Shoemaker, *Prosecution*

⁴¹⁶ This thesis is primarily concerned with occasions when the criminal justice system was utilised rather than when it was bypassed.

interaction between the two systems. Civil law was primary in the eighteenth century legal system and the criminal law was barely an 'appendage to civil jurisdiction'.⁴¹⁷ Although criminal cases tended to receive the majority of public attention, it was within the civil courts that most hearings and disputes were resolved. John Langbein has argued that during the eighteenth century, civil law was 'trial avoiding' whereas criminal justice was 'trial-centered'.⁴¹⁸ However, Langbein limited his consideration to the assize courts. As shall be returned to later in this chapter, Magistrates' courts existed to filter out the majority of cases before they reached the superior courts.

This distinction in the volume of business passing through the civil and the criminal courts would certainly resonate with the modern lawyer. The twenty-first century civil courts are increasingly concerned with dispute resolution⁴¹⁹, whereas the criminal courts are used as a public forum in which to reiterate and demonstrate social morality through the public shaming and punishment of criminals⁴²⁰. However, in the eighteenth century, this distinction in purpose between the criminal and the civil courts was less clear.⁴²¹

Criminal courts were not the only means by which to pursue a grievance in the eighteenth century. There also existed a number of civil courts that may have appealed to those wishing to take legal action.⁴²² Unlike today, the delineation between the criminal and the civil law was less strict in the eighteenth century, primarily due to the system of private prosecution. This modern distinction between the civil and the criminal is largely due to the introduction of the Director of Public Prosecutions in 1898, the establishment of the police as the sole investigators and

⁴¹⁷ Langbein, 'Origins' p.7

⁴¹⁸ *Ibid*

⁴¹⁹ Lord Woolf, *Access to Justice* (1996) The full report can be found at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm> (accessed 13th July 2016)

⁴²⁰ Further theoretical discussion of public punishment can be found in Michel Foucault, *Discipline and Punish* and Norrie, *Crime, Reason and History*

⁴²¹ An example of the interaction between the civil and the criminal law and the greater role of the civil law in incidences now considered criminal see Drew Gray 'Settling their Differences: The Nature of Assault and its Prosecution in the City of London in the Late Eighteenth and Early Nineteenth Centuries' in Katherine D. Watkins (ed) *Assaulting the Past: Violence and Civilisation in Historical Context* (Cambridge Scholars Publishing, 2007)

⁴²² Landau, *Law & History Review* (1999) p.533

then prosecutors of crime, and finally the establishment of the Crown Prosecution Service in 1986. Comparably though, the decision of whether or not to report a crime to the police still rests with victims of crime to this day. However, contemporary prosecutorial agencies such as the Serious Fraud Office (SFO), Financial Conduct Authority (FCA) and Competition and Markets Authority (CMA) increasingly conduct investigations into the fraudulent misconduct of individuals and companies without being invited by any particular 'victim'.⁴²³

The fluidity between the eighteenth century civil and criminal courts extended to the bench. Due to the relative infrequency of assize court sittings, even in London, the majority of judges sitting on the bench at the Old Bailey spent most of their time hearing civil matters in the civil courts; courts that sat every working day (including Saturdays but not Sundays), and not merely for two weeks, eight times a year. These judges sitting at the Old Bailey were seconded from the three central civil courts: King's Bench, Common Pleas, and Exchequer.⁴²⁴ As has been discussed in Chapter 3, this judicial overlap is particularly significant for the development of fraud offences which straddled both the civil and criminal law, as well as equity and the common law.

In addition, the decline in general civil litigation⁴²⁵, partly due to the increase in expense, led many barristers practising in civil law to seek to subsidise their income through criminal briefs.⁴²⁶ This interrelationship between the civil and the criminal courts further supports the assertion that the criminal courts were really an appendage to the civil courts and consequently, any understanding of the eighteenth century criminal court as being separate from the civil is anachronistic.⁴²⁷ Rather, in

⁴²³ For powers relating to these agencies see: The Criminal Justice Act 1987 (in particular, section 2) Financial Services and Markets Act 2000, Financial Services Act 2012, Enterprise Act 2002, Enterprise and Regulatory Reform Act 2013

⁴²⁴ Langbein, 'Origins' p.7

⁴²⁵ W.A Champion, Recourse to the Law and the Meaning of the Great Litigation Decline, 1650-1750: Some Clues from the Shrewsbury Local Courts in *Communities and Courts in Britain, 1150-1900*, ed Christopher W Brooks and Michael Lobban (The Hambleton Press, 1997) 179

⁴²⁶ Christopher W. Brooks, *Lawyers, Litigation and English Society since 1450* (The Hambleton Press, 1998) 61

⁴²⁷ Gray, *Crime, Prosecution and Social Relations*, p.174

understanding the criminal courts, it is essential to give due consideration to the doctrines and practises of the civil system.

With regard to fraud in particular, this intersection between criminal and civil doctrines is acute and cannot practicably be separated. A complete exploration of the civil courts is not possible in this thesis as it would require a detailed analysis of the various courts and the types of action pursued in each, whether that be the King's Bench, Chancery or another venue, often depending on the nature of the action and the remedies sought.⁴²⁸ However, for current purposes it is enough to appreciate that there was often an option for complainants to seek redress for an alleged fraud through civil, as well as criminal channels.

Factors Contributing to Choosing Between the Civil and the Criminal Courts

It is impossible to definitively determine why complainants chose to use the civil or the criminal courts. This is partly because this would not have been questioned at the time they made their complaint. Perhaps in some circumstances the courts may have questioned why the prosecutor had chosen the civil courts over the criminal, but such motivation would only rarely be of importance to the grievance, such as when the motives of the prosecutor were called into question by the accused.⁴²⁹ Sadly, very few records remain of the preliminary stages of the complaints.⁴³⁰ There are a small number of justices' notebooks such as those of Dudley Ryder⁴³¹, but such records are few in number.⁴³² This does not prevent speculation as to why certain courses of action were more or less likely to appeal to prosecutors and pulling together a range of evidence can provide insights into this decision-making.

The focus of this thesis is the 469 fraud cases that appeared at the Old Bailey and it must be questioned why the prosecutors of these frauds chose to pursue their claims in the most serious criminal court available to them. Why did these prosecutors

⁴²⁸ Lobban, *Law Quarterly Review* p.292 and Mark Freeman et al, *Business History*, p.637

⁴²⁹ Hay 'Policing and Prosecution' p.348

⁴³⁰ King *The Historical Journal*, p.27

⁴³¹ See James Oldham's forthcoming transcriptions.

⁴³² For further discussion see Chapter 7

choose the criminal justice system? And why did they choose the most senior criminal court available to them? The factors which most likely played a role in this decision making were the cost of any legal action, the procedural characteristics and difficulties of each court, the remedies available for each court, and the increased publicity such action would bring.

The Cost of Legal Action

From the seventeenth century onward, legal costs increased, both in civil and criminal courts.⁴³³ In London's superior courts, costs of actions doubled between 1680 and 1750.⁴³⁴ Civil litigation became more expensive overall during the seventeenth century, but this was predominately because of taxes imposed by the government and increasing counsel fees.⁴³⁵ This was for a number of reasons including that some courts began to demand numerous copies of documents to be filed and additional government stamp duties were imposed upon some forms of litigation.⁴³⁶ Such expense is likely in some instances to have pushed the civil litigant into the criminal courts.

Criminal prosecutions were also expensive. Every stage of the process needed to be paid for separately, this included paying several officers of the court individually and at different rates depending upon the required task. Costs also varied depending upon the venue and the number of clerks involved, regardless of which court was chosen. When seeking to prosecute an alleged crime, the would-be prosecutor was faced with a complex myriad of options regarding both venue and form of complaint. The most common route into the criminal justice system was via the summary courts. The prosecutor would attend at a sessions of the local magistrate and request that an indictment be drawn up by the clerk of indictment. Prosecutors could also have initiated proceedings at higher criminal justice courts, directly at either the quarter

⁴³³ Margot Finn, *The Character of Credit, 1740-1914* (Cambridge University Press, 2003) p.197

⁴³⁴ *Ibid* p.197

⁴³⁵ Brooks, *Lawyers*, p.45

⁴³⁶ *Ibid*

or assize sessions.⁴³⁷ The prosecutor could then have proceeded to indictment or could opt to proceed via a recognizance.⁴³⁸

Summary court records from the City of London at the turn of the nineteenth century reveal some of the more common costs incurred by the would-be prosecutor in the lower courts. These costs varied depending upon the action pursued. The complexity and variation of the pricing of court officials continued with regards to the form of offence being pursued. An indictment for a common law felony cost two shillings, whereas an indictment for felony laid down by statute cost three shillings and four pence.⁴³⁹ When pursuing multiple indictments, there was an additional charge of four pence and a shilling had to be paid for every affidavit sworn.⁴⁴⁰ Additional costs could be incurred should the prosecutor not know the whereabouts of the transgressor, or if the accused refused to attend the sessions. The prosecutor would need a warrant issued by the Bench (which was very common), and the issuing of the warrant itself would cost four shillings and four pence.⁴⁴¹ A warrant was of no use without someone to execute it, a duty that many left in the hands of a constable who would charge approximately five shillings for his trouble. Consequently, the very first stage of a prosecution, carried out in the least expensive method and without legal representation could cost the prosecutor almost a pound.⁴⁴²

At the quarter sessions, indictments were less frequently used because complainants would often resort to having the accused bound over with a recognizance rather than proceeding to a full prosecution.⁴⁴³ This was largely due to the expense;

⁴³⁷ Shoemaker, *Prosecution*, p.23

⁴³⁸ For a comprehensive exploration of the use of recognizance, see Shoemaker, *Prosecution*

⁴³⁹ Tables of fees for Clerk of the Peace of the City of London and for other jurisdictions at the London Metropolitan Archive reference CLA/047/LC/02/001

⁴⁴⁰ *Ibid*

⁴⁴¹ Papers re case against William Gorden and Thomas Drewry at the London Metropolitan Archive reference CLA/047/LJ/21/038

⁴⁴² By 1816, an ordinary labourer could expect to earn an average of three shillings a day and spend an average of eight or nine shillings per week on food. For more details on cost of living see M Dorothy George, *London Life in the Eighteenth Century* (1965, Penguin Books) and Lorna Weatherill, *Consumer Behaviour*. For more details of average incomes see L.D Schwarz, *London in the Age of Industrialisation: entrepreneurs, labour force, and living conditions, 1700-1850* (Cambridge University Press, 1992)

⁴⁴³ Shoemaker, *Prosecution* p.127 Binding over by recognizance was similar to the modern practice of binding over for good behaviour.

recognizances were seen as a cheaper and simpler method to achieve the ends of complainants.⁴⁴⁴ Of course many still wished to see their accused formally convicted but often the recognizance was enough to either alter the accused's behaviour, or to satisfy the complainant that some measure had been taken against the accused.⁴⁴⁵

If the prosecutor chose to proceed via indictment at the quarter sessions rather than the assize, the clerk of the quarter session would also need to be paid in order to draft the indictment.⁴⁴⁶ Norma Landau estimates that a prosecution at the quarter sessions could be carried out for fifteen shillings, provided no legal representation or advice was required.⁴⁴⁷ If a solicitor was hired (it was unusual for barristers to be required in the quarter sessions), the cost of a prosecution could rise to £2.⁴⁴⁸

Legal professionals greatly increased the cost of prosecution, whether they were attorneys, solicitors, or barristers. There is much discussion relating to the use of counsel in the Old Bailey until the mid-nineteenth century specifically in relation to fraud prosecutions, which will be discussed in more detail in Chapter 6.⁴⁴⁹ Counsel may not have been prevalent in the eighteenth and nineteenth century courts, although solicitors were frequently employed at the preliminary stages of the criminal justice process in order to help navigate the procedure and idiosyncrasies of the court system.⁴⁵⁰

In light of these contingencies, it is difficult to estimate the average cost of a prosecution in the eighteenth or nineteenth century. However, we know that the higher the court, the more expensive the prosecution. A complaint to the summary court would be cheaper than applying for an indictment directly at the quarter sessions or assize courts. However, if this complaint related to a felony, there was a

⁴⁴⁴ *Ibid*

⁴⁴⁵ For more information regarding recognizances, see Shoemaker, *Prosecution*

⁴⁴⁶ Shoemaker, *Prosecution*, p.28

⁴⁴⁷ Landau, *Law & History Review* (1999) p.534

⁴⁴⁸ *Ibid*

⁴⁴⁹ For general discussion of the prevalence of counsel see: Cairns, *Advocacy*; Langbein, *The University of Chicago Law Review*; John H Langbein, 'The prosecutorial origins of defence counsel in the eighteenth century: the appearance of solicitors' *Cambridge Law Journal* 58(2) July 1999, May, *The Bar*; John Beattie, *Crime and the Courts*; Griffiths, *Law, Crime and History*

⁴⁵⁰ B L Anderson, 'The Attorney and the Early Capital Market in Lancashire' in Francois Crouzet, *Capital Formation in the Industrial Revolution* (Methuen & Co, 1972) p.225

strong possibility that the prosecutor would find themselves liable for the assize court costs at a later date. The more complex or serious a matter pursued by the prosecutor, the more expensive the process would become.

Having examined the pecuniary implications of using the civil rather than the criminal, and the lower or higher courts, the question remains whether such considerations impacted upon the 469 prosecutors of fraud under consideration. The increases to costs, such as the instruction of counsel by fraud prosecutors, will be considered in depth in Chapter 6. However, what is apparent is that prosecutors by and large chose to use the most expensive route through which to pursue their grievances. As will be shown in Chapter 5, the majority of fraud offences heard at the Old Bailey were misdemeanours and so, prosecutors could equally have pursued these cases at summary or quarter sessions level.

In order to gain a better understanding of the economic motivations of prosecutors, it is necessary to know the value of the goods lost which form the subject of the fraud. Of the 469 indictments that form the focus of this study, the value of the goods or monies obtained are vary widely. Fortunately, there are details of the goods obtained by fraud for all fraud indictments heard at the Old Bailey during this period. The table below reveals that the majority of fraud cases related to goods worth less than 500d (or just over £2).

Table 4.1: The Value of Goods Obtained by Fraud Indictments

	Frequency	Percentage
Less than 500d	318	67.8
500-1000d	34	7.2
Over 1000d	117	24.9
Total	469	100.0

Whilst nearly sixty-eight per cent of cases concerned incidences where the obtained goods valued less than £2, there were many cases in which the goods were worth even less. In 1785, Thomas Field was charged with fraudulently passing off a financial

instrument, the value of which was a mere two shillings.⁴⁵¹ It is notable that someone spent considerably more money on a prosecution than the value of the goods lost.

The mere fact that such cases appear at the Old Bailey demands attention. As shall be explored below, these prosecutions were mostly in relation to misdemeanours and, as a result, there was no financial reward or gain for a successful conviction. Moreover, it has been demonstrated that criminal trials were expensive, and the burden of paying for these prosecutions was squarely on the shoulders of the prosecutor of a misdemeanour. It may be concluded that even where high-value goods were obtained, the use of the criminal law to address this loss of property was not cost-effective and was essentially an unprofitable undertaking in purely monetary terms. Given that nearly sixty-eight per cent of fraud indictments at this time concerned relatively small amounts of money and low-value goods, the choice of using the highest criminal court appears even more extraordinary.

Not only were over two thirds of prosecutors for fraud choosing to engage with a branch of the criminal justice system that would cost more than the goods lost, but they were not financially gaining by this choice.⁴⁵² This again suggests that motivations for using the criminal justice system were driven by more than financial gain.

Procedural Considerations

As today, civil and criminal procedure differed in the eighteenth and early-nineteenth centuries. The main areas of divergence in procedure lay in the level of discretion attributed to the prosecutor or plaintiff, the level of complexity of pre-trial and trial procedure, and the options and role of the testimony of the prosecutor or the plaintiff. The extent of the discretion of the prosecutor after complaint differed depending upon whether the offence was one of misdemeanour or felony.

⁴⁵¹ OBP, May 1785, trial of Thomas Field (t17850511-76)

⁴⁵² See below

Once a felony was reported by a complainant, the decisions regarding proceedings were limited. This was true at least according to the Marian statutes.⁴⁵³ In requiring prosecutors to be bound over by the magistrates to pursue any future prosecution, the Marian statute circumscribed the autonomy of the private prosecutor and limited the prosecutor's discretion as to whether to prosecute.⁴⁵⁴ However, the complainant would not be subject to the restrictions of the Marian statutes if the complaint was initiated in one of the civil courts, entirely by-passing the criminal justice system.⁴⁵⁵ The role of discretion is vital in understanding the eighteenth century legal system and will be considered in more detail in Chapter 6. However, it is apparent that prosecutions of offences such as obtaining goods by false pretences had more discretion than those prosecuting felonies. In such cases, prosecutors may have felt more confident using the higher criminal courts as they would have the discretion to cease proceedings without great sanction.

The cost considerations of the civil courts were inextricably linked to procedural complexities and limitations. In the eighteenth century common law courts, there was a general feeling that the law operated well, but that procedures were becoming increasingly oppressive and complex, leading to delays in administering justice.⁴⁵⁶ By the nineteenth century, the complexity and perceived injustice of the chancery courts was publically acknowledged and ridiculed.⁴⁵⁷ It is little wonder that complainants who found their case straddling the criminal and civil system might choose to pursue their claim through criminal justice channels rather than being entangled in the web of civil court procedure.

A further fundamental difference between criminal and civil trials was the role of the prosecutor. Civil litigants could not give evidence as they had an interest in the outcome of the trial and thus, were seen as open to perjuring themselves.⁴⁵⁸

⁴⁵³ Langbein, *'Origins'* pp.41-43

⁴⁵⁴ *Ibid* p.42

⁴⁵⁵ For in-depth discussion of the Marian Statutes see Langbein, *Origins*; John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, and France* (Harvard University Press, 1974)

⁴⁵⁶ Brooks, *Lawyers* p.48

⁴⁵⁷ The best example can be found in Charles Dickens' *Bleak House* (Wordsworth Editions, 1993)

⁴⁵⁸ Langbein, *'Origins'* p.38

Prosecutors in criminal cases however could give evidence and speak for themselves in open court.⁴⁵⁹ In criminal cases, the overarching victim was the Monarch, the Head of State. This went beyond the merely symbolic when it came to rules of procedure and evidence as this allowed the victim to be seen as a witness, not a litigant, and thus was not an interested party *per se*, meaning they could give evidence.⁴⁶⁰ This opportunity to publically speak about how they had been injured or had suffered at the hands of the accused may have contributed to the complainant's use of the criminal courts. The prospect of being able to publically shame the accused may have enticed the complainant away from the civil system and accept the risks of criminal jury trial.

Of course, in using the criminal courts, prosecutors also gave a voice to the defendant. In civil matters neither interested party could give direct evidence. It is for this reason that civil jury trial was less useful because the testimony of the parties was excluded.⁴⁶¹ Regardless of the practical successes of the 'accused-speaks trial'⁴⁶², a vexatious prosecutor may not have risked exposure through giving direct voice to his victim.⁴⁶³

Remedies

A motivating factor for using any facet of the law would have been the anticipated outcome of the case. As today, the civil courts were limited in the remedies they could enforce and therefore greatly relied upon the use of damages. There were some equitable remedies available during this period, but these were restricted to the Chancery courts.⁴⁶⁴

⁴⁵⁹ Landau, *Law & History Review* (1999) p.534

⁴⁶⁰ Langbein, '*Origins*' p.38

⁴⁶¹ *Ibid* p.8

⁴⁶² *Ibid* p.38

⁴⁶³ For further discussion regarding the vexatious prosecution see Hay '*Policing and Prosecution*'

⁴⁶⁴ For an overview of the Court of Chancery and equitable remedies see: P Tucker, 'The Early History of the Court of Chancery: A Comparative Study' *English Historical Review*, Sep 2000, Vol. 115 Issue 463, p.791.

Should a case of fraudulent misrepresentation be litigated as a breach of warranty or contract, there were some additional considerations for the parties.⁴⁶⁵ The initial concern of the claimant and the court relates to the fourth doctrine of criminal fraud identified within this thesis. If the court believed the matter to be a clear breach of warranty then the accuser could only bring this matter in a civil court at the criminal branch of the justice system would be closed to them.⁴⁶⁶ Alongside the satisfying of this doctrine, the two most significant considerations for accusers of fraud were the extent of common law damages, and whether property was recoverable.⁴⁶⁷ As today, contract law in the eighteenth century held that bona fide purchasers for value without notice could not forfeit the transferred property due to a previous fraudulent conversion at an earlier stage in the life of the property.⁴⁶⁸ Thus, if the fraudster had sold the goods obtained by fraud to an entirely innocent third party, then the goods could not be recovered by the original owner. This was not the case for larceny, where the property could be recovered by the initial owner.⁴⁶⁹ The relationship between the two offences has been detailed in the proceeding chapter. Consequently, in cases of fraudulent misdemeanour, had the goods been sold to an innocent party there would be no way, either under criminal or civil law, to recover the fraudulently obtained property.

Complainants may have resorted to the criminal justice system in order to recover their goods. Such motivation is closely linked with the earlier discussion considering costs of prosecution. It was possible for the goods obtained by felony to be recovered by the victim.⁴⁷⁰ However, this did not apply to goods that had been obtained through fraud and false pretences. The legislation allowing restitution of goods was passed in the time of Henry VIII and only applied to offences that were felonious. As

⁴⁶⁵ The jurisprudential use of common law contract law in relation to fraud cases has been explored in Chapter 3

⁴⁶⁶ For more detailed discussion regarding the five doctrines of fraud see Chapter 3

⁴⁶⁷ For a comprehensive authority on the development of contract law and damages recoverable in instances of contractual misrepresentation see: P.S Atiyah, *Essays on Contract* (Clarendon Paperbacks, 1990); Atiyah, *Rise and Fall*

⁴⁶⁸ For an overview of contractual remedies and the disposal of property see: G H Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford Scholarship Online, 1988)

⁴⁶⁹ Giles, *Criminal Law* p.225

⁴⁷⁰ 21 Hen 8, c.11

false pretences were a misdemeanour, victims of most frauds could not reclaim their goods.⁴⁷¹

Had the properties obtained not been converted or title passed to an innocent third party, then properties could be recovered in the civil courts, whereas they could never be recovered in the criminal courts. However, criminal courts had many remedies and punishments available to them.⁴⁷² The criminal remedy available depended upon the type of offence in question. The majority of trials heard, at any stage of the criminal process, were property offences, and in those cases, mostly larceny. With regard to property offences, Landau has argued that, certainly in the quarter sessions, the main aim of the court was to gain compensation for the victim and not to punish the accused.⁴⁷³ However, as stated above, compensation was not possible in cases of misdemeanour. Prosecutors may have been motivated by a number of economic, social, or personal consequences such as punishing the accused or publically declaring these crimes unacceptable.

Prosecutors had some agency over the sentence meted out to the accused through their influence on the judge.⁴⁷⁴ Thus, if punishment was the remedy the complainant desired, they could strongly influence the decision of the court. Because the criminal justice system was both operated and utilised by private prosecutors, the functioning of the courts were greatly dictated by the desired ends of prosecutors.⁴⁷⁵ In theory, prosecutors did not only play the main role in deciding whether to prosecute, their role continued well beyond the trial and into sentencing. Should the accused have confessed to the crime, prosecutors would be consulted by the court when determining sentence.⁴⁷⁶ When the accused did not plead guilty, the court could still consult the prosecutor after the jury convicted in order to find a satisfactory outcome for the prosecutor.⁴⁷⁷ Of course, this was limited in capital offences, although the prosecutor continued to play an important role in any decisions of the judge or later,

⁴⁷¹ Catharine MacMillan, *The Cambridge Law Journal*, p.719

⁴⁷² Oberwittler, *Historical Social Research* p.20

⁴⁷³ Landau, *Law & History Review* (1999) p. 508

⁴⁷⁴ King, *The Historical Journal*, p.27

⁴⁷⁵ Landau, *Law & History Review* (1999) p.536

⁴⁷⁶ *Ibid* p.527

⁴⁷⁷ *Ibid*

in any appeals for mercy. This consultation of the complainant further supports Landau's hypothesis that the courts' overall objective was to satisfy the prosecutor. Landau's research mainly focused upon assault offences, but the logic of the criminal courts being prosecutor-focused, particularly at summary level, is sound.

Having identified the lack of financial gain for such prosecutions, a motivation for use of the criminal courts to prosecute fraud emerges; the prosecutor either sought to punish the accused⁴⁷⁸, to deter individuals from committing such crimes against them in the future, or to make a broader declaratory statement regarding intolerance of such crimes. As shall become apparent when exploring the prosecutors of fraud, a large number of complainants were shopkeepers or artisans.⁴⁷⁹ Such complainants may have felt particularly vulnerable to fraud and may have wished to publically prosecute fraudsters, not to deter that particular individual, but to declare an intention to prosecute all such criminals.⁴⁸⁰ This motivation will be further considered in Chapter 6, in which the tools and aids for prosecutions of fraud at the Old Bailey will be discussed.

The Avoidance of Publicity

Partly due to the Proceedings and the general public appetite for crime reporting, trials at the Old Bailey were more likely to be publicised than those heard within the civil courts. This publicity may have attracted some prosecutors, but deterred others. In many instances, prosecutors of fraud may have chosen not to engage with the criminal justice system at all. Writing off a loss may have been a common occurrence, particularly amongst those who were not frequently the subject of fraudulent activities. As detailed above, prosecutions were an expensive undertaking and if the value of the goods lost were low, then one small loss may have been written off. However, those who lost property or money regularly through frauds, were more inclined to use the criminal justice system in order to deter future frauds. Equally,

⁴⁷⁸ Shoemaker, *Prosecution*, p.201

⁴⁷⁹ See Chapter 5

⁴⁸⁰ Such a declaration is similar to signs in modern shops stating 'shoplifters will be prosecuted'.

those who frequently lost small quantities of goods or monies may have been more inclined to accept a small proportion of loss.

Publicity may have deterred complainants of fraud offences who felt themselves either partly to blame for their predicament, or who felt foolish for falling foul of a swindle or trick. In tracing the development of fraud-related laws preceding the eighteenth century⁴⁸¹ we see the continuing significance of the doctrine that the law does not operate to protect a fool.⁴⁸² Any prosecutor of fraud ran the risk of public disapprobation should it be felt that the complainant contributed to their loss through foolishness or gullibility. There are a number of examples of complainants quite clearly trying to lessen their own blame or gullibility when making an accusation of fraud. For example, when Daniel Brestow prosecuted Thomas Scott for defrauding him in gambling, Brestow went to great lengths to stress that he had not been careless and whilst he had been drinking, he repeatedly stressed that he did not ordinarily drink.⁴⁸³ This is a common example of a complainant putting a narrative to the court in which he cannot be held responsible for falling victim to a fraud. The complainant in a fraud accusation, whether it is criminal or civil, would have to be careful to demonstrate that this fraud was not committed due to the fault of the victim. Of course, there are no records of prosecutors who decided not to proceed with a trial due to their being made a fool and consequently, not engaging with the criminal justice system.

As will be explored in Chapter 5, certain types of complainant may have been particularly embarrassed by being the victim of a fraud. For example, in the case of John O'Conner and John Alsibrook, prosecuted in 1773 by Richard Ryder for a rather crude gambling fraud which was eventually pursued as a regulatory breach of gambling for more than 10 pounds.⁴⁸⁴ Ryder was described before the court as having been '...a little forward in liquor; that he called again at eight and saw the defendants; that he was worse than with respect to liquor, than he was before, for he was quite

⁴⁸¹ See Chapter 3

⁴⁸² Giles, *The Criminal Law* p.218

⁴⁸³ OBP, September 1769, (t17690906-106)

⁴⁸⁴ OBP, February 1773, trial of John O'Conner and John Alsibrook (t17730217-74)

fuddled...'. This state of drunkenness resulted in Ryder not being able to recall how much he lost to the accused and not being able to recall how he was defrauded, beyond that he thought one of the accused could see his cards. The proceedings fail to detail any judicial comment on the behaviour of Ryder, but it is perhaps telling that the judgment was respited.

Randall McGowen has suggested that shopkeepers in particular may have been reluctant to report frauds committed against them due to the 'emotional and economic issues peculiar to this crime'.⁴⁸⁵ Assumedly by 'emotional and economic issues', McGowen is referring to the embarrassment of having been defrauded⁴⁸⁶, and the undesirability of being publically named as a potential target for future frauds. This argument is not supported by the high number of tradespeople who prosecuted fraud offences in the Old Bailey. Moreover, it is not in keeping with the existence of prosecution associations such as the Society for the Protection of Trade against Swindlers and Sharpers⁴⁸⁷, which were dedicated to the prosecution of fraud committed against tradespeople. Such associations reflect a pro-active approach to tackling and deterring fraud by shopkeepers. Whilst it was true that prosecutors needed to be careful not to look foolish in succumbing to a fraud, there is no suggestion from contemporary sources that shopkeepers were criticised for falling foul of the swindler.⁴⁸⁸ As shall be further explored in Chapter 5, a number of tradespeople were eager to prosecute frauds.

Alternative Dispute Resolution

What of those who felt they were victims of fraud but chose to resolve their disputes outside of the legal system? Victims had the option to not pursue a fraud at all, or they could seek satisfaction through the threat of prosecution alone. There could be

⁴⁸⁵ Randall McGowen 'From Pillory to Gallows: the Punishment of Forgery in the Age of the Financial Revolution' *Past & Present* no.165 (Nov.1999) pp.107-140. p.126

⁴⁸⁶ Possibly due to the doctrine that the law would not act to protect a fool.

⁴⁸⁷ To be discussed at length in Chapter 6

⁴⁸⁸ Daniel Defoe, *The Complete English Tradesman* (Alan Sutton Publishing Limited, 1987) First published 1726; Unknown Author, *A View of London, or The Stranger's guide through the British Metropolis* (B. Crosby & Co, 1803); Unknown Author, *The London Guide & Stranger's safeguard against the cheats* (J. Bumpus, 1819)

a number of reasons for this avoidance of the court system: resistance to engage with the tools of the state, a perception that desired ends could be achieved through less formal or community channels, a desire to avoid publicity, or to avoid additional prosecution costs. There are a number of examples within the Old Bailey of prosecutors declining to offer evidence at the final hour, indicating some resolution to the disagreement outside of the court system. Included are some examples of such practice being carried out with the contribution of counsel.⁴⁸⁹ For example, the case against William Hodge in 1813 was discontinued as soon as it reached the Old Bailey, even though counsel had been instructed: ‘Mr. Alley, counsel for the plaintiff, declining to offer any evidence, the defendant was acquitted’⁴⁹⁰

In most instances, the courts, both civil and criminal, existed in order to resolve disputes between citizens. This resolution was most likely to take the form of some compensation or reparation, or the promise to cease the offending behaviour.⁴⁹¹ This is not the forum to discuss community-based methods of dispute resolution⁴⁹², but an understanding of the use of the court system cannot be complete without some consideration of alternative, unintended uses of the court system.

The threat of criminal prosecution could often be enough to persuade the transgressor from repeating their crime and even to return the fraudulently obtained goods. Whilst it is impossible to gauge the extent of such a practice, it was assumed, by both modern academics and contemporaries, that the court system could be used by complainants to pressure others into paying debts.⁴⁹³ This was not necessarily an underhanded motive, but was intended to recover goods or enforce a debt, ideally without paying the full costs for prosecution or litigation. Such out-of-court

⁴⁸⁹ OBP, April 1813, trial of William Hodges (t18130407-169) or OBP April 1813, trial of John Wolley Lesingham (t18130407-170)

⁴⁹⁰ OBP, April 1813, trial of William Hodges (t18130407-169)

⁴⁹¹ Shoemaker, *Prosecution*, Chapter 5

⁴⁹² Although such methods as Rough Music are a fascinating example of community ‘justice’. For further discussion see E. P Thompson ‘Rough Music Reconsidered’ *Folklore*, Vol.103, No.1 (1992) pp.3-26

⁴⁹³ Hay, ‘*Policing and Prosecution*’

settlement might be welcomed in the post-Woolf English legal system⁴⁹⁴, but in the eighteenth century, arbitration was generally not encouraged for felony.⁴⁹⁵ It was however encouraged for misdemeanour and consequently, the majority of the 469 cases heard at the Old Bailey could have been resolved outside of the formal criminal sanction. Given the misdemeanour status of most fraud offences, we are again faced with the question of why 469 prosecutors chose to pursue their claims, at least to the point of beginning the trial process, within the assize court. Such prosecutors had less expensive and time-consuming litigation options available to them, and yet hundreds chose to engage with an expensive and ostensibly thankless court.

Fraud within the Summary and Quarter Sessions Courts

As explained above, when considering litigation options in fraud cases, it is imperative to consider both the civil and the criminal courts. By contextualising the choices available to prosecutors, this now allows for deeper consideration of *why* fraud was pursued in the criminal justice system, and more specifically, *where* fraud was pursued in the criminal justice system. Where prosecutors chose to pursue an accusation of fraud through the criminal courts, where did they first report their grievance, what types of fraud accusations appeared at these courts, and how did these courts dispose of these complaints?

The answering of these questions is problematic. As explored in Chapter 2, there are significant methodological hurdles to be jumped when trying to use summary court records from this period. The summary courts were courts of no record and thus, any records which did exist did so at the discretion of the clerk. Moreover, a series of fires and lost records has resulted in no equivalent summary records for both Middlesex and the City. This largely prevents any comparative analysis between the two. However, the Minute Books for both the Mansion House and the Guildhall of the City

⁴⁹⁴ Lord Woolf, *Access to Justice* (1996) The full report can be found at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm> (accessed 13th July 2016)

⁴⁹⁵ Gray, *Crime, Prosecution and Social Relations*, p.71

of London have been sampled in order to ascertain the frequency with which fraud complaints were made.

As explained in Chapter 7, Greg Smith has transcribed a number of the Guildhall Minute Books, and a small number of the Lord Mayor's Waiting Books.⁴⁹⁶ Both of these records were held in approximately a month per book, surviving from May 1752 to 1796. These records are not complete and only approximately fifty-five books remain, of which the first surviving fifteen Smith has transcribed.⁴⁹⁷ These books run from 1751 to 1781. In assessing the frequency and disposal of fraud-related cases within the Guildhall, a further six Minute Books⁴⁹⁸ have been assessed along with ten Mansion House Minute Books.⁴⁹⁹ In total, twenty one Guildhall Minute Books have been analysed, along with ten Mansion House Minute Books.

In analysing these summary court records the frequency of fraud reporting at the magistrates' court and what types of fraud were most commonly heard can be ascertained. Because no such equivalent records remain for the Middlesex and Westminster petty sessions, the City records will have to form the basis of the analysis. This is not to conclude that the Middlesex records would be similar to the City, as this thesis repeatedly demonstrates the discrepancies in the treatment of fraud between the two jurisdictions.⁵⁰⁰

Frequency of Complaints

These Minute Books reveal that between one and four complaints regarding fraud appear in the Minute Books per month. Sadly the records are very difficult to trace from one month to the next and so it is rarely possible to trace outcomes of these initial hearings unless they eventually reached the Old Bailey.⁵⁰¹ It is possible that the Minute Books hold only a fraction of the hearings held at the Magistrates' offices.

⁴⁹⁶ Smith, *Summary Justice*

⁴⁹⁷ *Ibid*

⁴⁹⁸ Guildhall Justice Room – Minute Books at the London Metropolitan Archive reference CLA/005/01

⁴⁹⁹ LMA CLA/004/02

⁵⁰⁰ See Chapter 7

⁵⁰¹ Although none of the cases identified in the Minute books were later heard in the Old Bailey.

More significantly, it cannot be said that because a case does not appear in the Minute Books that it was not heard at that particular court. These records do reflect however that fraud complaints were definitely being heard in the summary courts; in low frequencies, but certainly regularly. The next question is whether the forms of fraud being heard were of the same quality and characteristics of the forms of fraud heard at the Old Bailey.

Types of Complaints

As with other court records, these summary records persistently refer to 'a fraud' so often it is not possible to ascertain the exact nature of the offence.⁵⁰² However, extrapolating from the information available, it is apparent that the majority of fraud accusations heard at in the summary courts were for obtaining goods by false pretences.⁵⁰³ Accusations included the obtaining of geese or horses through false pretences and accusations of fraudulently obtaining goods from tradespeople.⁵⁰⁴ As shall be demonstrated in Chapter 5, these types of fraud mirror exactly the forms of fraud heard within the Old Bailey.

The eighteenth century magistrates heard a large number of regulatory cases, both civil and criminal in nature. Magistrates' offices heard a variety of disputes, the most common of which related to payment of debts, returning of borrowed items, and defrauding at cards.⁵⁰⁵ The Magistrates' courts were an ideal setting within which to begin or resolve disputes relating to fraud offences that sat between the civil and the criminal.⁵⁰⁶ There are a number of examples of contractual and commercial disputes being addressed through fraud informations at the Guildhall. The Alderman appeared willing to adjudicate on these matters as if they had full jurisdiction in the civil courts. In May 1752, William Sparry accused John Knight of fraudulently

⁵⁰² This has been discussed in Chapter 2 and will be further explored in Chapter 5

⁵⁰³ Guildhall Justice Room – Minute Books at the London Metropolitan Archive reference
CLA/004/02/001

⁵⁰⁴ *ibid* CLA/005/01/020

⁵⁰⁵ King, *Past & Present*, p.127

⁵⁰⁶ See Chapter 7 for more detail of the workings of magistrates' courts

obtaining monies but the court found both parties had cheated each other and recommended they deal with their disagreements outside of the courts.⁵⁰⁷

Fraud Disposed of within the Summary Courts

Table 4.2: Disposal of Fraud Accusation in the City of London Summary Courts

Disposal	Frequency	Percentage
Dismissed	17	41.46
Adjourned ⁵⁰⁸	8	19.51
Committed to Prison ⁵⁰⁹	4	9.76
Upholding of contract ⁵¹⁰	2	4.88
Warrant Issued ⁵¹¹	2	4.88
Committed to Newgate ⁵¹²	1	2.44
Referred to Middlesex ⁵¹³	1	2.44
Unknown	6	14.63
Total	41	100.00

Overwhelmingly the most common form of disposal of fraud at the summary courts is dismissal. Comparative data does not exist regarding other offences and the rate of dismissal by Magistrates. However, as the summary courts were designed to act

⁵⁰⁷ Guildhall Minute Book, 25th of May 1752 cited in Smith, *Summary Justice*

⁵⁰⁸ In all instances of adjournment, no further or future records of the complaint can be found.

⁵⁰⁹ Poultry or Wood Street Comptor

⁵¹⁰ There are examples where the accused counter-accuses the prosecutor and the Magistrate finds for the accused.

⁵¹¹ Again, though a warrant was issued, no further record of the complaint can be found in either summary court or the Old Bailey

⁵¹² Although the accused was committed to Newgate, there is no record of further action within the Old Bailey

⁵¹³ For details see Chapter 2

as a filter for the wider criminal justice system, siphoning cases away from the more senior courts, it is perhaps unsurprising that a large number of complaints should be dismissed. Such a high rate of dismissal is unsurprising for fraud complaints given the confusion and osmosis between the criminal and civil law. Magistrates may have directed contractual disputes out of the summary courts and into the civil courts. However, there are examples of City Magistrates adjudicating on contractual disputes.

In 1780, Timothy Green brought Mary Somers before Alderman Sainsbury on a charge of 'defrauding'. The alderman found Green and Somers to have a contractual dispute and took it upon himself to find for Mary Somers, ordering Green to fulfil his side of the bargain.⁵¹⁴ Such clear examples are found under the categorisation of 'upholding a contract', although this is only allowed for due to the uncommon detail of the records in that instance. Given this potential interconnection between the criminal and civil law, this would explain why summary justices were likely to avoid using the criminal system to settle such disputes.

The next stages, and ultimate outcomes of cases that were adjourned or where the accused was committed to prison, sadly cannot be traced due to the paucity of the records. However, it is clear that none of these cases, specifically for fraudulent offences, were heard at the Old Bailey. In fact, analysis of the Minute Books would suggest that records of those cases committed to the Old Bailey were not detailed in the Minute Books, but were recorded elsewhere, such as in gaol delivery records and calendars. This would explain why very few of the 469 indictments for fraud heard at the Old Bailey during this period appear in any of the summary court records. This certainly does not mean that cases did not originate in the summary courts, only that records of these have not been kept.

As well as the most common misdemeanours of fraud, summary court records also included instance of fraudulent felony in the form of fraudulent obtaining of naval prize money. For example, the Mansion House formed the venue for a small number

⁵¹⁴ Smith, *Summary Justice*

of prize money cases such as the accusation by Thomas Broughton against Robert Potts and John Dickenson for the fraudulent obtaining of prize money relating to the vessel, *The London*.⁵¹⁵ Interestingly, when the case was brought before the justices the next day, the information was reduced to merely a common cheat.⁵¹⁶ This change of tact by the prosecutors, from capital felony to misdemeanour, suggests that either the prosecutors realised the potential consequences of their initial charge and changed their mind or, the Magistrate suggested a lesser charge. This is an extraordinary example as it suggests that justices were either encouraging, or allowing for, the compounding of felonies. Also, that this was permitted with regard to an offence that was treated so harshly by the criminal justice system, such as the fraudulent obtaining of prize monies.

The Minute Books reflect that the types of fraud being heard within the summary courts are very similar to the cases heard at the Old Bailey. The most common form of fraud was by false pretences or a breach of contract with occasional appearances of frauds against the navy. However, it is significant that so many contractual disputes appear at the summary courts, but not at the Old Bailey. This reflects how the Magistrates were seen as an initial venue to report a grievance, specifically in relation to all manner of social and economic disputes. The Old Bailey however played a different role as a more senior and obviously criminal court.

There is no clear evidence that the cases disposed of at the Petty Sessions were of a significantly less serious nature than those reaching the Old Bailey. In light of this, it is necessary to look at the number and nature of fraud offences heard at the next most serious venue, the quarter sessions.

Quarter Sessions

Quantitative research of quarter sessions court records is hampered by the fact that often the offence, the parish of residence and the occupation of the defendant were

⁵¹⁵Guildhall Justice Room – Minute Books at the London Metropolitan Archive reference
CLA/004/02/002 6th November 1784

⁵¹⁶ *Ibid*, 7th November 1784

all unreliable.⁵¹⁷ More significantly, like the summary courts, the quarter sessions records have not been digitised and so any research, including that conducted for this thesis, requires sampling of the records rather than any holistic analysis. Unlike the summary courts however, the quarter sessions records were at least recorded with some pro forma. The Sessions rolls are very large and detailed bundles of documents making research far more cumbersome and time constraining. However, samples of the quarter sessions records have been taken from Westminster and Middlesex, and the City. These samples cover one month per five years and provide a snapshot of the business heard at the quarter sessions. To give scale to the number of fraud cases appearing at the sessions, the number of recognizances heard that session is also given.

Table 4.3: Sample of Quarter Sessions Recognizances in Middlesex and Westminster, 1760-1820.

Jurisdiction	Date	Total number of recognizances	Recognizances for Fraud
Westminster	January 1760	266	4
Middlesex	Sep 1765	540	2
Middlesex	May 1770	298	2
Middlesex	July 1775	127	3
Westminster	January 1777	340	4
Middlesex	January 1780	218	0
Middlesex	February 1785	26	0
Middlesex	October 1790	682	5
Middlesex	September 1795	278	1
Middlesex	July 1800	178	4
Middlesex	January 1805	208	4
Westminster	April 1810	177	6
Middlesex	February 1815	293	4

⁵¹⁷ Shoemaker *Archives*, p.145

Table 4.4: Sample of Quarter Sessions Recognizances in the City of London, 1760-1820.

Jurisdiction	Date	Total number of recognizances	Recognizances for Fraud
The City	July 1760	113	5
The City	February 1765	73	6
The City	October 1770	40	0
The City	January 1775	40	0
The City	April 1780	49	0
The City	December 1785	59	3
The City	January 1790	51	0
The City	October 1795	48	0
The City	February 1800	82	0
The City	May 1805	38	0
The City	September 1810	52	1
The City	June 1815	40	2
The City	June 1820	45	2

Comparing the rates of fraud complaints at the quarter sessions with those of the summary court, it is apparent how strikingly fewer instances of fraud were heard at the middle-ranking court. Of the limited number of fraud accusations heard at the quarter sessions, the majority of them were for obtaining goods by false pretences and general accusations of ‘cheats’. Offences such as those heard within the Middlesex Sessions, including Edward Gillan, who was accused of carrying out a fraudulent lottery.⁵¹⁸ Strikingly there are two examples of prosecutions for obtaining prize money through fraud, one in 1765 and one in 1785. Given the severity of the crime it is surprising that it should be ultimately disposed of at the quarter sessions and even more surprising that in both instances the quarter sessions went beyond the usual remit and hanged both accused.

⁵¹⁸ MJ/SP/1774/12/005

Evidently the quarter sessions were not an attractive venue for prosecutors who brought cases directly at such a level, and nor was it attractive to magistrates who referred cases up to the quarter sessions in other instances. From the gaol delivery records, it is apparent that fraud cases were entering the criminal justice system through the summary courts, although they were immediately being sent to the Old Bailey. As these cases were largely misdemeanours they could have been sent to any level of the criminal court system, but would have been expected to be disposed of at summary or quarter sessions level in the case of more serious misdemeanours.

Conclusion

Having explored the options available for those subject to a fraud, it is surprising that any fraud beyond the felonious obtaining of naval prize monies should appear at the Old Bailey. As misdemeanours, these matters could have been addressed in the lower courts, even at the summary level. As a collection of offences which were not subject to the same financial support as felonies, most frauds would have personally cost the prosecutor a great deal of money. Moreover, with no option of a reward or recovering the goods obtained, using the criminal courts in matters of fraud would have resulted only in more financial loss for the prosecutor. However, having sampled and searched the lower criminal court records for complaints of fraud, there is little suggestion that the majority of fraud complaints were being disposed of at the lower levels. There are a small number of fraud complaints at the Magistrates' courts, but a large proportion of these were dismissed and none identified reached the Old Bailey. As posited above, it is apparent that cases that were committed to the Old Bailey were recorded elsewhere, such as in the gaol delivery records. Certainly those committed to Newgate to await trial were recorded in the prison calendars, rather than the Minute Books. These Calendars and their recording of fraud offences will be discussed in Chapter 7. However, where fraud was being addressed in the criminal system, few fraud accusations were being disposed of in the lower and middle courts, but rather, a large number were to be found in the assize court.

What is also apparent from the analysis thus far is that there is little evidence of immediate economic motivation for the prosecution of fraud at the Old Bailey. Those prosecuting fraud could not recover their goods or receive any financial support or reward for the prosecution itself. Consequently, there must have been other motivations for the 469 indictments of fraud appearing at the Old Bailey during this time. In order to explore further what these motivations may be, it is now necessary to identify what types of fraud were appearing at the Old Bailey and, perhaps more importantly, who was bringing these prosecutions.

Chapter 5 Fraud in Practice and the People Who Prosecuted

Those who use the law, shape the law. To understand English law, it is imperative to understand the parties who are utilising this law. As Hay and Snyder assert, until the law is 'animated through the act of prosecution, or the plausible threat of it, its existence as a text is of little consequence, even as symbol'.⁵¹⁹ Following on from Chapter 4, during the eighteenth and most of the nineteenth century, the criminal justice system was not self-activating. If the criminal law was to be utilised, it had to be done so by a prosecutor.

This chapter will explore who was prosecuting fraud in the assize courts at this time. In particular, the occupations of these prosecutors will be explored, revealing not only who was potentially being targeted by those committing fraud, but particularly those people who chose to address this fraud through the highest available court. The cases that reached the assize courts, particularly those in the Old Bailey, had a greater probability of changing the legal shape of fraud laws through alterations to the common law. Whilst the courts that form the basis of this study did not create legal precedent, superior courts can only hear legal matters once they have been heard in lower courts. It is these courts of no record that refer matters of legal, factual, or procedural importance, and no such question can be decided without first being brought into the lower courts. Therefore, the people bringing cases into the justice system were more likely to shape the legal system overall, and this was especially so in cases of fraud.

Establishing the occupations and backgrounds of prosecutors using the criminal justice system is significant because it provides an insight into whose interests were being furthered and, in effect, which groups the justice system served. More specifically in relation to fraud, information relating to the prosecutor also reveals something about the types of people who would fall victim to frauds, or would take the most serious action available to enforce the laws of fraud against others. It has

⁵¹⁹ Douglas Hay and Francis Snyder, 'Using the Criminal Law, 1750-1850' in *Policing and Prosecution*, p.3

been suggested by a number of crime historians that due to the costs involved in bringing actions at the assize courts, the majority of plaintiffs at the Old Bailey were middle-class.⁵²⁰ A finding from the ESRC funded project, *London Lives*, claimed that between seventeen and twenty percent of litigants at the Old Bailey were of the labouring poor or were servants.⁵²¹ Instead, it has been claimed that poorer litigants used the summary courts⁵²² and the assize courts were reserved for wealthier prosecutors.

As well as revealing the occupations of those bringing fraud prosecution to the Old Bailey, this chapter will also demonstrate how public bodies or representatives of such bodies were bringing fraud prosecutions at this time. These findings will challenge existing research on the beginnings of public prosecution⁵²³ and will additionally contextualise how fraud galvanised many state-connected agencies to undertake prosecutions. This chapter will then problematize the individuals who brought and led prosecutions of fraud. This will be achieved by questioning the assumption that complainants of crime were the people who actually brought these prosecutions. Rather, the 469 indictments will be scrutinised to ascertain whether the person at the centre of the prosecution, bringing the accusation and providing the most relevant prosecutorial evidence, is the same person who has suffered from the fraud itself. In asking this question, insight will be given into the mechanics of prosecution and the relationship between those affected by the fraud and the actor bringing the prosecution, thereby forming the heart of the prosecution.

Lastly, this chapter will seek to further answer two fundamental questions at the heart of this thesis: what was fraud? And who prosecuted fraud? This will be achieved through the analysis of a series of categorisations and typologies of fraud applied to

⁵²⁰See in particular <http://www.londonlives.org/static/ProsecutorsLitigants.jsp>

⁵²¹ <http://www.londonlives.org/static/ProsecutorsLitigants.jsp> (assessed 13th February 2016)

⁵²² Peter King 'The Summary Courts and Social Relations in Eighteenth-Century England' *Past & Present* no.183 (May, 2004) pp.125-172, p.145

⁵²³ See in particular Randall McGowen, 'The Bank of England and the Policing of Forgery, 1797-1821' *Past & Present*, No.186; Randall McGowen 'Managing the Gallows: the Bank of England and the Death Penalty, 1797-1821' *Law and History Review*, Vol.25, No.2 (Summer, 2007) pp.241-282 (Feb, 2005) pp.81-116; Randall McGowen 'From Pillory to Gallows: the Punishment of Forgery in the Age of the Financial Revolution' *Past & Present* no.165 (Nov.1999) pp.107-140

the 469 indictments that form the basis of this study. By exploring the circumstances under which fraud offences were carried out, not only can some conclusions regarding the types of people committing fraud be identified, but also it can be seen how the doctrines of fraud, as categorised in this thesis, translated into fraud in the courts. In particular, examples of the artful device used to commit fraud can be demonstrated and discussion around public harm, as well as the relationship between criminal and contract law can be explored.

The Occupations of Fraud Prosecutors at the Old Bailey

The occupation of prosecutors appearing before the Old Bailey provides an insight into who was using the assize courts and the criminal law. They also provide a better understanding of the significance of the criminal justice system in both the day-to-day lives of people, as well as the significance of the criminal law as a forum within which to manage disputes. The occupation of those using the criminal courts reveals which social groups felt most comfortable using the system to pursue their own interests. If a broad spectrum of society using the most serious courts to enforce their rights, does this reflect a system both for and of the whole of society? If all social strata were utilising the courts proportionally, does this demonstrate the legitimacy of the criminal justice system?⁵²⁴ Just as the types of fraud found at the Old Bailey reflect the users and agendas of the criminal justice system, so too do the occupations of the prosecutors.

This chapter will answer these questions simultaneously. Rather than focusing solely upon the occupation of the prosecutor in isolation, this chapter will also consider the nature of the offence they prosecuted and the circumstances within which the offence was committed. This will be achieved through the imposition of a series of typologies applied to the 469 indictments of fraud heard at the Old Bailey in this period.

⁵²⁴ Douglas Hay 'Prosecution and Power' in *Policing and Prosecution*, p.389

As stated at the beginning of this chapter, *those who use the law, shape the law*. If we know which social groups were most frequently using the courts to prosecute fraud, we can make some conclusions regarding why the laws surrounding fraud changed in the way they did. There is much contention within twentieth century literature regarding who was using the criminal justice system and what this means in relation to the public perception of the criminal courts⁵²⁵, particularly in relation to the legitimacy of the criminal justice system. Douglas Hay and Peter Linebaugh, have contended that the criminal justice system operated in such a way as to promote the interests of the social elite through the protection of property rights.⁵²⁶ John Langbein has strongly criticised these Marxist theories⁵²⁷, claiming that the influence of so many non-elites in the criminal justice system, including the petty jury, makes such an 'elite conspiracy' utterly impossible.⁵²⁸ However, by establishing that certain social and economic groups were using the assize courts to shape the offence of fraud, additional evidence emerges supporting the argument that the criminal justice system was indeed the tool of certain groups of society rather than others. Consequently, the purpose of identifying the occupations of persons bringing fraud prosecutions within the Old Bailey is to explore and problematize which social groups were using the criminal justice system to further protect both their property, and their commercial businesses. This is not what Langbein has criticised in others as a clumsy attempt to understand legal history through a straight-jacket of Marxist theory which requires 'class warriors...[to]...wear rose-coloured glasses of the deepest hue'⁵²⁹ Rather, in identifying the prosecutors of fraud, this thesis will further support Hay's argument that the criminal justice system as a whole clearly supported some forms of complaint more than others, namely, offences which threatened property and commercial interests.

⁵²⁵ This will be discussed further in this chapter.

⁵²⁶ See all contributions within Eds Douglas Hay, Peter Linebaugh. *Albion's Fatal Tree, Crime and Society in Eighteenth Century England*. (Allen Lane, 1975) This explanation is also taken up by Alan Norrie in *Crime, Reason and History*

⁵²⁷ Although Douglas Hay has argued that he is not, in fact, a Marxist.

⁵²⁸ John Langbein 'Albion's Fatal Flaws' *Past & Present* no.98 (Feb, 1983) pp.96-120. P.107

⁵²⁹ *Ibid* p.101

This thesis is not directly invoking class for reasons which shall be returned to but which are best encapsulated by E.P. Thompson:

Sociologists who have stopped the time-machine and, with a good deal of conceptual huffing and puffing, have gone down to the engine room to look, tell us that nowhere at all have they been able to locate and classify a class. They can only find a multitude of people with different occupations, incomes, status-hierarchies, and the rest.⁵³⁰

By identifying the occupations of people utilising the highest and most public court in the country to pursue fraud cases, a clearer picture will emerge of both how fraud laws were defined and enforced and by whom.

The Categorisation of Prosecutors and their Occupations

Before exploring the occupations of prosecutors of fraud, it is essential to first describe how these occupations have been categorised. Drew Gray provides a typology of prosecutors in his work on the City of London and the prosecutions brought at both petty and quarter sessions. Within this typology, the categories Gray imposes are: gentry/wealthier, merchants, masters/professionals, tradesmen and artisans, poverty vulnerable trades, other, city officials, and not known.⁵³¹ Gray's findings illustrate that in the City's lower courts, a third of prosecutors were tradesmen and artisans⁵³², and compared with rural courts, more prosecutors in the City's summary courts were of a higher social level.⁵³³ As with any categorisation process, Gray's categories have some overlap and prosecutors may have fallen into two or more of these groupings.

Peter King has also provided categorisations of prosecutors, although with slight differences to Gray. King identifies the prosecutors in his study to be: gentry, professionals, farmers, tradesmen and artisans, maritime, husbandmen, labourers,

⁵³⁰ Thompson, *The Poverty of Theory*, p.85

⁵³¹ Gray, *Crime, Prosecution and Social Relations*, p.30

⁵³² *Ibid* p.29

⁵³³ *Ibid* p.30

and paupers.⁵³⁴ What is immediately apparent from these categorisations is that Gray's focus was the City of London, and King's, rural Essex. This explains why King has included a number of more traditional and rural occupations such as farmers and husbandmen, whereas Gray included merchants and city officials. Clearly, when categorising a determined group into occupations, one must consider the type of society from which these persons are drawn.

By its very process, categorisation joins different types of individuals together under an overarching banner. This is of course unavoidable, if not essential, as otherwise individuals would be labelled by the specifics of their profession. Professions in the eighteenth and nineteenth centuries, as today, were wide-ranging and diverse. A very limited sample of the professions arising in fraud trials at the Old Bailey include: cutlers, corn meters, drovers, distillers, poulterers, and glass strainers.⁵³⁵ Without some form of classification, disparate cases provide little comparative worth in discerning meaningful historical trends within the court records. The purpose of categorising these professions is to allow for some conclusions regarding the types of people who were using the Old Bailey to enforce their property rights. This categorisation is also important as it reveals something about the more common targets for fraudulent activity and the type of settings within which fraud was carried out.

This classification must be understood in context. King warns against the process of categorisation, or indeed, the drawing of any conclusions that can be drawn from the naming of specific professions. King gives the example of a carpenter, which appears a clearly defined trade and one that can be safely categorised as an artisan. However, the occupation of 'carpenter' could include a range of people from the master carpenter to the semi-skilled: '...if those labelled as artisans are included in the middling sort the importance of lower-status prosecutors will be under-estimated, many were journeymen or apprentices rather than masters owning significant

⁵³⁴ King, *The Historical Journal* (1984) p.29

⁵³⁵ *OBP*, April 1802, trial of Daniel Moore (t18020428-153); *OBP*, April 1805, trial of Thomas-Joseph Charles (t18050424-139); *OBP*, September 1809, trial of Robert Streeter (t18090920-186); *OBP*, October 1766, trial of Stephen Willoughby (t17661022-58); *OBP*, January 1813, trial of Margaret Laidler (t18130113-108); *OBP*, September 1816, trial of William Ashlyn (t18160918-118)

amounts of wealth or capital'.⁵³⁶ Consequently, it is problematic to equate a profession with a level of wealth or social standing. Though profession may be indicative of a level of financial standing, there is a spectrum of success within any profession and one victualler may be far wealthier than another victualler. Also, complainants, or indeed any witness at the Old Bailey, may not have been honest in stating their profession. In open court, with the knowledge that their case may be reported in detail in the next edition of the Old Bailey Session Papers, it may have been tempting for a witness to exaggerate their success. Of course there is no way of knowing the level of exaggeration or dishonesty of witnesses but this possibility should be borne in mind when drawing any conclusions regarding the social standing of complainants before the Old Bailey. Again, we must be careful so as to avoid under-estimating the prevalence of lower-status prosecutors.

E.P Thompson warns against making anachronistic references to class in relation to the eighteenth century.⁵³⁷ Even during the Industrial Revolution, people did not think of themselves as being members of a particular class and rather, social identification was less likely to be horizontal, with people associating themselves with others of similar incomes, and more likely to be vertical, with members associating with people of the same profession, trade, or guild.⁵³⁸ By the middle of the eighteenth century, the guild system was certainly on the wane, but the rise of the self-regarding class-consciousness of the nineteenth century was yet to take hold⁵³⁹. This may partly explain why prosecutors would be unlikely to state their level of expertise or success within a profession, as the profession itself would be deemed a sufficient description of their identity.

Ascertaining the occupation of any actor at the Old Bailey is problematic. Frequently cases contain no more information than the names of the complainant and the accused. For example, the trial of Thomas Smith, the report of which states:

⁵³⁶ King, *'The Historical Journal'*, p.31

⁵³⁷ Thompson, *Social History* (1978)

⁵³⁸ Thompson, *Journal of Social History*, (1974) p.396

⁵³⁹ This contemporary understanding of class also creates challenges for those trying to explain eighteenth century fraud through the lens of white-collar crime as not all occupational roles fitted a twenty-first century understanding of occupation as relating to class.

'THOMAS SMITH indicted for a fraud. The case was opened by Mr. Knapp, and the prisoner was ACQUITTED [sic]'.⁵⁴⁰ This report contains no information of the prosecutor whatsoever. Sometimes cases contain information regarding the setting in which the fraud was committed. Where an occupation of the complainant is not stated, the wider case account may reveal more detail. Because the information from the Old Bailey Sessions Papers is rather opaque, an approach to collecting the available information has been wider than merely taking the Proceedings at face value. Rather, an interpretative approach has been adopted in order to make informed assumptions about the prosecutor. This approach has been taken with regard to a number of the hypothesis made in relation to the data collected from the Sessions Papers. For example, in the case of Reuben Thomas Craven, the complainant is a Godfrey Sykes.⁵⁴¹ The Papers do not explicitly state the occupation of Mr Sykes, and in fact Mr Sykes does not give evidence. Rather, his servant gives evidence and from the facts given, it is apparent that the accused obtained goods through the servant, who worked for Mr Sykes in the capacity of some sort of tradesperson or trader. From this, it can be ascertained that Mr Sykes was most likely the owner of some sort of business that sold goods. Consequently, we can categorise him as a tradesperson, tradesman or warehouseman, though of course we cannot be concluded with certainty.

Another example is that of the case of Walter Harris, who committed a fraud against Thomas Sheene, when obtaining 'ironmonger's wares' through Sheene's servant, John Owen.⁵⁴² As with the case of Godfrey Sykes, the Sessions Papers do not specify the occupation of Thomas Sheene but his status as a tradesperson can be safely presumed from the details of the servant and the wares obtained. Such examples demonstrate that regardless of the limitations of the Sessions Papers, they contain many accounts with sufficient detail to make some conclusions about the occupation of prosecutors.

⁵⁴⁰ OBP, February 1795, trial of Thomas Smith (t17950218-45)

⁵⁴¹ OBP, April 1791, trial of Reuben Thomas Craven (t17910413-66)

⁵⁴² OBP, July 1770, trial of Walter Harris (t17700711-64)

Due to the nature of categorisation, not every prosecutor falls sufficiently into the above ten classifications. For example, John Peters, prosecutor of Thomas Gilham in 1815, was the proprietor of the Milford Waggon. Peters is providing a service, but it would be inaccurate to consequently define him as an artisan, rather, he is providing a service but not as a servant. Similarly, William Offin, who brought a case in 1820 was employed as a 'carrier'. For accuracy, these two cases have been separately categorised. Perhaps these prosecutors could be categorised as being the eighteenth century equivalent of the service industry, although this adds little to the categorisation of prosecutors of fraud during the period.

Table 5.1: Occupations of Prosecutors of Fraud

Occupation ⁵⁴³	Frequency	Percentage	Percentage minus unknown occupations
Tradesperson	170	36.2	52.8
Naval Agent	67	14.3	20.8
Artisan ⁵⁴⁴	35	7.5	10.9
Public Official	16	3.4	5.0
Company ⁵⁴⁵	10	2.1	3.1
Bank of England	6	1.3	1.9
Clerk	4	0.9	1.2
Spinster	3	0.6	0.9
Servant ⁵⁴⁶	2	0.4	0.6
Other ⁵⁴⁷	9	1.9	2.8
Total	322	68.7	100.0
Missing	147	31.3	
Overall Total	469	100.00	

Tradespeople and the frauds they prosecuted

As demonstrated in Table 5.1, the majority of complainants for fraud were tradespersons, and those who traded or sold wares from a property; 52.8 percent of complainants were shopkeepers, tradesmen, or warehousemen. Within fraud prosecutions during this period, recurrent professions appear such as grocers,

⁵⁴³ See Appendix 1 for details of how occupations have been categorised and the theoretical and methodological considerations required for this process.

⁵⁴⁴ Broadly, 'Artisans' have been defined as any prosecutor who manufactured goods, or provided a service that related directly to the making or repairing of goods.

⁵⁴⁵ It is interesting that at such an early stage in the life of corporate identity, there should be examples of companies being identified as prosecutors, as opposed to owners of companies.

⁵⁴⁶ Rarely did servants prosecute fraud offences in their own right as complainant, rather than acting as an agent or servant of another complainant.

⁵⁴⁷ This includes persons of private means.

owners of warehouses, and linen-drapers.⁵⁴⁸ ‘Tradespeople’ is a fairly wide occupational grouping and includes non-traditional sellers of goods such as pawnbrokers⁵⁴⁹, as well as merchants who sold to consumers directly.⁵⁵⁰ Tradespersons also include wholesalers such as William Carey, who sold brandy and rum, but only by larger amounts and not less than two gallons.⁵⁵¹ There are also a small number of tradesmen prosecuting who are without premises from which to sell their goods. For example, a Mr Price, described by his wife as a ‘salesman’ fell victim to a fraud in 1793⁵⁵² and Thomas Barnesley, a ‘licensed hawkker’ who brought a prosecution in 1801.⁵⁵³

In order to appreciate the high percentage of tradespeople prosecuting fraud at the Old Bailey, a wider view of eighteenth century society and occupations therein will provide context. The percentage of tradespersons within the Metropolis cannot be known exactly, although in-depth research on occupations has been carried out with regard to the seventeenth century to the nineteenth centuries.⁵⁵⁴ It has been argued that retailing was one of the most common occupations in the country during the eighteenth century.⁵⁵⁵ However, different regions would have had different industries and consequently, different occupations making up the population. Justman and Van Der Beek have used *Campbell’s London Tradesman* and the insurance policies for the Sun Fire Office and Royal Exchange Assurance to chart the occupations within London between 1775 and 1778.⁵⁵⁶ Further analysis of this data, and using the same typological approach when identifying occupations of prosecutors for this thesis⁵⁵⁷, reveals that 27.6 per cent of insurance policy holders in London during this period were tradespeople. By far the most common

⁵⁴⁸ *OBP*, September 1765, trial of John Spragg (t17650918-77), *OBP*, September 1796, trial of George Dallaway (t17960914-111), *OBP*, May 1800, trial of John Burley (t18000528-136)

⁵⁴⁹ *OBP*, December 1775, trial of Thomas Trotman (t17751206-86)

⁵⁵⁰ *OBP*, September 1777, trial of Barnard Christian De Nassau Deitz (t17770910-101)

⁵⁵¹ *OBP*, May 1779, trial of Daniel Dempster (t17790519-44)

⁵⁵² *OBP*, September 1793, trial of James Stone (t17930911-124)

⁵⁵³ *OBP*, April 1801, trial of Lemon Caseby (t18010415-143)

⁵⁵⁴ For example see Schwarz, *London in the Age of Industrialisation*

⁵⁵⁵ Brewer, *The Sinews of Power* p.184

⁵⁵⁶ Moshe Justman and Karine Van Der Beek, ‘Market forces shaping human capital in eighteenth-century London’, *Economic History Review*, 68, 4 (2015), pp. 1177–1202. p.1188

⁵⁵⁷ See below

occupations undertaken by London citizens related to artisanal activities, with the most frequent being carpentry. Consequently, there is some suggestion that whilst trade formed a common occupation across the country, the manufacturing of goods and provision of services continued to form the basis of employment.

In light of the estimated proportion of tradespeople in London during the eighteenth century, the evidence indicates a disproportionate number of tradespeople were bringing prosecutions for fraud. This is not the only instance where a smaller proportion of the population brings a large number of prosecutions. In Essex in the eighteenth century, farmers made up an eighth of the population and yet brought thirty five percent of prosecutions for felony.⁵⁵⁸ The demographic differences within the capital will be explored in more detail in Chapter 7, but what is apparent is that tradespersons were the most likely to bring high-level prosecutions for fraud. This does not necessarily mean that over fifty per cent of frauds were committed against tradespersons, only that it was this group who pursued fraud prosecutions in the highest criminal court. However, as shall be demonstrated below when considering the types of fraud prosecuted, tradespersons were certainly the target for specific forms of fraud.

It is significant that tradespersons should choose the highest and most expensive court to pursue prosecutions for fraud offences. Table 5.2 illustrates that the most common offence of fraud heard at the Old Bailey was the obtaining of goods by false pretences. As has been explored in Chapter 3, obtaining goods by false pretences was a misdemeanour and thus, could have been pursued at summary or quarter session level. Moreover, as explored in Chapter 4, as a misdemeanour, the costs for such prosecutions, and the goods lost, could not be recovered. In light of this it must be questioned, why did tradespersons choose to prosecute fraud at the Old Bailey? In Chapter 6 it will be demonstrated that many tradespersons were likely members of prosecution associations and so, more likely to have financial and other support in bringing prosecutions. This may explain why tradespersons were more willing to undertake what would otherwise be a very expensive process with no hope of

⁵⁵⁸ King, *The Historical Journal*, p.31

financial reward. Another significant reason underpinning the use of the assize courts by tradespersons when prosecuting fraud was the role of the criminal justice system itself including the clerks who drafted the indictments and the magistrates who directed where in the system a trial would be disposed. The role of the magistrates will be addressed in the remaining chapters of this thesis. However, for current purposes it is apparent that what appear to be simple misdemeanours that should have been disposed of lower down in the criminal justice system are finding their way into the highest criminal court. Moreover, the majority of these prosecutions were brought by propertied citizens who were not necessarily members of the elite.

As will be identified in Chapter 6, prosecutors did not have full discretion in bringing prosecutions. Other actors, such as magistrates and clerks of indictment, played pivotal roles in deciding which offences were pursued, as well as the venue in which they were disposed of. Of course, the prosecutor was responsible for meeting the costs for a prosecution in cases of misdemeanour and it is therefore likely that court actors could not force the hearing into the assize courts should the prosecutor not wish to pay higher fees.⁵⁵⁹ However, court actors could dissuade prosecutors from using the already burdened higher courts by recommending lesser charges or a simpler prosecution route. Regardless of whether these tradespeople were driving these prosecutions to the assize court, or whether it was official actors within the system, it is unclear why the courts allowed these misdemeanours to be heard at the Old Bailey.

Douglas Hay has suggested that the criminal justice system at this time was a tool of the elite and was used in such a way as to ensure the continued system that protected the property of this elite.⁵⁶⁰ This argument is strongly supported by the occupations of prosecutors of fraud during this period. For Hay, the 'elite' were the aristocracy and landed gentry, who made up a very small proportion of the population. Tradespersons were by no means the elite. This group was however becoming increasingly more significant and influential. There was undoubtedly a

⁵⁵⁹ As was the case with felony

⁵⁶⁰ Hay, 'Prosecution and Power'

growth in consumerism that increased the wealth of tradespersons.⁵⁶¹ The changing status of tradespersons and merchants was therefore at the heart of fraud prosecutions during this period. Edward Thompson has written extensively about the changing face of social relations in the eighteenth century.⁵⁶² He argues that the period preceding the Industrial Revolution saw a shift in power away from a stricter hegemony dominated by the land owners, what Hay claimed were the elites of society, to a more complex social structure requiring a greater degree of negotiation between the old monopolisers of power, and the growing power of a new class.⁵⁶³ This negotiation was indeed possible because the old hegemonic structure was one of a cultural, rather than of economic, military, or, as is argued here, legal nature.⁵⁶⁴ Those with cultural power were not always those with economic or, increasingly, political power.⁵⁶⁵ Increasingly, new centres of commercial power were emerging and were creating political power as merchants bought their way into civic positions.

Whilst the view of the criminal justice system as being a system to protect property is very convincing, it would be an oversimplification to suggest that society was ever neatly divided into a dialectic of the elites and the non-elites, or the Bourgeoisie and the Proletariat. Rather, in protecting property, the criminal justice system acted to protect the wealthier strata of society including the elite and the burgeoning commercial classes. An elite hegemony has never entirely been imposed successfully across all social strata⁵⁶⁶. Such power structures do however shape and define how actors within the structure operate and impose constraints that limit the paths potentially taken by actors.⁵⁶⁷ Rather than having the limited role of protecting the property of the elite against the rest of society, the prosecution of fraud in the eighteenth century reflects how the criminal justice system acted to protect and promote conditions central to commercialism. The transformation in the distribution

⁵⁶¹ Lorna Weatherill, *Consumer Behaviour* p.8

⁵⁶² In particular see E.P Thompson 'Patrician Society, Plebeian Culture' *Journal of Social History*, Vol.7 No.4 (Summer, 1974) pp.382-405

⁵⁶³ Thompson, *Journal of Social History*, p.384

⁵⁶⁴ *Ibid* p.387

⁵⁶⁵ Nicholas Rogers, 'Money, Land and Lineage: the Big Bourgeoisie of Hanoverian London' *Social History*, Vol.4, No.3 (Oct, 1979) pp.437-454.

⁵⁶⁶ Norrie, *Crime, Reason and History*

⁵⁶⁷ Thompson, *Social History* p.164

of power within eighteenth century England, at its core, was driven by growing economic rationalization which not only 'nibbled...through the bonds of paternalism'⁵⁶⁸, but also created a space within which economic actors could utilise the previous legal structure to protect their wider commercial interests. Thompson's focus is upon the time between feudalism and the Industrial Revolution when, workers were between social controls.⁵⁶⁹ It was not only workers who found themselves in this social lacuna. A space of negotiated claims to power was opening up. The status of tradespersons and merchants was changing at the same time as the nature of consumerism. As Marx observed: 'a new, more colossal bourgeoisie arises. While the old bourgeoisie fights the French Revolution the new one conquers the world market'.⁵⁷⁰

To properly understand the significance and influence of tradespersons and merchants prosecuting fraud, a structural approach is required in order to appreciate the framework within which prosecutors were operating. As will be explored in Chapter 6, prosecutors did not have *carte blanche* in deciding which rung of the criminal justice ladder they chose to pursue their grievance. Rather, actors such as magistrates and clerks played an essential role in diverting cases to the most appropriate venue. In making this decision, all the actors involved in prosecutions may have been driven by a number of factors. The most important of which were the nature of the offence, the circumstances in which the offence was carried out, and against whom the offence was committed. Lawmakers, and enforcers of the law, such as magistrates and clerks, enforced the law depending upon the 'social fears, economic and political interests and administrative capabilities'.⁵⁷¹

Just as Thompson warns that to speak of class in the eighteenth century is anachronistic⁵⁷², so too is reference to capitalism. Thompson claimed the eighteenth century to be the 'predatory phase of...commercial capitalism'.⁵⁷³ The period

⁵⁶⁸ Thompson, *Journal of Social History*, (1974) p.385

⁵⁶⁹ *Ibid* p.386

⁵⁷⁰ Marx cited in Richard Johnson, 'Peculiarities' p.20

⁵⁷¹ V.A.C Gatrell, *Crime and the Law*, p. 243

⁵⁷² Thompson, *Social History*

⁵⁷³ *Ibid* p.139

between 1760 and 1820 is one of proto-capitalism, wherein the circumstances for a more developed and self-propelling economic condition in which the values that underpinned capitalism were set into the social, economic, and legal structure. These economic conditions included the growing society of this period fostered a more internally mobile population. At the same time, the economy was also growing in complexity. Devices such as the greatly extended use of financial instruments were increasingly being used in lieu of money or currency. These devices were, in effect, another form of credit.⁵⁷⁴ Such changes are central to understanding fraud during this time.

The eighteenth century markets, whether local, regional, or international, operated on systems of credit.⁵⁷⁵ Because there was very little currency circulating, market relations between individuals and tradespersons, between tradespersons and wholesalers, and between wholesalers and merchants, were conducted within a system of increasingly complex financial instruments such as promissory notes. From merchants to modest consumers, there was a reliance upon credit.⁵⁷⁶ Consequently, for systems of credit to operate, there needed to be trust that the debts would be repaid. Contemporaries estimated that over two-thirds of transactions were carried through credit rather than currency.⁵⁷⁷ To this extent, the eighteenth century commentator, Daniel Defoe referred to credit as ‘the strength and fund of a nation’⁵⁷⁸, but what fundamentally underpinned these markets was trust. Trust facilitated the development of more sophisticated and international forms of

⁵⁷⁴ Andrew and McGowen, *The Perreaus* p.136

⁵⁷⁵ Daniel Defoe writes about the tension between English and Scottish merchants as English contracts often contained an exclusion clause to protect merchants for non-payment if they could show that trade had been particularly poor not due to their actions but because of some commercial act of God. Suffice to say the Scottish merchants were unhappy about such practices and English merchants were often dismissed as the ‘God-willings’: Daniel Defoe, *The Complete English Tradesman* (Alan Sutton Publishing Limited, 1987) First published 1726

⁵⁷⁶ Craig Muldrew ‘Interpreting the Market: The Ethics of Credit and Community Relations in Early Modern England’ *Social History*, Vol.18, no.2 (May, 1993) pp.163-183, p.171

⁵⁷⁷ Brewer, *Sinews of Power* p.185

⁵⁷⁸ Defoe, *English Tradesman* p.232

commercial dealing at a time when the economic and financial tools required for this were yet to be established.⁵⁷⁹

The law and the courts played an increasingly significant role in the underpinning of trust-based market relations, with fraud posing the most insidious threat to commercial relationships. If fraud was tolerated and allowed to thrive by going unpunished, trust within markets would break down, systems of credit would be undermined, and the markets themselves would fail. It is to be expected that those who benefitted most from this complex and developing commercial society should take steps to preserve and promote the trust that allowed such markets to flourish. A central group that benefitted from growing commercialism was the tradesperson and the merchant and so, it is unsurprising that they should be the most eager to enforce the laws of fraud.

The fundamental significance of trust and the great threat posed by fraud reveal the central motivation behind the courts' allowance of fraudulent misdemeanour, as well as felonies, to be heard at the assize level. Given the value of trust for the expansion of commercial activities, it was understandable that judges and magistrates sought to enforce transgressions. It has been commonly held that the middle-class bench would behave in such a way as to promote their own interests and the wider interests of capitalism.⁵⁸⁰ It is therefore significant that the Capital's benches were occupied by the wealthier merchants and aldermen of the day.⁵⁸¹ The courts and those most invested in commercial activity, the merchants and the tradespersons, acted to consistently reinforce their values and power within society through the courts.

⁵⁷⁹ Such tools as sophisticated financial regulation and internationally effective measures for enforcement of debts.

⁵⁸⁰ Wiener, *Reconstructing the Criminal*, p.53

⁵⁸¹ The make-up of the summary court benches will be discussed in more detail in Chapter 7

Table 5.2: Forms of Fraud Heard at the Old Bailey

Offence ⁵⁸²	Frequency	Percentage	Percentage minus unknown offence
False Pretences	234	49.9	68.2
Prize Money	51	10.9	14.9
Uttering	16	3.4	4.7
Conspiracy	16	3.4	4.7
False Personation	15	3.2	4.4
Forgery	11	2.3	3.2
Unclear	126	26.9	
Total	469	100.0	100.00

Types of Fraud Heard at the Old Bailey

The specific offence for which cases of fraud were brought is not always identifiable. This is primarily due to the persistent and ubiquitous use of the shorthand ‘a fraud’ when recording offences, even in official court records from the Old Bailey, the City of London, Middlesex and Westminster.⁵⁸³ However, even where a specific offence such as obtaining goods by false pretences is identifiable, this does not reveal the circumstances within which the offence was carried out.

One purpose of this thesis is to challenge assumptions around fraud, including the belief that fraud was a ‘middle-class crime’ and that it was carried out in situations within which some previous relationship or fiduciary relationship can be exploited.⁵⁸⁴ One method to demonstrate that the majority of fraud offences could have been committed by anyone, regardless of class or position, is through the imposition of a typology of fraud. Such a typology also better explains the types of people

⁵⁸² According to indictment noted down in the Proceedings.

⁵⁸³ As discussed in Chapter 2

⁵⁸⁴ See Chapter 1 and the discussions surrounding the work of Edwin Sutherland and John H Langbein.

committing these offences through the discovery of how these people carried out their offences; as explained in Chapter 2, there is far less information about defendants compared with prosecutors during the eighteenth century.

Table 5.3: Typology of Fraud

Typology	Frequency	Percentage	Percentage Minus Unknown Categories
False Servant	137	29.2	36.8
Naval	66	14.1	17.7
Financial Instrument	56	11.9	15.1
Consumer	34	7.2	9.1
Public Official	29	6.2	7.8
Gambling	23	4.9	6.2
Previous Relationship	15	3.2	4.0
Intra-Commercial	12	2.6	3.2
Total	372	79.3	100
Unknown	97	20.7	
Overall Total	469	100	

This hypothesis is further supported when considering the types of frauds being prosecuted by tradespeople during this period. The main forms of prosecution have been categorised as ‘false servant’, ‘consumer’, and ‘intra-commercial’. These forms of fraud appear in the Old Bailey approximately thirty-seven, nine, and three percent respectively.⁵⁸⁵

False Servant

By far the most common type of fraud offences appearing at the Old Bailey were carried out via the ‘false servant’ method. This method involved the accused obtaining goods or monies by pretending to be sent by, or have the authority of,

⁵⁸⁵ These figures exclude the twenty percent of cases for which a type of fraud cannot be assigned.

another party. Often the creditor would know this third party. This method of fraud required some inside knowledge on the part of the false servant, knowledge either about the tradesperson and their dealings with the third party, or about the third party themselves. This can be illustrated through any of the 137 instances seen at the Old Bailey. In 1766, Stephen Willoughby was prosecuted for obtaining gin by false pretences through the method of claiming to be sent by his master, Mr Bicknall.⁵⁸⁶ Mr Bicknall was a known customer to the prosecutors, Messrs. Thomas and John Isherwood, distillers in Aldersgate Street and Willoughby took advantage of this to claim goods, ostensibly on Mr Bicknall's behalf. Another, particularly audacious false servant swindle was carried out by Matthew James Everingham who, in 1784, obtained a number of law texts, criminal practice books from a member of the Middle Temple under the pretence of being sent by his master, a companion of the lawyer Everingham sought to defraud.⁵⁸⁷

Sometimes these false servants were known to the prosecutor and had indeed been a servant in the past and it was this prior recognition that allowed the accused to carry out their swindle. For instance, Ann Birt had previously been a servant to Mrs Law, who for many years had an account with the baker who brought the prosecution.⁵⁸⁸ When Birt left her post she had the inside knowledge and knew the tradesperson would recognise her when she came on behalf of her mistress to obtain goods fraudulently.

The false servant scenario also applied in circumstances where the complainant did not know the accused, but the accused had knowledge of the complainant's customers or business and utilised this information in order to obtain goods by false pretences. Charles Wilts obtained goods from calico printers, John and James Stirling, by falsely pretending to be sent from Messrs. Waithman and Bristow, who were long-time customers of the Stirlings.⁵⁸⁹ At the trial, both Mr Waithman and Mr Bristow testified that they had never seen the accused before. Assuming that the court was

⁵⁸⁶ *OBP*, Oct 1766, trial of Stephen Willoughby (t17661022-58)

⁵⁸⁷ *OBP*, Jul 1784, trial of Matthew James Everingham (t17840707-116)

⁵⁸⁸ *OBP*, Oct 1789, trial of Ann Birt (t17891028-96)

⁵⁸⁹ *OBP*, May 1800, trial of Charles Wilts (t18000528-137)

right and Wilts was guilty, Wilts must have gained knowledge of the customers of the Stirlings and used this to obtain the goods.

In both instances, where the accused was known to the prosecutor and where they were not, we see clear examples of the first doctrine of fraud, the use of the artful device. Often, this artful device was the abuse of knowledge by the accused such as knowing that certain tradespeople provided credit to particular families. The artful device could equally be the abuse of the former relationship between the accused and the tradesperson such as the tradesperson believing the accused to have the permission of their master to obtain the goods.

False servant fraud was made increasingly available due to the changing nature of society in the eighteenth century. London had always been a diverse city, but early-eighteenth century London society was still bound by parish and places of worship, through which most people lived, socialised, and were recorded in official records. London was more a series of towns than an holistic city. This social structure resulted in the majority of persons being known to those whom they saw and traded with every day. This allowed for trust-based credit transactions between consumers, retailers, wholesalers, and merchants, as discussed above. London society began to change due to the increase in population and the influx of outsiders from other parts of the country. This loosened communal ties and resulted in new faces, new consumers, new retailers, wholesalers, and merchants. Consequently, these changes in demography resulted in greater opportunities for fraud.⁵⁹⁰

Given that tradespersons make up 52.8 percent of identifiable prosecutors of fraud offences during this period, it is perhaps not surprising that this modus is the most common. As explored in Chapter 3, for obtaining false pretences to be successfully made out, the prosecutor must show that a false pretence was indeed used, and that they, the prosecutor, was tricked into voluntarily handing over the goods or monies. If tradespersons were generally of a more litigious bent, it was expected that one of the offences for which they would prosecute would be fraud. The method of acting

⁵⁹⁰ Muldrew, *Social History* p.174

as a false servant was perhaps substantially easier than other methods, such as those labelled 'consumer fraud.'⁵⁹¹

Tradespersons and merchants were the most common prosecutors of fraud at the Old Bailey, although the courts had to be supportive of these prosecutors if they were going to be heard at such a high level.⁵⁹² Why were the courts so ready to propel fraud committed against tradespersons, particularly in cases by those pretending to be authorised servants, into the Old Bailey? Servants were commonly employed by households, even by the more modest ones. These people were indispensable and a great deal of trust was granted them. Servants looked after the family's children, cooked the food the family ate, and to a large extent, they impacted upon the family's reputation in local commercial circles. It was the servants who attended markets and shops to buy and collect goods on behalf of the family.

This treatment of the prosecution of this type of fraud reflects the third doctrine of fraud as defined within this thesis, the need for the fraud to have some public harm. There was great concern throughout the eighteenth and nineteenth centuries with the trustworthiness of servants and this concern formed the basis of judicial recognition of the public harm of frauds committed by these trusted figures. In 1749, Henry Fielding, who would become the famous Bow Street Magistrate, established the Universal Register Office on the Strand.⁵⁹³ The purpose of the office was to act as an agency through which a database of all the servants in London could be held. Information such as a full history of employment and a record of any misdemeanours would enable would-be employers to have better control over whom they let into their homes. This ambitious project had some successes as an employment agency for servants, but Fielding's passion for collecting data, which he would later take to Bow Street, is evident from this time. Equally evident is the public demand for thoroughly checked servants, reflecting a wider concern with the veracity of servants

⁵⁹¹ As discussed below

⁵⁹² This will be discussed in detail in Chapter 6

⁵⁹³ Anthony Babbington, *A House at Bow Street. Crime and the Magistracy, London 1740-1881* (2nd Ed, Barry Rose Law Publishers, 1999) p.109

and the potential for fraud and other types of offences which may befall the employers of untrustworthy servants

There were a number of extremely high-profile cases in the nineteenth century regarding servants' accused of attacking their masters. The 1816 case of Eliza Fenning, erroneously convicted for poisoning the family for which she worked, resulted in public outrage for the harshness with which she was treated.⁵⁹⁴ Likewise, the 1840 case of Courvoisier, accused of murdering his master, Lord William Russell, attracted public, professional, and political condemnation of his defence counsel, Charles Phillips. It was widely believed that Phillips went too far in defending a man who had brutally murdered his master in his own bed.⁵⁹⁵

As illustrated in Chapter 3, it has often been assumed by historians that fraud required an element of literacy on the part of the swindler and it is this assumption that has propagated the perception of fraud as a middle-class crime. It is repeatedly apparent throughout this study that this *modus operandi* was grounded in knowledge, alongside bravado and a convincing performance, but certainly not the requirement for any form of literacy. Clearly, the long-held assumption associating fraud offences with the middle-classes, or at least the literate, is not supported by the most common form of fraud being carried out during this period. As the false servant method demonstrates, fraud relied more on the exploitation of knowledge, often from an insider, rather than any distinct literacy skills. While fraud became increasingly defined as a breach of trust⁵⁹⁶ by the mid-nineteenth century, in the eighteenth century, fraud was more broadly construed as an abuse of knowledge.

Consumer Fraud

As discussed above, the eighteenth century saw a commercial revolution that began in the mid-eighteenth century. It was enabled by a growth in disposable income,

⁵⁹⁴ Even though no members of the family had died, Fenning was executed. For more details of Eliza Fenning see Gatrell, *The Hanging Tree. Execution and the English people, 1770-1868* (Oxford University Press, 1994) and Ben Wilson, *The Laughter of Triumph: William Hone and the Fight for the Free Press* (Faber and Faber Limited, 2005) Ch. 13.

⁵⁹⁵ May, *The Bar* p.226

⁵⁹⁶ As discussed in Chapter 1

partly created by a national fall in food prices⁵⁹⁷, and facilitated by the extension of credit and more sophisticated financial instruments. This commercial boom greatly extended the consumer classes and provided huge opportunity for commercial activity, both selling and consuming. However, the growth in commercial activity simultaneously created opportunity for fraudulent activity. The fundamental method by which consumer fraud was carried out was by swindlers obtaining goods or credit by falsely claiming to a tradesperson or merchant that they could pay the debt, or by pretending to be a person of good character to whom credit could safely be extended. This was a different mechanism to the 'false servant' swindle in that the accused was obtaining the goods or credit for themselves, rather than on behalf of a third party. This form of fraud has also been categorised separately as it related to a particular abuse of the credit system as identified by Margot Finn.⁵⁹⁸ 'Consumer Fraud' was a less common method of fraud than that of the false servant. This was partly because it was more difficult to carry out and, as shall be argued, less likely to be prosecuted. This form of fraud is a further demonstration of how the doctrine of the artful device was interpreted by the courts.

There are many colourful examples of consumer fraud within the Old Bailey. Roger Prate obtained goods from a tradesperson by pretending he was a merchant with a large customer base abroad.⁵⁹⁹ A similar ruse was carried out by John Dawson and Joseph Clerk, who claimed to gun-maker, Samuel Knock, they had come into a great inheritance and consequently were credit-worthy.⁶⁰⁰ They even produced a stack of papers amongst which was ostensible proof of their inherited wealth from a Mrs Catherine Prussia Farrington. On the promise of this inheritance, Dawson and Clerk obtained credit from the gun-maker. The case is reported at length in the Proceedings due to the elaborate lengths the co-accused went in order to convince Knock that they had inherited the money. The ruse even included Mr Knock attending the estate from which the inheritance was to derive. Even though the co-accused used seemingly false documentation to obtain the credit, it was the wider ruse that

⁵⁹⁷ Weatherill, *Consumer Behaviour*, p.19

⁵⁹⁸ See in particular Margot Finn, *Character of Credit*

⁵⁹⁹ *OBP*, December 1769, trial of Roger Prate (t17691206-47)

⁶⁰⁰ *OBP*, December 1820, trial of John Dawson and Joseph Clerk (t18201206-140)

convinced Knock, which resulted in a conviction for obtaining goods for false pretences.

A further illustration is provided by Henry Fielding in the 1750s:

There is another sett (sic) who defrauded tradesman by taking on themselves false names, and by pretending to be related to, or connected with, some persons of credit and fashion, and produce false letters to prove their intimacy...they make it their business to enquire at inns who serves them with their wines and brandies from London and sith (sic) out of shopkeepers the names of the tradesmen here who supply them with goods. Furnished with this knowledge, they come to London, and one day appearing in the character of a country Inn-keeper, they go to the distiller, whose name they have learned, telling him he has taken an inn...they he was recommended to him by one of his customers, whose name he tells him, and describes his house and family. The distiller's suspicion being lulled asleep by this stratagem, he cheerfully supplies his new customer with some of his best goods, and sends them to some appointed inn in the town, from whence they are conveyed...and converted into cash.⁶⁰¹

Consumer fraud is not always as obvious as the above cases. In some instances, the relationship between civil and criminal frauds is more apparent. The potential to enforce debts or address fraud through the courts provided the final mechanism to underwrite the trust within the market.⁶⁰² Consequently, the doctrine that a criminal fraud is not merely a breach of contractual warranty is apparent. The doctrine of public harm is equally relevant to consumer fraud as in order to nurture trust in commercial relationships, it was important that contracting parties knew there was recourse to the law when needed. Consequently, as the complexity of the market

⁶⁰¹ John Fielding, *Extracts from such of the penal laws as particularly relate to the peace and good order of the Metropolis*, 2nd ed.- (T.Cadell, 1763) p.257

⁶⁰² Muldrew, *Social History* p.179

developed, and the need for commercial trust became more significant, so too did the involvement of the courts.⁶⁰³

One regulatory criminal offence that was common across the period was that of false weights and measures. These offences could take a multitude of forms from selling under-weight bread to watered-down wine. It is perhaps not surprising that few such cases appear at the Old Bailey as these offences would be addressed at lower courts, most likely summary courts. However, although cases of obtaining goods by false pretences and cheats were also capable of being disposed of at lower courts, they were actually more likely to be found in the Old Bailey. One reason that false weights and measures cases may not be found at the highest courts was because a large number of the prosecutors were women and there has been research that suggests where women prosecuted, disposal of cases were likely to happen in lower courts.⁶⁰⁴ Another reason for the dearth of such prosecutions at the assize level may be the operation of the doctrine of individuals needing to take some steps to protect themselves. Such a barrier to a successful fraud prosecution may have prevented such frauds from reaching the higher criminal courts as there may have been concern that prosecutions would place too much onus on tradespeople and relinquish consumers' responsibilities to ensure the terms of the contract for sale in which they were entering⁶⁰⁵.

Intra-commercial

Intra-commercial prosecutions were accusations of fraudulent misrepresentation within a contract or business dealing between tradespeople. The dearth of instances in which tradespeople appear to be using the criminal courts and the laws of fraud to enforce debts or create sanctions for breaches of contract is notable and reflects the courts' awareness that a breach of contract was not a criminal matter. The threat of litigation has long been used to recover or settle debts. Furthermore, in a time when the line between civil and criminal litigation was blurred and criminal

⁶⁰³ Craig Muldrew, 'Rural Credit, Market Area and Legal institutions in the Countryside in England, 1550-1700' in Brooks and Lobban Eds, *Communities and Courts* p.158

⁶⁰⁴ Shoemaker, *Prosecution* p.211

⁶⁰⁵ See Chapter 3 for further discussion of Caveat Emptor

prosecution was arguably cheaper than civil litigation⁶⁰⁶, it might be expected that people would use the criminal courts to recover civil debts. There is evidence from some Proceedings that the courts were alert to the potential overlap between the criminal offence of fraud, and the civil laws of contract law. For example, the 1803 prosecution of John Edwards was dismissed as it appeared 'there was a contract entered into between the parties.'⁶⁰⁷ It is unclear whether the prosecutor brought an action against Edwards in the civil courts, although it is certain that the Old Bailey judge in this instance held that the dispute was civil rather than criminal in nature. This is a strong example of the fourth doctrine of fraud identified in this thesis, that a criminal fraud could not merely be a breach of contractual warranty.

It is possible that the threat of the criminal law could be used to extract monies or recover debts, even if this threat was not carried through. In such instances, these cases do not appear in the courts themselves. There is suggestion that buying off prosecutors was fairly common during this period.⁶⁰⁸ So, it is likely that should a breach of contract occur, even one that was not due to a fraudulent misrepresentation, the accused may be quick to settle any disagreement outside of the courts. At a time when credit was all-important for commerce, whether for consumers, retailers or wholesalers, the mere suggestion that a tradesperson could not be trusted would have a great impact upon their creditworthiness. Daniel Defoe wrote extensively on the tradesperson, revealing much about the perceptions of credit and how tradespeople existed in a system with little actual money in circulation. Defoe's guidance to tradesmen in 1729 is enlightening.⁶⁰⁹ He makes the extraordinary statement that 'there is some difference between an honest man and an honest tradesman'⁶¹⁰ and goes on to advise tradesmen that commercial agreements were more flexible than for non-commercial relationships. According to Defoe, it was understood in commercial circles that often payments could not be

⁶⁰⁶ For more details see Chapter 4

⁶⁰⁷ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 17 April 2011), November 1803, trial of John Edwards (t18031130-59)

⁶⁰⁸ Innes and Styles, *Journal of British Studies*, p.394

⁶⁰⁹ Defoe, *English Tradesman*

⁶¹⁰ *Ibid* p.159

made on time, and credit agreements would need to be stretched.⁶¹¹ Defoe speaks of the changes to commercial dealings, stating that: 'custom, indeed, has driven us beyond the limits of our morals in many things, which trade makes necessary, and which we cannot now avoid'.⁶¹² In light of this, perhaps it is more understandable that there were few fraud cases brought for dishonest dealings between tradesmen. On the one hand, there existed a culture of allowance for late payment of debts. On the other though, tradesmen would act quickly to prevent damage to their reputation and so, any threat of criminal prosecution would speed up the payment of debts.

Naval Fraud

The second most common prosecutor of fraud trials between 1760 and 1820 was the Navy. As stated when defining and characterising the underlying framework of fraud through the five doctrines, there is a sixth doctrine of fraud which only applies to instances of public prosecution of fraud. This sixth doctrine is significant because it recognises the importance and the distinction between frauds which fell under the central five doctrines, and frauds which were defined as felony and prosecuted as capital crime should they fall under the sixth doctrine. This is not to claim that the sixth doctrine of fraud does not overlap with the other five doctrines. Doctrines such as the need for an artful device and the public harm of defrauding the navy are at the heart of such prosecutions.

Over twenty percent of known prosecutors of fraud represented the Navy. During this period, sixty six indictments were brought by the Navy, or an agent of the Navy, for the fraudulent obtaining of naval wages or prize monies. Prize money was additional pay received by all crew on a ship should it capture an enemy ship during a time of war. A captured enemy ship and its cargo would be sold, and any enemy sailors ransomed back to their country. The total value of this would then be split

⁶¹¹ *Ibid* p.161

⁶¹² *Ibid* p.166

between the crew according to strictly defined proportions, with the Crown receiving the largest share and the remainder split according to rank and position.⁶¹³

There are three central points of interest in the role of the Navy as prosecutor of fraud. First, that the Navy, essentially a public prosecutor, should be leading prosecutions for fraud. Second, that there were so many acts of fraud against the Navy. And third, how naval frauds interacted with other forms of fraud being heard at the Old Bailey.

The Navy as a Public Prosecutor

In a time of private prosecution, the state sporadically involved itself in the enforcement of the criminal law, with naval prosecutions for fraud being an illustrative example of such involvement. The more distinct state-related offences of treason and sedition attracted the support of the state and, as discussed above, there were occasions when the monarch's lawyer, the Attorney-General, would undertake a prosecution directly on behalf of the Crown. However, this was not only for treason cases, and certainly by the nineteenth century the Attorney-General appeared more frequently in high-profile prosecutions of fraud against banks.⁶¹⁴

A public prosecutor during this time would be an institution that carried out a public function on behalf of the state, such as the Royal Mint or a local authority, including those administering the poor laws. The presence of prosecutions by public agencies demonstrates a prototype model for a fledgling public prosecutor. It is known that certain institutions such as the Mint brought prosecutions against coiners and clippers during this period. Randall McGowen has written extensively on the active stance the Bank of England took in detecting and prosecuting forgers, certainly from

⁶¹³ N.A M Rodger, *The Wooden World. An Anatomy of the Georgian Navy* (Collins, 1986) p.128

⁶¹⁴ Taylor, *English Historical Review* and James Taylor, 'Why Have no Bankers Gone to Jail?' *History and Policy* (November, 2013)

the early-nineteenth century.⁶¹⁵ There has been less work on the role of the Navy as a prosecutor and no work on the role of the Navy prosecuting fraud.

McGowen has concluded that prosecutorial actors, such as the Bank of England, were acting merely as a private prosecutor. The phrase ‘public authority prosecutors’ should not be confused with modern impressions of prosecution authorities, but rather applies to trials that were either funded directly by the state, or by an agent of the state, such as the Royal Mint. During this research on the appearance of public prosecutors in the summary courts, Bruce Smith has cast light upon ‘...the inadequacies of the categories of ‘private’ and ‘public’ [which] have bedevilled efforts to characterize the extent of public participation in prosecution before 1850’.⁶¹⁶ In light of these concerns with identifying the public and the private prosecutor, it is desirable that we focus upon such attempts and turn our attention to the specific prosecution of fraud offences.

Contrary to McGowen’s claim, the Bank of England was certainly not acting merely as a well-resourced private prosecutor. Not only had the Bank lobbied to change the laws of forgery but it also employed its own police agents to act as detectives and had internal solicitors to bring cases.⁶¹⁷ McGowen claims these resources did not significantly impact upon the private status of the Bank as prosecutor.⁶¹⁸ However, we must also acknowledge that the resources available to such prosecutors were unparalleled. Consequently, it is counterintuitive that such a powerful and influential organisation should be treated the same as an individual private prosecutor. Given the resources of the Bank, including in-house lawyers, detectives, and police officers, it is hard not to conclude that the Bank of England certainly had resources that put it in a different category to private prosecutors. Judges and juries were receptive to these public prosecutors and the Bank of England developed a high degree of

⁶¹⁵ See in particular McGowen, ‘*Law and History Review*’; McGowen *Past & Present* (2005)

⁶¹⁶ Bruce P. Smith ‘The Emergence of Public Prosecution in London, 1790-1850’ 18 *Yale J.L & Humanities* 29 (2006) p.59

⁶¹⁷ McGowen, *Law and History Review* p.245

⁶¹⁸ *Ibid* p.243

influence over the prosecution of offences such as forgery, even circumventing the Crown's prerogative of mercy.⁶¹⁹

Table 5.4: Public Authority Prosecutors within the Old Bailey

Public Authority Prosecutor?	Frequency	Percentage
Yes	120	25.6
No	349	74.4
Total	469	100

The Navy was the most prevalent, but by no means the only public body prosecuting fraud during this period. Over twenty five percent of fraud prosecutions were brought by public authority prosecutors and less than fifteen percent of indictments for fraud were brought by the Navy. Other public bodies that appeared as prosecutors at the Old Bailey included the Post Master General⁶²⁰ and The Stamp Office⁶²¹, amongst others. Other offences against the state included the use of fraud in obtaining support under the poor laws, offences against the postal system, and offences against offices of the criminal justice system, such as prisons or lower courts. In 1795, Matthew Swift met Sarah Burnett outside the Guildhall and pretended to work for the magistrate.⁶²² Burnett was convinced that Swift could address her prosecution against another woman for assault without Burnett (who had no understanding of the magistrate's office) having to enter the court. Whilst Burnett was the first witness, the case was brought by a team of prosecution lawyers, including the well-reputed, Mr Knowlys. Evidently, actors within the court system were keen to punish those who abused their institutions for purposes of fraud.

⁶¹⁹ *Ibid* p.271

⁶²⁰ *OBP*, October 1769, trial of William Barns (t17691018-50)

⁶²¹ *OBP*, January 1785, trial of Ann Jones (t17850112-50)

⁶²² *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 17 April 2011), September 1795, trial of Matthew Swift (t17950916-99)

From the Proceedings, the identities of the naval agents leading these prosecutions can often be ascertained. Of the sixty seven instances in which a naval employee or agent was prosecuting a fraud offence, there are almost as many different prosecutors as there are indictments. Some employees of the naval pay office, such as the Ratcliff brothers, John and Robert, appear in more than one case, although there is certainly no indication that there were particular individuals used to prosecute these cases. The diversity of individuals attending the Sessions and leading prosecutions indicates that there were no naval employees dedicated to the prosecution of crimes against the Navy. This is in contrast to the Bank of England, for whom, as McGowen argues, there was a specialised team dedicated to the prosecution of crimes against the Bank.⁶²³ Naval prosecutors reflect not only the significant changes to bureaucracy within the Navy, but in relation to fraud, the common appearance of state actors prosecuting fraud at the highest levels. The numbers of fraud cases being brought by the Navy at this time were still relatively low in comparison to the Bank of England during the beginning of the nineteenth century. However, it does reflect that the Old Bailey was hearing cases brought by public authorities a generation before McGowen claims the Bank began doing so.

Fraud against the Navy

Naval historians have largely over-looked the payment of prize monies and the potential for fraud created by the pay system employed by the Navy. Consequently, little is known about the naval employees and agents who distributed wages and prize monies to sailors. Details of prosecutors within the Proceedings reflect that these naval actors were employed by the 'Pay Office', the 'Naval Office', or were contracted as pay agents of the Navy. The role of contracted agents was certainly quite fluid in that they not only distributed wages to the lower-ranked sailors, but often acted as bankers to the officers.⁶²⁴

⁶²³ McGowen, *Past & Present* (2005)

⁶²⁴ Martin Wilcox, "These Peaceable Times are the Devil' Royal Navy Officers in the Post-War Slump, 1815-1825' *The International Journal of Maritime History*, Vol.26(3), (2014) pp.471-488. p.476.

The presence of naval agents as prosecutors reveals much about the Navy of the time and, more generally, about how the criminal justice system responded to public authority prosecutors. The period between 1760 and 1820 saw a great expansion of state bureaucracy in general, and naval bureaucracy in particular. Between 1680 and 1780, the Army and Navy trebled in size.⁶²⁵ This was primarily due to a succession of wars including the Nine Years War at the end of the seventeenth century, the Seven Years War starting in 1756, and the American War of Independence starting in 1775. Because of these conflicts, the armed forces rapidly grew in number and by the end of the eighteenth century the Navy was one of the largest single employers of civilian labour in the country.⁶²⁶ With this great expansion came a growth of naval administration. The number of clerks employed in the naval office during the first half of the eighteenth century increased from sixteen to 101.⁶²⁷ In fact, these figures are more likely conservative estimates as the naval office, like the civil service today, artificially kept their declared number of employees low by not declaring all part-time and casual workers.⁶²⁸ With such dedicated resources to these matters, the naval office felt it could undertake more prosecutions against those undermining the prize money system through fraud.

As has been detailed in Chapter 3 and above, fraud pertaining to the obtaining of naval prize monies were felonies and were prosecuted by quasi-public agents. *Prima facie*, this type of fraud appears distinct from types such as the false servant scenario, which were overwhelmingly disposed of as misdemeanours.⁶²⁹ However, the underlying mechanism for carrying out the fraudulent obtaining of prize monies was either the exploitation of inside knowledge about the duties and ships of the genuine beneficiary of the money, or through convincing the naval agent through some false personation to be the rightful beneficiary. In essence though, the methods of

⁶²⁵ Brewer, *Sinews of Power* p.29

⁶²⁶ *Ibid* p.36

⁶²⁷ *Ibid* p.66

⁶²⁸ *Ibid* p.68

⁶²⁹ All were either the misdemeanour of obtaining goods by false pretences or by false personation. For more details on these offences see Chapter 3

obtaining prize monies were the same as those used by swindlers in false servant scenarios.⁶³⁰

These frauds were carried out via two modus, false pretences and false personation. The most common prize money swindle involved the accused pretending to be a particular crew member in order to obtain their prize money. Often, the true beneficiary was deceased, which would provide ample opportunity for the false personation. As there were so few checks and balances to confirm the identity of the person presenting themselves to the pay office or the agent, all that was needed was a certain amount of inside information. In theory, the only information needed would be which ship the true beneficiary sailed on, from which port they sailed and when, who was the captain, and which position on the ship the individual held. However, as demonstrated in the case of Andrew Roman, agents would often know little about the ranks and positions of sailors. So, whilst there was a logbook, it is not known how scrupulously the book was referred to, particularly when many sailors were clamouring to be paid at the same time. The second most common method for obtaining prize monies by fraud was by pretending to be a family member of a deceased sailor. Hannah Mullens took a false oath to obtain the required documentation to prove she was the sister of Peter Roach, a late seaman who had served on the ship, *The Burford*.⁶³¹ Mullens knew that Roach was due prize money and used a fraudulently obtained document to claim she was the next of kin.

Prize monies played an essential role in the recruitment and placation of sailors. Wages were not high and were often delayed in being paid, in some cases by many months. The promise of prize monies was used by the Navy, and indeed the captain and senior officers on ships, to placate the unpaid men and ensure that sailors felt invested in the conflicts within which they took part. Often these prize monies were received before wages and acted to prevent wider unrest amongst sailors.⁶³² For generations before this period, politicians and monarchs were aware of the potential consequences for not paying sailors. As early as 1629, Sir Henry Mervin had warned the

⁶³⁰ See above

⁶³¹ *OBP*, Apr 1786, trial of Hannah Mullens (t17860426-10)

⁶³² Brewer, *Sinews of Power* p.198

monarch 'let not your eye that looks on the public good overlook this [victualling] mischief; for without better order his Majesty will lose the honour of his seas, the love and loyalty of his sailors, and his Royal Navy will droop'.⁶³³

Whilst the Navy was quick to prosecute outsiders who sought to fraudulently obtain prize money or wages, it was less likely to reprimand those sailors who acted fraudulently to obtain additional pay or monies themselves. Correspondence between various offices within the Navy suggests that sailors would sometimes seek to take advantage of the chaotic pay system and there is suggestion that, should these ruses be discovered, they were largely ignored.⁶³⁴ The same reasons for prosecuting non-sailors for fraudulently obtaining prize monies explained non-prosecution of sailor obtaining these monies. The Navy appreciated that they often failed to pay their sailors and this resulted in a precarious situation in which sailors could, and in fact, did often withdraw their labour or strike.⁶³⁵ Therefore, it was presumed that had the Navy prosecuted its own members for what might be seen as a workplace perquisite, then the risk of unrest within the ranks would have increased. Credit is again very important here. The prevailing wisdom at the time stated: 'credit makes the soldier fight without pay, the armies march without provisions'⁶³⁶, and of course, the Navy sailed with unpaid men. It is also the reason the Navy so assiduously prosecuted non-sailors; that being the significance of public opinion towards the Navy and its sailors.

Public opinion of the Navy was very high, presumably because the public appreciated the significance of a strong Navy for an island state not only surrounded by possibly hostile nations, but an island with aspirations for world dominance. Unlike the Army,

⁶³³ Cited in Michael Arthur Lewis, *The Navy of Britain: A History* (London, George Allen and Unwin Ltd, 1949)

⁶³⁴ Records such as 'Navy Pay Office – Miscellaneous correspondence and papers' reference ADM 49/72 in The National Archive reflect this but further research is warranted to explore this further in later projects. The majority of relevant records appear to be held at the National Maritime Museum.

⁶³⁵ In 1768, a number of naval ships and their crews positioned themselves in the middle of the Thames and destroyed their sails by striking them with swords, until they were paid their back wages see Anderson Frykman, Heerma Van Voss and Rediker, '*Mutiny and Maritime Radicalism in the Age of Revolution: An Introduction*' IRSH 58 (2013) pp.1-14. p.6

⁶³⁶ Defoe, *English Tradesman*. p.232

the Navy was seen as a purely defensive force and one that protected its citizens without the threat of being turned inland in times of civil unrest.⁶³⁷ This support for the Navy applied not only to the institution, but to the individual members of the Navy as well. Those in the Navy were also greatly respected by the wider public and even when sailors were themselves accused of having committed crime, the public were less likely to condemn them.⁶³⁸ Moreover, the Navy had a reputation for not paying their employees and destitute sailors were a common sight in port towns across the country.⁶³⁹ The perception of the ill-treated sailor permeated the national imagination. Consequently, it is not surprising that when an outsider sought to defraud the Navy, or to defraud a sailor of his own wages or prize money, prosecutions were quickly undertaken and courts were extremely harsh when dealing with such swindlers. The public opinion of the Navy and its sailors was particularly high at this time because of the perception that Britain's thriving economy was reliant upon its ability to win wars.⁶⁴⁰ Moreover, naval men were frequently seen as the main defenders of Britishness itself.⁶⁴¹

Naval Checks and Balances: Limiting Opportunities for Fraud

The fraudulent obtaining of naval prize monies were at heart very similar to obtaining goods by false pretences and by false personation. However, the fundamental difference was the prosecutor of naval frauds. The Navy played a pivotal role in the expansion of the British Empire and any offence against such a fundamental institution was predictably treated with great severity. In addition to the courts' and Parliament's appreciation for the need to protect the Navy's interests, there was great public support for the Navy and its sailors as mentioned previously. Equally as significant was the realisation that the naval pay system lent itself embarrassingly to opportunities for fraud. As well as demonstrating the significance of the interests of the Navy during this period, this section will also illustrate how the navy exposed

⁶³⁷ Brewer, *Sinews of Power* p.55

⁶³⁸ Brewer, *Sinews of Power*

⁶³⁹ Wilcox, *The International Journal of Maritime History*

⁶⁴⁰ Brewer, *Sinews of Power* p.178

⁶⁴¹ Don Leggett, 'Navy, Nation and Identity in the Long Nineteenth Century' *Journal for Maritime Research*, 13:2 pp.151-163, p.155

itself to fraud and will explore some of the measures taken by the navy in order to limit these frauds. This will demonstrate how the Navy's main weapon in the fight against fraud was high-level criminal prosecution and the use of the death penalty.

As with other deceptive offences such as forgery, the payment of naval prize monies was, by the standards of the day, highly regulated, with only a few authorised and licensed naval agents being allowed to pay prizes.⁶⁴² Every instrument by which a seaman or marine conveyed his prize money or wages in the hands of the public officers must have conformed to one of the forms prescribed by statute.⁶⁴³ Justice Kenyon stated the purposes behind this heavy regulation in 1795:

*The Legislature have anxiously provided for those most useful and deserving bodies of men, the seamen and marines of this country; for this purpose they have made regulations to protect their earnings from those impositions which are too frequently practised upon them; and have for their own benefit imposed various restrictions upon the modes by which they might transfer their property.*⁶⁴⁴

There were a number of illegal obtaining of prize money cases that were prosecuted using forgery laws. This is because the swindler would, on occasion, use some 'false instrument' or document to carry out the fraud.⁶⁴⁵ A fundamental difference between fraud offences and forgery is the manner in which the offence was carried out. In most prize money forgery cases, some contract or certificate was altered in order to obtain the monies. However, fraudulent obtaining of the monies was achieved either by pretending to be the true beneficiary through false personation, or by pretending to be the true beneficiary using inside knowledge.

Such prosecutions were not always straightforward and the drafting of the indictment was all-important. For example, John Carver pretended to be the half-

⁶⁴² 49 Geo. III. c. 123, s. 35

⁶⁴³ 26 G. III, c. 63

⁶⁴⁴ As reported in *Turtle v Hartwell*, 101 E.R. 630; (1795) 6 Term Rep. 426

⁶⁴⁵ Some cases of fraudulent obtaining of prize monies were so similar to forgery that they have been mislabelled within the Old Bailey Online project. For example *OBP*, January 1761, trial of Thomas Davis (t17610401-31)

brother of a sailor deserving of prize monies.⁶⁴⁶ When the naval agent brought the prosecution, a vital element of the offence was that Carver had taken a false oath in the Prerogative Court at Canterbury in order to obtain the monies. As the prosecutor could not prove that the oath had been taken, the prosecution failed. This is a variation of the need, when prosecuting for obtaining goods by false pretences, to make clear the exact nature of the pretence through which the fraud was carried out.⁶⁴⁷ The statute regarding the fraudulent obtaining of prize money was strictly construed by the courts. In 1816, Maxwell Hume was acquitted on an indictment of fraudulently obtaining prize money because he obtained not money, but bank notes.⁶⁴⁸

In some circumstances, alternative indictments were brought, presumably for similar reasons to today, in order to allow the prosecutor other chances of success should one indictment fail, or to cover a range of separate but connected actions that amounted to different offences. This is demonstrated in the case of Darby Kerwick, against whom there were two indictments. The first was for taking a false oath to obtain prize monies thereby acting as a false pretence⁶⁴⁹ and an alternative indictment for the false personation of the true beneficiary in order to obtain letters of administration and thereby prize monies.

The wages system used by the Navy was, by necessity, haphazard. Sailors would often leave England on one ship expecting to return on the same, but be moved or volunteer to move to another ship at a foreign port.⁶⁵⁰ This peripatetic workforce made payment difficult as sailors were paid on returning to England and a record had to be kept as to how much was owed. There were several regulations relating to pay, but one safeguard that applied on behalf of sailors was that they did not need to have a copy of their original contract in order to obtain wages. This benefitted sailors as in some unfortunate cases, ships sank and possessions were lost and it was considered

⁶⁴⁶ *OBP*, July 1760, trial of John Carver (t17600709-19)

⁶⁴⁷ This will be discussed in Chapter 6

⁶⁴⁸ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 17 April 2011), April 1816, trial of Maxwell Hume (t18160403-102)

⁶⁴⁹ *OBP*, Oct 1761, trial of Darby Kerwick (t17611021-26)

⁶⁵⁰ Such as James Burgess who set sail in the *Tyger* before he and the crew were transferred to the *Panther*: *OBP*, April 1763, trial of John Williams (t17630413-36)

deeply unfair if sailors lost pay due to a loss at sea. In less dramatic circumstances it benefitted sailors not to have to produce contracts at the pay office on return as sailors were often gone for many months, if not years, and contracts were easily lost. In practice, it is likely that, when switching between ships, sailors were not furnished with new contracts for their new ship. Consequently, it benefitted captains and senior officers of ships, as well as crew, because not having to provide contracts for every different ship made it easier to transfer crew.

Not having to produce a contract to recover prize money and wages provided ample opportunity for fraud. As has been highlighted throughout this thesis, in a time where identity was difficult, if not impossible, to prove, false personation was often successful. One safeguard the Navy most likely relied upon to ensure monies were not fraudulently obtained was knowledge about the person claiming the money. Because most sailors would try to obtain their money as soon as returning to England, they would more than likely visit the pay office at the same time and therefore were able to verify each other's identities. A fundamental flaw in this system was that crews would sometimes be divided up and sailors paid for the same prize money many months apart. There was also the official requirement that sailors attend the Naval Office to claim their prize monies.⁶⁵¹ However, payment often happened wherever agents could find suitable premises, often public houses, and multiple crews could attend for payment at the same time. For example, Albert Innes, an agent for the Navy, described a confused scene at the King's Head on Fenchurch Street in 1763, in which a number of ships' crews were being paid at the same time.⁶⁵² Having to pay dozens of impatient sailors, all crammed into an inn, many of whom would be keen to return home or to sample the recreational treasures of London would have been chaos. Paying multiple sailors from multiple ships would require the juggling of multiple pay books and documentation in order to verify the contract details of sailors, many of whom would have no paperwork.

⁶⁵¹ Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century*, 2nd edition, (Verso, 2006) p.128

⁶⁵² *OBP*, July 1763, trial of Richard Potter (t17630706-34)

A further contributing factor to the opportunities for fraud was that often agents were not accustomed with the intricacies of naval hierarchy and culture. Naval agent, Alexander Chorley, revealed in cross examination that he did not really understand the terminology of rank utilised by the Navy and 'was not much accustomed to the sea'.⁶⁵³ The eighteenth century English Navy was an institution of contradictions. On the one hand, it played a pivotal role in the development of the economic and military strengths of a growing empire. On the other hand, it ran on a system of debt, being forced to pay its workforce sporadically. Likewise, the Navy was a shining example of modern bureaucracy, while simultaneously operating a pay system that rested upon a series of precarious measures that regularly fell foul of fraud.

These contradictions led to the Navy relying heavily upon the criminal justice system to secure its financial interests and to prevent its reputation as an employer and an efficient bureaucracy from sliding into mocked disrepute. The Navy used the threat of capital punishment to both deter being the subject of fraud and also to counter a growing reputation as an organisation in disarray. Consequently, whilst the manner in which frauds against the navy were carried out were very similar to other fraudulent offences, such as obtaining goods by false pretences, the fact that these crimes were committed directly against the Navy explains why they were defined as capital felonies.

Financial Instrument Fraud

Of the known fraud types heard at the Old Bailey, 15 per cent related to and were carried out through the use of a financial instrument or document.⁶⁵⁴ The interconnection between fraud and forgery was most apparent when the crime was carried out through the use of a financial instrument or other writing. As explored in Chapter 3, forgery and fraud offences were often seen as two sides of the same coin. Given the larger number of forgery cases heard at the Old Bailey during this time compared with fraud offences⁶⁵⁵, it can be concluded that prosecutors were more

⁶⁵³ *OBP*, September 1783, trial of Andrew Roman (t17830910-70)

⁶⁵⁴ A financial instrument was essentially any substitute for coins.

⁶⁵⁵ A statistical search carried out through www.oldbaileyonline.org reflects that during the period there were 604 Proceedings reports for forgery as opposed to 433 fraud cases. As with fraud, the

inclined to use forgery laws than fraud laws should there be a choice between the two. This is understandable given that forgery offences were constructed in a clearer way than obtaining goods by false pretences or personation, and clerks were reluctant to draft false pretence indictments given the additional complexities these created.⁶⁵⁶ Another reason why forgery offences may have been preferred over fraud offences was that the majority of these offences were felonies. The advantages of felony prosecutions was that the goods could be reclaimed, costs of prosecution could be recovered, and there were wider sentencing possibilities, including execution.⁶⁵⁷

Whilst there is certainly overlap between forgery and fraud using a financial or written instrument, there were some fundamental differences. One example being when the instrument itself was genuine, but directed to another person, such as in cases of false personation in which an unauthorised servant used a genuine note to obtain goods from a tradesperson. The distinction between forgery and fraud is important because it reveals something of how both laws were used, as well as the limitations or advantages of using either set of offences. As has been discussed in Chapter 3, fraud offences played a significant role in the wider justice system as they acted to fill the gaps left by a system that narrowly defined forgery and larceny offences; where forgery could not be made out, cheating or obtaining goods by false pretences or false personation could apply.

On occasion with false instrument frauds, the accused was tried for both forgery and fraud. In 1771, Robert Johnson was found guilty at one Sessions for the forgery of a financial instrument and, in the next Sessions, for the fraudulent use of the instrument to obtain goods from a tradesperson.⁶⁵⁸ Presumably this was because there were a number of prosecutors and the tradesperson, his counsel, or another actor, felt that the matter was best prosecuted through false pretences, rather than forgery. In other instances, the court found it necessary to change the indictment

number of Proceedings are fewer than the number of indictments or defendants. For more detail see Chapter 3

⁶⁵⁶ See Chapter 6

⁶⁵⁷ For more details of the differences between felony and misdemeanour, see Chapter 3

⁶⁵⁸ *OBP*, February 1771, trial of Roger Johnson (t17710220-83)

during the trial. There was the case in the trial of Daniel Murphy, when the court held:

*It appeared upon enquiry to be a crime of a higher nature; the court therefore directed the jury to acquit the defendant of the fraud, and he was immediately committed by the court to take his trial at the next session for forgery.*⁶⁵⁹

The wording here is particularly revealing as forgery was clearly indicated as a more serious crime than fraud by false pretences.

It is when examining cases of fraud by financial instrument that the interconnection with uttering also becomes apparent. Of course, uttering requires that the money or instrument be false and this is where fraud offences become so useful to the prosecutor. Even when the instrument was genuine and the accused had obtained and altered it somehow, this was not strictly uttering. It could equally be forgery or false pretences. This is demonstrated in the case of John Hevey and Richard Beaty.⁶⁶⁰ Hevey and Beaty conspired together to add a fictitious acceptor of a Bank of England note with intent to defraud a watchmaker out of goods. This offence united the forging of the note, the uttering of the forged note, and the pretences surrounding the passing off of this note, which in this case was highly elaborate. Hevey tried to pass off the note to the watchmaker who was reluctant to accept it. Hevey then suggested the two of them attend the closest compting-house where the note could be verified. Beaty, Hevey's accomplice, walked out of the compting house just as the two arrived, making the watchmaker think he was a clerk at the compting-house. Beaty then proceeded to act as a knowledgeable and objective party, confirming that the forged note was in fact genuine. This led the watchmaker to give Hevey a watch and also the additional monies to make up the rest of the note. Without the false pretences of pretending to work at the compting-house, the watchmaker would never have accepted the false note. Fortunately, the shorthand writer saw fit to note

⁶⁵⁹ *OBP*, September 1778, trial of Daniel Murphy (t17780916-79)

⁶⁶⁰ *OBP*, February 1782, trial of John Hevey and Richard Beaty (t17820220-63)

the lengthy address the court made regarding the indictment in this case and the drafting considerations in the indictment otherwise such details would be lost.

Frauds that were carried out using financial instruments were the closest to the common view of fraud during this period. Certainly the historiography surrounding the nineteenth century makes much of the developing myriad of financial instruments and a deepening in the complexity of the economy, which lent itself to greater opportunities for fraud.⁶⁶¹ However, the types of frauds being carried out through false instruments are far from sophisticated manipulation of the economy. Rather, these types of fraud are closer to the false servant type in that the accused would use notes pertaining to come from a master or potential customer in order to defraud tradespersons.

It is unsurprising that financial instrument frauds were less commonly prosecuted at the assize than false servant cases. The threat of accepting a fraudulent financial instrument was well known to tradespersons during this period. Tradespersons often relied upon questioning the person attempting to pass off the instrument. However, this entailed placing a great deal of trust in how the person conducted themselves, how they dressed, and the general appearance of trustworthiness.⁶⁶² There are few examples of false instrument types of fraud at the assize court. One explanation for this might be found in the fifth doctrine of fraud identified in this thesis, the requirement that the prosecutor demonstrate they had taken steps to protect themselves against the fraud. It is not possible to know of the cases which were not brought into the criminal justice system but prosecutors bringing accusations of fraud by financial instrument faced the additional hurdle of having to demonstrate that it was reasonable for them to have trusted the person using the instrument.⁶⁶³

A central issue in determining the validity of a financial instrument was the handwriting on the instrument itself. This sounds extraordinary today, but tradespersons knew that paying attention to the handwriting of the masters sending

⁶⁶¹ The historiography focused more upon forgery than fraud.

⁶⁶² Finn, *Character of Credit*, p.291

⁶⁶³ This has been discussed at greater length in Chapter 3

servants, or customers sending agents, was essential to commercial life.⁶⁶⁴ Financial instruments may have been increasingly used, but alongside pro-forma instruments, they tended to take the form of hand-written instruments, amounting to little more than an 'IOU'.⁶⁶⁵

Bank of England

The Bank of England only appears as a complainant in 1.9 per cent of cases in which a complainant is identifiable. These cases have been separately categorised in order to answer wider questions within the current historiography and to contrast with the great number of offences the Bank was prosecuting during this period. Randall McGowen has conducted wide-ranging research on the activities of the Bank as both an investigative force and as a prosecuting agency.⁶⁶⁶ McGowen identified that the Bank of England began heavily prosecuting forgers after 1797, with as many as forty eight prosecutions at one assize in 1817.⁶⁶⁷ In identifying the number of prosecutions brought by the Bank of England for fraud cases, it can be demonstrated that the Bank of England was far more concerned with forgery than it was with fraud. This is perhaps not surprising as the forging of bank notes directly undermined the legitimacy of the Bank of England, whereas fraud offences often rested upon an additional dishonest or deceptive act of the fraudster and not solely upon the well-replicated financial instrument. Moreover, as has been discussed in Chapter 5, the Bank of England proactively changed the laws of forgery so as to avoid the difficulties of navigating other, less applicable laws. Forgery was codified under a plethora of separate laws and the Bank acted to introduce more coherent and enforceable offences. Such tailored offences of forgery allowed the Bank to construct the laws it required in order to more easily bring prosecutions.

This dearth of Bank of England prosecutions for fraud again supports the argument that where prosecutors had a choice between forgery and fraud offences, a forgery

⁶⁶⁴ Andrew and McGowen, *The Perreaus* p.18

⁶⁶⁵ *Ibid* p.138

⁶⁶⁶ In particular see: McGowen, *Law and History Review*, (2007) pp.241-282 and McGowen *Past & Present* (2005)

⁶⁶⁷ McGowen, *Past & Present*, (1999) p. 105

indictment would be preferred. As explored in Chapter 4, choosing a felony over a misdemeanour meant that the prosecution would more likely be paid for by the state. Whereas, a prosecution for a misdemeanour would have to be paid for by the prosecutor. Again, such decision-making shines a light on the seemingly unusual choice by prosecutors of fraud to pursue their claim in the assize courts.

Prosecutorial Actors: Complainants and Agents

There has been a distinct lack of research conducted into the mechanics of the prosecution process and, in particular, who was bound over to prosecute cases. The recognizances attached to the Sessions Rolls provide some information in this area, although for only a limited number of cases under scrutiny. The Proceedings strongly suggest that the most relevant witness in prosecutions is the complainant. The most relevant witness is, in most instances, the first witness to give evidence. From this information it is possible to make some conclusions about who was bringing the case, or at least who was the most significant witness to the court. This person is not always the ‘victim’ of the offence, but often a servant or agent.

Table 5.5: Prosecutorial Actors in Fraud Prosecutions at the Old Bailey

Primary Actor	Frequency	Percentage	Percentage Minus Unknown Actors
Servant/Agent	159	34	51.5
Complainant	150	32	48.5
Total (of known)	309	65.9	100
Unknown	160	34.1	
Overall Total	469	100	

Given the number of tradespersons bringing fraud cases, and the presence of the Navy, it is not surprising that it is servants who are at the center of these cases. There

is the possibility that the owner of the business was not in attendance when the fraud was carried out and it was naval employees, mostly pay masters or agents, who paid the monies to the swindler. Further study into the use of servants in bringing prosecutions is needed, in particular whether prosecutors had servants bound over instead of themselves in order to reduce the onus of the prosecutorial process. Evidence from the Proceedings certainly suggests that servants of complainants played a pivotal role in bringing of prosecutions to court.

Conclusion

Those who use the law, shape the law. This chapter has revealed both the types of prosecutors bringing fraud cases to the Old Bailey, and the types of fraud they prosecuted. In identifying the occupations of prosecutors of fraud, better insight into the sectors of society pursuing expensive cases in the Old Bailey can be ascertained. Equally as significant, light can be shed on the backgrounds of prosecutors who are allowed by the criminal justice system to pursue these misdemeanours in the assize courts.⁶⁶⁸

Analysis has revealed that the majority of fraud prosecutions were brought by tradespeople and the Navy. The very high presence of tradespeople further demonstrates the central argument of this thesis that the criminal justice system was operating in such a way as to promote the conditions of proto-capitalism. This is further supported by the types of fraud tradespeople prosecuted, frauds that deeply undermined trust within a financial system that relied upon credit and relationships based on trust. Frauds, such as those of the false servant and the financial instrument, directly attacked the trust in who one was dealing with and how people paid for goods in a time of very little circulating cash. Again, these offences were misdemeanours and could have been addressed at a fraction of the cost in the lower courts. However, these tradespeople chose to pursue these claims in the highest criminal court, thereby reflecting the severity with which they perceived these offences.⁶⁶⁹ These cases reflect an individual and a state pronouncement that fraud

⁶⁶⁸ The decision-making regarding disposal of cases will be discussed in detail in Chapter 7.

⁶⁶⁹ Other motivations based upon practicalities will be discussed in Chapter 6

offences were a significant threat to commercial and social values, and that such offences needed to be prosecuted using the most serious and punitive tools available.

The imposition of a typology to the frauds heard at the Old Bailey allows for more contextualised analysis of how fraud was committed, and to a lesser extent, who was committing fraud.⁶⁷⁰ The high presence of the Navy as a prosecutor of fraud is also both surprising and revealing. It is not surprising that these types of fraud should be prosecuted at the assize level as they were capital felonies. However, it is very surprising that there should be such a presence in the Old Bailey of a public prosecutor, decades before the Bank of England, which has often been accepted as being the first example of a concerted public prosecutor. The types of fraud prosecuted by the Navy further reflect how similar these forms of fraud were to fraudulent misdemeanours. These similarities illustrate how the way in which frauds were committed were a long way from the sophisticated financial crimes often associated with fraud. Rather, the two most important requirements for committing fraud were some form of inside knowledge that could be exploited through a mechanism of deception, and the necessary bravado to carry off the ruse.

The public forum of the Old Bailey, with such severe consequences for the accused was used as a declaratory medium by which the Navy could demonstrate to wider society that the fraudulent obtaining of prize monies would be prosecuted using the full force of the law. In both cases, for tradespersons and the Navy, this declaration served both to punish the individual transgressor, but more importantly to deter future fraudulent behaviour.

These results reflect the way in which the criminal justice system operated and was used to punish frauds that undermined national and international commerce. In allowing tradespeople to pursue fraud misdemeanours at the highest level of the criminal court system, and thereby providing maximum public attention to these

⁶⁷⁰ As discussed in Chapter 1, focus is not given to the perpetrators of fraud for both practical methodological reasons, and because the focus of this thesis is on the process of prosecution of fraud.

crimes, the criminal justice system as a whole declared the seriousness of such crimes and the severity with which they would be punished. The high level of naval prosecutions further demonstrates the frauds that undermined international commerce and the expansion of the Empire would be even more seriously punished.

This chapter has also revealed the types of fraud being prosecuted at the Old Bailey at this time. Given the dearth of archival information regarding those accused of fraud, this typology has gone some way to reveal the types of people being prosecuted for fraud at the Old Bailey. The most common method of fraud appears to have been committed through the abuse of some prior knowledge such as in the case of false servant frauds in which the accused pretended to be sent by a genuine customer to collect goods from a tradesperson. The next most common through pretending to be entitled to naval prize monies, and the next committing fraud using a written or financial instrument⁶⁷¹. These methods of committing fraud rely upon the exploitation of some previously held information such as the name of a particular sailor and the ships on which he sailed, or upon some deception as to character such as dressing in a way so as to appear of a higher class in order to obtain credit⁶⁷². These methods of committing fraud reflect how different in character eighteenth century prosecuted fraud were from nineteenth century forms of fraud which captured the public attention such as higher-level banking fraud⁶⁷³. More significantly, the types of fraud prosecuted at the Old Bailey reflect that those committing fraud did not have to be of a higher class or be in a position of trust in order to commit fraud. It cannot clearly be concluded whether many of these prosecuted individuals were of a particular class⁶⁷⁴ but what is apparent is that there was certainly no requirement that a level of literacy or particular occupation was required to commit these frauds.

Having established who was prosecuting fraud and what types of fraud were being heard at the Old Bailey, the following chapter will further question why these prosecutors were so frequently heard at the assize court by exploring the methods

⁶⁷¹ See Table 5.3

⁶⁷² For examples of this see Finn, *Character of Credit*

⁶⁷³ Examples include the 1856 prosecution of the Royal British Bank, see: Wilson, *Origins*; Taylor, *English Historical Review*; James Taylor, *Historical Research* (2005).

⁶⁷⁴ Although those prosecuted for false servant fraud were mostly servants.

and mechanisms used by these prosecutors to bring these cases, and the steps required to be taken by the prosecutor when navigating their way through the criminal justice system.

Chapter Six The Role of Prosecutors and Tools of Prosecutions

Previous chapters have explored the laws and doctrines of fraud, the choices of court and legal pathways available to those subject to fraud, and who prosecuted fraud at the assize court in London. This chapter will shed further light on prosecutions of fraud at the Old Bailey by exploring the methods and mechanisms by which prosecutions arrived at the assize court. First, the role of Old Bailey court officials in filtering and promoting fraud prosecution will be considered, with a particular focus upon the roles of clerks and the significance of their positions for influencing the preferred choice of indictment. Thus far, this thesis has focused upon the discretion and decision-making of the prosecutor. This chapter, along with the following chapter, will examine the significance of criminal justice officials upon the cases that arrived at the Old Bailey.

The second focus of this chapter is the appearance and significance of policing agents in the prosecution of fraud. An examination of the Proceedings will reveal the extent to which policing agents appeared in fraud trials. The third influence upon prosecutors of fraud that is considered here is the role of prosecution associations, which were organisations designed to spread the cost of prosecution and give assistance to its members. To conclude, the presence of counsel at Old Bailey fraud trials will be investigated, especially their interdependence with prosecution associations. An in-depth analysis of the role of counsel in fraud trials will not only contribute to and challenge the wider literature on the development of counsel within trials, but will also explore the lengths to which prosecutors were willing to go in their pursuit of fraud accusations.

Deciding the Offence

The laws surrounding fraud were multiple and interconnecting. Chapters 3 and 4 have revealed the breadth of choice available when prosecuting fraud, for both venue and offence. The focus of this thesis thus far has been upon the lay prosecutor and how prosecutors had wide discretion over the disposal of their cases, from

whether to report the crime, to consultation on sentencing.⁶⁷⁵ However, less is known about the level of discretion prosecutors had over the more detailed elements of the prosecution process. Given the intricacies and complexities of fraud laws, it seems unlikely that lay prosecutors would entirely control all elements of the prosecution process, including legally complex stages such as the choice of the indictment and its drafting. Rather, there is an expectation that other legally qualified actors must have influenced stages of the prosecution to a greater or lesser degree.

It has been accepted that, to varying degrees, prosecutors played a role in the sentencing of prisoners.⁶⁷⁶ It has also been demonstrated that magistrates played a central role in filtering cases away from the more senior courts. This process may have been contrary to the will of the prosecutor, although there is no research on the presence, frequency or extent of such tension. Langbein has suggested that the discretion of the lay prosecutor was actually very limited, while King has provided quantitative data that supports this claim.⁶⁷⁷ However, it shall be demonstrated that prosecutors did not have full discretion when bringing a prosecution, particularly in cases of fraud that were often more complex than other criminal accusations. This chapter will therefore demonstrate the significance of magistrates and clerks in the disposal of fraud prosecutions.

Clerks are an overlooked group of actors across the whole of the criminal justice system. However, clerks played a central role in providing advice to prosecutors for how best to pursue their cases. The Old Bailey clerk of assize would equally play a fundamental part in shaping the form and substance of the indictment. In his early work, Langbein made the bold claim that prosecutors had no control whatsoever over the nature, form, and details of the indictment once a felony was reported.⁶⁷⁸ This claim is not strongly evidenced and, given the number of fraud indictments at the Old Bailey that were discontinued due to non-appearance of the prosecutor, it is apparent that judges tolerated the prosecutor's decision to withdraw.⁶⁷⁹ The

⁶⁷⁵ See Chapter 4

⁶⁷⁶ Ibid

⁶⁷⁷ King, *The Historical Journal*, p.27

⁶⁷⁸ John Langbein, 'Albion's Fatal Flaws' *Past & Present* no.98 (Feb 1983) pp.96-120. p.104

⁶⁷⁹ This will be discussed below.

majority of fraud cases were misdemeanours and, as such, they were not subject to the same regulation as felonies.⁶⁸⁰ Leaving aside the level of discretion of lay prosecutors in the drafting of indictments of felony, clerks would have ostensibly played an advisory role in the prosecution of misdemeanours.

Did prosecutors always follow this advice and, more significantly, did the lay prosecutor genuinely have discretion to pursue a case as they wished? In examining a range of sources, including contemporary law treatises, magistrates' office accounts, and miscellaneous lawyers' papers, it is apparent that lay prosecutors did not have *carte blanche* to indict as they saw fit. Rather, magistrates clerks, clerks of assize, and lawyers involved in the drafting of indictments strongly directed prosecutors towards the offence that was pursued.

The Role of Clerks

The clerk is an erroneously commonly overlooked actor in the prosecution process. Within different courts there were a number of clerks and, in almost every instance, these clerks were legally trained, if not still practising as solicitors.⁶⁸¹ In the magistrates courts there was often a clerk acting as a filter between the magistrates and the complainant. This position was enacted to provide initial legal advice and to direct the complainant as to which offence to pursue. In cases of assault or larceny this may have been more straightforward. However, in the case of fraud offences, the initial advice concerning the offence may have been subject to change during the various stages of the prosecution process. Due to the complexities and breadth of potential fraud prosecutions, clerks at different levels of the court system may have added to, or varied, the initial advice provided in the first instance.

Within higher courts, arguably the most important clerk at assize level was that of the clerk of indictment. There is little archival evidence to reveal the nature and influence of the clerk of indictment. However, guidelines and advice for clerks and

⁶⁸⁰ As discussed in Chapter 4

⁶⁸¹ John H Langbein, *The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: the appearance of solicitors*. *Cambridge Law Journal* 58 (2) (July, 1999) pp.314-365. p.351

other lawyers, such as Chitty's *Practical Treatise of the Criminal Law*⁶⁸², as well as a collection of pro-forma indictments used within the Old Bailey itself, reveal that clerks of indictment had significant influence upon the type of offence prosecuted.

Research that has been conducted into the process of indictment drafting has suggested that much of this process occurred within 'a bureaucratic vacuum' and without the input of evidence, or even the details recognizances.⁶⁸³ This appears unlikely however as the prosecutor would most likely be present when the indictment was drawn up, if only because the prosecutor had to pay for the service.⁶⁸⁴ Consequently, whilst there are no existing archives of the information used to draft the indictment, it is feasible that the prosecution provided such information verbally during the actual process of drafting the indictment. However, it can be surmised that the influence of the clerk and the scope within which they could alter the indictment depended upon the nature of the offence.⁶⁸⁵ Again fraud, which was a complex myriad of offences, overlapping with forgery and larceny, potentially gave the drafter of the indictment more choices.

One method to ascertain the boundaries within which clerks of indictment operated is to return to the sources and materials lawyers would have used to assist them in the drafting process. Chitty wrote a number of treatises designed to guide practicing lawyers in how to negotiate the criminal justice system. His most extensive within the criminal law was his *Practical Treatise of the Criminal Law. Comprising the Practice, Pleadings, and Evidence* in four volumes.⁶⁸⁶ This treatise was published throughout the nineteenth century, producing several different editions in 1811, 1826, 1832, and onwards. In light of the fundamental changes that were happening to the criminal trial and criminal evidence during this period, it is not surprising that new editions were required regularly.

⁶⁸² J. Chitty, *A Practical Treatise on the Criminal Law Comprising the Practice, Pleadings, and Evidence Which Occur in the Course of Criminal Prosecutions*, (A. J. Valpy, 1816)

⁶⁸³ J.S Cockburn, *Journal of the Society of Archivists*, p.229

⁶⁸⁴ John H Langbein, *The Origins of the Criminal Adversarial Trial*, (Oxford University Press, 2003) p.44

⁶⁸⁵ Gray, *Crime, Prosecution and Social Relations*, p.10.

⁶⁸⁶ Chitty, *Practical Treatise*.

As a practical guide, Chitty writes using examples of pleadings and indictments. What is immediately apparent is that a disproportionate number of these examples relate to fraud offences. Given the complexity and vagueness of the laws surrounding fraud, it is not surprising that Chitty returns time and again to the difficult examples of fraud offences, which lawyers of the day would have struggled. One particular warning that Chitty repeatedly gives is the need for specificity in drafting indictments. Again, Chitty uses a fraud offence, the obtaining of goods by false pretences, to illustrate how vital such precision is to ensure that indictments do not result in cases being dismissed.⁶⁸⁷ Other advice for drafting indictments included the avoidance of complicated legal language and writing in such a way that all in the court could understand.⁶⁸⁸

More specific advice in the drafting of indictments for fraud offences included techniques for drafting indictments for a cheat in which legal terms such as a 'cheat' were permitted due to the particular meaning of the term.⁶⁸⁹ Chitty also warns of forgetting to specify the *mens rea* of the offence and again, it is fraud to which Chitty refers.⁶⁹⁰ In particular, the drafter of the indictment is reminded to include the word 'knowingly' in the indictment in order to ensure it does not fail at the first hurdle.

Chitty provides a number of examples of accurately drafted indictments for obtaining goods by false pretences contrary to the 1757 Act.⁶⁹¹ One of these is the common method for obtaining goods by false pretences, through pretending to be a servant to an unsuspecting shopkeeper.⁶⁹² Another example is a more commercial ruse, whereby the pretence of being 'merchants of fortune' was used in order to obtain credit for goods.⁶⁹³ Chitty details a number of the more common methods to fraudulently obtain credit such as the giving of a fashionable, but false address that made the fraudster appear much wealthier than they were. Chitty also details frauds

⁶⁸⁷ *Ibid* p.171

⁶⁸⁸ *Ibid* p.173

⁶⁸⁹ *Ibid* p.240

⁶⁹⁰ *Ibid* p.241

⁶⁹¹ 30 Geo II. C.24

⁶⁹² Chitty, *Practical Treatise*, p.1005

⁶⁹³ *Ibid* p.1006

against the Army and Navy to obtain pay and also the use of promissory notes to commit a fraud.⁶⁹⁴

What is apparent from Chitty's examples is that contemporaries were painfully aware of the plethora of offences falling under the umbrella of 'fraud'. Perhaps the most aware were the individuals charged with identifying the most appropriate law to apply in the circumstances, who were, of course, the clerks of indictment. Such scrutiny of indictments has often been argued to be one of the safeguards against the Bloody Code; if the indictment did not fit the circumstances, the prisoner was given the benefit of the doubt and the entire case was likely to be dismissed.⁶⁹⁵

Chitty concedes that often *multiple* indictments are required, particularly for more complex property offences in which the clerk has to apply both statute and common law.⁶⁹⁶ However, Chitty warns against adding unnecessary charges to an indictment as the Master (presumably of the Rolls) can fine clerks for unnecessarily complex or long indictments.⁶⁹⁷ This discretionary sanction was presumably introduced in order to ensure efficient drafting and also to save the court's time, as well as to limit the number of cases that had to be dismissed before or during trial due to poor drafting. Before Chitty's *Treatise*, the well-known Old Bailey barrister, William Garrow, reflected upon how judges were unsympathetic to the drafters of poor indictments: "I know there never was a judge went out of the way in order to cover the slovenliness of those who chuse [sic] to drawn indictments".⁶⁹⁸

⁶⁹⁴ *Ibid* p.1006-1020

⁶⁹⁵ May, *The Bar*, p.103

⁶⁹⁶ Chitty, *Practical Treatise*, p.248

⁶⁹⁷ *Ibid* p.293

⁶⁹⁸ Cited in Randall McGowen, 'Forgery and the Twelve Judges in Eighteenth-Century England' *Law and History Review*, vol. 29, no.1 (February, 2011) p.251

Drafting in Practice

In addition to Chitty's advice for the drafting of indictments, there survive a small cache of archives relating to the prosecution of fraud at the Old Bailey.⁶⁹⁹ The pre-trial papers for the prosecution of William Gordon and Thomas Drewry at the City of London Sessions in 1777 contain all prosecution witness informations, details of costings, legal notes by counsel, warrants and, very usefully, instructions regarding the indictment.⁷⁰⁰ The case concerns the fraudulent selling of a certificate for the Freedom of the City to John Cole, a carpenter then working in Farringdon Without. This collection of papers is particularly illustrative as counsel appears to have taken a note of the potentially applicable law, including five statutes and reference to 'Acts respecting mariners', with another note detailing a further five relevant statutes. In light of this complexity of law, it is unsurprising that the instruction for indictment is comprehensively detailed and the brief for the Prosecution contains both a conspiracy offence and obtaining monies by false pretences. The detailed costings of the case reveal that there were further complications in the drafting of the indictment due to the draftsmen not attending one Sessions, and having to re-appear at the next Sessions. It is important to note that whilst William Gordon apparently appeared at the Old Bailey, this is not recorded in the Proceedings.⁷⁰¹ This example reveals not only the complexity of fraud prosecutions, but also the options available to the prosecutor and the drafter of the indictment. It also reveals something of how conspiracy was added to indictments, presumably as an alternative offence should the false pretences indictment fail.

Given the breadth of choices available and the procedural regulations regarding the drafting of indictments, it is increasingly clear that lay prosecutors did not have full control over the entire criminal procedure when prosecuting fraud. Clerks were answerable for their drafting, so it therefore stands to reason that such actors were

⁶⁹⁹ These can be found at the London Metropolitan Archive: 'Papers re case against William Gordon and Thomas Drewry for a conspiracy and for obtaining money under false pretences' CLA/047/LJ/21/038

⁷⁰⁰ London Metropolitan Archives reference CLA/047/LJ/21/038

⁷⁰¹ This is one of a number of fraud cases which did not appear in the Proceedings. See also, the 1805 prosecution of Vincent Wright, Anne Fagan, and William Elson detailed in the accounts of Marlborough Street Magistrates' Court at T38/675.

not merely the puppets of prosecutors. Likewise, it is likely that lay prosecutors would have been happy to follow the legal advice of the clerk when laying down the indictment. These services had to be paid for and it is reasonable to suggest that a prosecutor would rarely argue against a legally-trained clerk's advice as to which offence to indict. A prosecution for a fraud brought to Marlborough Street Magistrates in 1805 is an revealing example of magistrates' clerks undertaking prosecutions and by-passing lay prosecutors.⁷⁰² Vincent Wright, Anne Fagan, and William Elson were brought before magistrates in 1805 for a bold scheme in which they rented a fashionable house near New Oxford Street, masqueraded as a lady and gentlemen and obtained credit by false pretences against a large number of shopkeepers and merchants in the area. Many, if not all of these shopkeepers, brought a united prosecution against the three accused and this caused great confusion in how the prosecution should be pursued. When the magistrates' clerk attended to support the prosecutors he found:

*[a] misunderstanding taking place between them and the clerk of indictments, on the misdemeanour side, they informed the sitting magistrate there of, whereupon they, and particularly Philip Neve Esq, one of the committing magistrates, ordered me to go down to the Sessions then holden, and endeavour [sic] to get an indictment preffered [sic] and found the defs [sic] being such very notorious characters, he directed me to carry on with the prosecution for them. Instructions and authority to prosecute accordingly.*⁷⁰³

This clearly demonstrates that when the magistrate felt a particular prosecution should be brought, the lay prosecutor could be circumvented in pursuit of a successful outcome. It further suggests that lay prosecutors did not have full discretion in bringing their prosecutions. Sadly there are few records pertaining to the thought and decision-making process of court officials. However, some forms and precedents for fraud indictments exist within the Old Bailey from between 1786 and 1800. It is significant that such precedents have not survived for other offences such

⁷⁰² See records at The National Archive: T38/675

⁷⁰³ T38/675

as forgery or larceny. This could be purely due to the capricious nature of decisions to retain certain documents over others. However, given the complexity of fraud offences and the interconnectedness with other offences such as forgery, it is unsurprising that there was more support for the drafters of fraud indictments than for other offences.

Prosecution Associations and Fraud

Previous chapters have demonstrated that complainants of fraud had a number of choices when using the law to seek redress for fraud. These choices ranged from the civil to the criminal law, and within the criminal law, a possible range of indictments and courts. As has been detailed in Chapter 3, fraud offences ranged from misdemeanours to felonies and consequently, any of the criminal courts from the summary to the assize may have been used for respective prosecutions.

This section of the chapter questions whether prosecutors of fraud were members of prosecution associations, and whether this had an effect on their choice to pursue their complaint of fraud criminally and in the most expensive criminal court. A brief overview of prosecution associations will be followed by consideration of a London prosecution association, The Society for the Protection of Trade against Swindler and Sharpers. Due to the nature of these associations, the focus will be upon prosecutions for non-naval frauds as such prosecutions are distinguishable by their quasi-official nature in that prosecutions were brought by state officials or agents.⁷⁰⁴

Prosecution Associations: a Background

Prosecution associations came into existence in the late-seventeenth century and continued in popularity until the mid-nineteenth century.⁷⁰⁵ Prosecution associations developed in order to make prosecutions cheaper for lay prosecutors by banding members together to form a type of insurance organisation that would cover the cost

⁷⁰⁴ See previous chapter

⁷⁰⁵ A Schubert, 'Private initiative in law enforcement: associations for the prosecution of felons, 1744-1856' in Victor Bailey (eds) *Policing and Punishment in Nineteenth Century Britain*. (London: Croom Helm, 1981) p.25

of any future prosecution.⁷⁰⁶ These private institutions existed in ‘virtually every part of the country’⁷⁰⁷ and were generally made up of local property owners. The number of prosecution associations is not fully known, but they certainly numbered in the hundreds between the mid-eighteenth and nineteenth centuries.⁷⁰⁸ In a time of private prosecutions, these associations ostensibly existed in order to reduce the cost and complications of securing justice through the criminal courts.

The associations were designed to pool the resources of their members, so that, should a member be a victim of a crime, they could rely on the association to either pay for this process or provide compensation. ‘Prosecution associations’ is a slightly misleading name as such associations often had wider and more nuanced purposes. Some associations merely provided compensation for the loss of the goods, rather than funding any legal action. Other associations only assisted the advertising of stolen property or only the partial funding of any legal action. Likewise, some associations acted as a hue and cry-type association and would actively seek out perpetrators of crime, sending agents to neighbouring areas to investigate and actively search for illegally obtained property.⁷⁰⁹ These associations also ranged in the scope of the offences they helped to prosecute. King highlights that most prosecution associations in the eighteenth century only applied to specific offences such as cattle theft, housebreaking or highway robbery.⁷¹⁰ This trend changed during the nineteenth century. From the end of the eighteenth century, there are more examples of associations prosecuting crimes other than larceny and burglary, such as crimes by soldiers, bread riots, or embezzlement of yarn.⁷¹¹ However, these associations were very much ephemeral, with their existence depending upon the crises to which they were reacting.

⁷⁰⁶ Langbein, *Cambridge Law Journal* p.344

⁷⁰⁷ Schubert, *Policing and Punishment*, p.25

⁷⁰⁸ *Ibid* p.27

⁷⁰⁹ David Philips, ‘Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England, 1760-1860’, In *Policing and Prosecution in Britain 1750-1850*, eds. D. Hay and F. Snyder. (Oxford, Clarendon Press, 1989), p.142

⁷¹⁰ P J R King, ‘Prosecution Associations and their impact in Eighteenth Century Essex’ in *Policing and Prosecution in Britain 1750-1850*, eds. D. Hay and F. Snyder. (Oxford, Clarendon Press, 1989) p.174

⁷¹¹ *Ibid*

Before turning to The Society for the Protection of Trade, it must be stressed that we cannot know how many of the 469 fraud indictments under scrutiny were brought by members of such organisations. The Proceedings make no reference to such associations in any of the relevant fraud cases, but this certainly does not mean that prosecutors were not members. With regard to the wider existence of prosecution associations, it is difficult to gauge their number or usage. Luckily there exists a cache of documentation relating to one particular prosecution association and this association was directly concerned with fraud.

The Society for the Protection of Trade against Swindlers and Sharpers

The Society for the Protection of Trade against Swindlers and Sharpers (henceforth referred to as 'the Society') was founded in London in 1776.⁷¹² There would have been other such trade associations during this period and, by 1866, these groups were amalgamated into the National Association of Trade Protection Societies.⁷¹³ Fortunately, there are surviving records of the Society from between 1825 and 1835, including a large number of the notices that were sent to members and correspondence both to and from the Society's secretaries.⁷¹⁴ The existing records provide insights into the Society, as well as invaluable information as to how its members fought the onslaught of fraud in the nineteenth century. Before analysing the details of the records surrounding the Society, it is perhaps first useful to outline the nature of these records and what they can tell us more generally about the Society.

The Society published bi-monthly notices that it sent out to each of its members. These notices contained a range of information, predominantly listing people to whom credit had been extended by one of the Society's members, who had then either disappeared or was found to be a swindler. The records also contain details of the proposed members to the Society, along with their professions. There are also

⁷¹² Records can be found in The National Archive at C 114/34

⁷¹³ Finn, *Character of Credit* p.290

⁷¹⁴ I would like to thank Professor Margot Finn for bringing these records to my attention.

examples of the accounts of the Society that were sent to members and a small cache of correspondence both to and from the Society's secretaries.

As with any voluntary organisation during the time, the scope of the responsibilities of prosecution associations were limited to the constitution of that particular association and Consequently, it is appropriate to use one such association as a focus upon which to inform understandings of the role that particular association played in the criminal justice system. By studying this particular society, we can gain insight into the common practices that traders used to deter, detect, and prosecute potential swindles.

The Society was highly organised and run by a strict set of rules. A recommended change in 1831 to 'the 18th of the printed rules' suggests that a constitution underpinned the running of the Society. Like many other such associations⁷¹⁵, the Society employed a solicitor, Mr Thomas Miller of 22 Ely Place, Holborn. It is because of Mr Miller that the records survive. From its accounts, it is apparent that the Society had a full time secretary who was paid a very generous salary amounting to £628 including expenses. The Society also had its own Treasurer, Messrs Veres, Ward & Co of Lombard Street. The Society had quarterly meetings in the George and Vulture tavern on Cornhill, but the notices would suggest that attendance at such meetings needed to be encouraged. The committee incentivised attendance at the meeting with a policy that the first nine members who arrived at quarterly meetings and remained for the duration received three shillings. The Society had such healthy finances that it also invested some of the subsidies in financial speculations. There are no details of these investments, but they returned a bi-annual dividend of the usual three per cent, so it might be concluded that these investments were safe options such as government bonds.

Members

Fortunately the quarterly meetings of the Society were well-recorded and the minutes sent to members. These minutes, in the form of notices, included a list of

⁷¹⁵ Schubert, *Policing and Punishment* p.32

the newly proposed members alongside their occupations and addresses. We know from the records that the Society was very large, receiving subscriptions from between 830 and 890 members, at an average of just over one pound per annum. Lists of proposed members suggest that both companies and individuals could be members. The occupations of all the members cannot be ascertained, as the records do not include a full list of members. However, the notices detail the occupation of proposed members, which gives a very good indication of the background of members.

The Society membership appears diverse. Memberships of prosecution associations tended to be gentlemen, farmers, or tradesmen, depending upon the location and purpose of the association.⁷¹⁶ The notices reflect that, as well as tradespeople, there were a large number of artisans such as brush makers, sack makers, hat makers, carpenters, and silversmiths. Overwhelmingly however, the members are tradespeople including a range of merchants, booksellers, drapers, and haberdashers. There is evidence of professional members such as land surveyors and solicitors, as well as a 'gentleman' member. Companies were also members of the Society. Of the 225 members recommended for election to the Society, 83 of these were companies. This is to be expected given the nature and purpose of the Society as a protection against threats to trade.

As detailed in Chapter 5, we must be very careful not to make too broad conclusions regarding the social status of members according to their occupations. However, what we can see is that the Society has a wide range of members, from the smaller artisan to the international merchant. The membership of the Society largely correlates with the occupation of prosecutions of fraud within the Old Bailey, with the largest proportion of members coming from trade.⁷¹⁷ What all members have in common is that they all had property to protect and they all worked in industries and occupations that heavily relied upon the use of credit, both receiving and extending. The diverse membership of the Society supports Schubert's claim that membership

⁷¹⁶ Philips, *Policing and Punishment* p.132

⁷¹⁷ See Chapter 5

of such associations was not based on social standing⁷¹⁸, as a 'gentleman' was a member alongside a bricklayer.

As well as tradesmen, the board of the Society was also made up of aldermen, such as George Bridges Esq, who was Vice-President, and Richard Clark Esq, Chamberlain of London, who acted as President. Connections between magistrates and prosecution associations were well known. Sir John Fielding strongly advised all property owners to join such an association, perhaps because he believed this would encourage more people to engage with and utilise the criminal law. It is unknown how many associations Fielding played a role in establishing, but it is known that he directly advised the establishment of the 'Society for Prosecuting Felons, Forgers etc' in 1767.⁷¹⁹ Fielding was also passionate about the need for prosecution associations in order to protect shopkeepers:

As shopkeepers are more subject to the inroads of cheats and thieves than other persons...and as the expense and loss of time in prosecutions, added to the loss of their goods, deters many from bringing such offenders to justice, by which leniety (sic) they are encouraged to continue their villainous practices, to the injury of trade, it is apprehended that an association of tradesmen and shopkeepers, under the following restrictions, will, by rendering the detection and punishment of the said offenders more easy...and deter evil-disposed people from fixing on shopkeepers as the objects of their prey.⁷²⁰

It is therefore unsurprising that City magistrates and officials would be senior members of the association. It is also not surprising that aldermen, often leading merchants within the City, would be members of an association designed to protect their business interests from fraud. Schubert has noted a correlation between the existence of prosecution associations and the presence of active magistrates.⁷²¹ The

⁷¹⁸ Schubert, *Policing and Punishment* p.30

⁷¹⁹ Philips, *Policing and Punishment* p.122

⁷²⁰ Fielding, John, *Extracts from such of the penal laws as particularly relate to the peace and good order of the Metropolis*, 2nd ed.- (T.Cadell, 1763) p.267

⁷²¹ Schubert, *Policing and Punishment* p.27

role of aldermen in the committal of fraud cases to the Old Bailey will be explored in detail in the following chapter. What is significant in relation to the members of the Society however is that aldermen, who also sat as magistrates within the City of London, were actively involved in a large association devoted to prosecuting fraud. The significance of the presence of City aldermen is compounded by the location and operation of the Society.

Most prosecution associations were locally focused, rather than nationally, with Schubert arguing that prosecution associations ‘tend[ed] their own gardens’.⁷²² The geographical remit of the Society is not wholly clear, but the Society was certainly based in the Metropolis, if not the City. The quarterly meetings were held on Cornhill⁷²³, perhaps chosen because it was central to most members and easily reached, but could also suggest that more members were based in the City than in the rest of the Metropolis. Some further detail regarding the location can be gauged from the addresses of the new members that were circulated in the monthly newsletter. These addresses were referred to as the ‘residents’ of the new members but it is not clear whether this is the location of the business or the individual. One proposed member, James Careless, a gentleman, gave his residence as the New York Coffeehouse, presumably because this is where he had his post directed when he was in town.

Most new members lived within the Metropolis, with approximately only eight per cent giving an address outside of the capital.⁷²⁴ There were members from as far away as Banbury, Manchester, Newcastle, and Liverpool. Of these members who lived outside of the Metropolis, forty-four percent were bankers, sixteen percent gentlemen or solicitors, and eleven percent merchants. The majority of members are London-based and joined a London-based association to protect their trade. Of the eight percent who reside outside of the Metropolis, it is highly likely that many of them conducted some of their business in London or spent enough time in the Capital to justify membership of an association should they fall foul of fraud when in London.

⁷²² Schubert, *Policing and Punishment* p.29

⁷²³ Cornhill is a major street within the City of London.

⁷²⁴ Of 227 new members, 18 lived outside the Metropolis.

The increasingly mobile population and improved transportation links across the country resulted in swindles being carried out in more than one area at a time and there was a growing need to enforce laws across the country. This is reflected in the notices of the Society. For example, there is suggestion that legal action was taken by members outside of the Metropolis. In March 1831, it was circulated that a member had taken action in Birmingham and the case had been dismissed as the goods sought to be recovered were for less than £5 and thus, the member had started his action in too superior of a court. This is a very significant notice as it reflects not only that the Society's dealings extended beyond the metropolis, but also that members were sharing legal experience in order to develop knowledge of the court system. This further demonstrates how membership of associations allowed for the pooling of knowledge, as well as the pooling of finances, and made such prosecutions far more formidable than the lone prosecutor.

The Work and Focus of the Society

The Society seems to have had a range of functions, not just the prosecution of swindlers. There is much evidence to suggest that the Society was more concerned with the prevention of fraud than the subsequent compensation of members. The Society also acted as insurance for its own members. In 1831, a motion passed to ensure that members not only had their costs paid for in failed prosecution cases, but that their legal fees when defending any legal action would also be paid. It is not clear what these 'legal fees' refer to as they are separately noted in the Society's accounts to those of prosecutions. However, as shall be detailed below, there were a number of reasons the Society might have been embroiled in varying forms of litigation.

From a detailed examination of the records, a selection of offences against members shall be considered, followed by the responses and reactions the Society employed to address such threats to their trades. The records detail some of the methods by which the associations caught and prosecuted swindlers, illustrating how associations used the full range of activities we would come to associate with the modern police: detection, prosecution, and deterrence.

As illustrated throughout this thesis, there were a range of fraudulent offences and types of fraud being commonly carried out in the eighteenth and nineteenth centuries. The forms of fraud carried out against members of the Society resemble the types of fraud found at the Old Bailey during this time. Many swindles against members involved the fraudulent obtaining of credit. In a time when it was almost impossible to definitively check the identity or credentials of a person, tradespeople were often forced to rely on either the person's demeanour, or the use of an introductory letter or character reference. Swindlers took advantage of this by imitating the more respectable classes, forging character references, or pretending to be acquaintances of mutually known third parties.⁷²⁵ It is these types of fraud that make-up over fifty percent of the fraud cases heard at the Old Bailey. These forms of fraud have been classified in this thesis as false servant fraud, financial instrument fraud, and consumer fraud.

The swindles committed against members of the Society were variations of obtaining goods by false pretences, false personation, or the fraudulent use of a financial instrument. Some swindles were more elaborate or ingenious than others, but they were no more than variations of these three core types of fraud. Extending credit always came with risks of non-payment, whether this be due to fraudulent or non-fraudulent motives of those to whom credit has been extended. However, the notices of the Society would suggest that the members had identified a number of recurring fraudulent threats to their commercial integrity. In looking at just one of the Society's notices circulated to its members, we can see the range of frauds suffered by the members.⁷²⁶ A common threat to tradespeople was the fraudulent use of cheques in order to obtain goods. Mr D Page, keeper of a shop on the Mile End Road, was swindled by a man claiming to be a 'G. Edwards', who obtained goods using a cheque that, when presented at the payer's bank, was rejected as the payer was not known to the bank. This type of offence was more likely to be pursued as a forgery, although additional indictments of fraud offences could have been added.

⁷²⁵ Finn, *Character of Credit*, p.292

⁷²⁶ C 114/34 : 4th notice, 1831

A further threat to members was the fraudulent ordering of goods by post. Such long-distance trading posed an even greater risk for the traders as the usual methods available to assess creditworthiness, such as questioning the customer, gauging their social standing and credibility from their demeanour, accent, or dress, were not possible. There are many examples of such fraud within the notices. For example, a letter purporting to be from a Henry Jones & Co of Duke Street turned out to be fraudulent in that Henry Jones had not given permission for the letterhead to be used and knew nothing of the correspondence. A particularly bold fraud was circulated to the members of the Society in 1831. John Hamilton & Co advertised for the purchase of goods from 'merchants, manufacturers, warehousemen, factors, shopkeepers, and others' instructing them to send samples of their goods to an address on Bishopsgate Street in the City. The fraudsters requested that the first communication should contain 'no personal applications in the first place'. Clearly this was an ingenuous fraud to obtain as many samples of goods and property in a short space of time before disappearing.

A common threat to the members of the Society was organised fraud committed by groups of individuals. There was even an instance in which a member of the Society himself was part of an organised swindle heard at the King's Bench that resulted in a one-year prison sentence. There are two groups of swindlers who appear in the notices a number of times. The Whittingham brothers appear in five notices, primarily in 1831, and it is apparent that the Society paid close attention to the brothers' movements. The final reference to the Whittingham brothers in the Society's notices details over twelve addresses at which the brothers had lived, which assumedly would allow members to cross-reference further applications for credit or other historic frauds.

Another gang of fraudsters who plagued the Society was headed by Thomas Cornish Broad. Broad appears in the notices seven times between 1831 and 1835, wherein he was reported to have played several roles in frauds including the fraudulent giving of good character references in order to obtain credit. Newspaper reports following these notices reflect that the authorities were also aware of the web of criminal

activity involving Broad through which the tradesmen of London were terrorised. In 1840, Isaac Godfrey was brought before Sir Peter Laurie at the Mansion House on a charge of forgery. During these proceedings it became apparent that Godfrey was a member 'of a gang of fellows who have been extensively plundering tradesmen'.⁷²⁷ Following much interrogation by Laurie, it was revealed that the person in charge of this 'knot of swindlers'⁷²⁸ was none other than Thomas Cornish Broad. Laurie postponed the hearing, calling for other potential prosecutors or witnesses to come forward. A week later, 'a great crowd of tradespeople' appeared at the Mansion House revealing Broad's organisation to be 'a very extensive gang of swindlers [who] defrauded tradesmen of their goods'.⁷²⁹ The evidence given during the hearing paints Broad as a *Moriarty* figure at the centre of a gang of swindlers made up of at least fifty members. Laurie asked the throng of prosecutors and others in attendance whether Broad had attended the hearing in order to answer the accusations against him. Unsurprisingly this question was met by laughter. There is no evidence that Thomas Cornish Broad was ever brought to justice, or that Sir Peter Laurie was true to his word that 'I shall not see the tradesmen of the metropolis plundered by gangs of villains'.⁷³⁰ It is apparent however that the Society paid close attention to the threat of organised crime and attempted to take action to protect their members.

Prosecutions

The Society employed a range of methods to protect its members from common frauds of the day, including the use of prosecution and formal engagement with the criminal justice system, which forms the focus of this thesis. The Society prosecuted fraud in the magistrates and at the King's Bench, demonstrating that the Society engaged with the full range of criminal courts.

The notices reference fourteen successful prosecutions; three at the Old Bailey, one in the King's Bench, and the remaining ten in the magistrates' court. However, the notices do not always detail which magistrates, so it is not possible to identify

⁷²⁷ The Morning Chronicle, 26th November 1840

⁷²⁸ *Ibid*

⁷²⁹ The Morning Chronicle, 2nd December 1840

⁷³⁰ *Ibid*

whether the bulk of the prosecutions were carried out in the City or in Middlesex. Of the three Old Bailey cases, one was for forgery, one for conspiracy to defraud, and the other for obtaining goods by false pretences. The reporting of the prosecutions within the notices predictably only covers successful prosecutions. Nevertheless, they give an impression of merciless prosecutions, such as the prosecution of Frederick Smith for forgery in 1831, who was reportedly sentenced to death. What this notice excludes however is that the Society had asked the judge for mercy to avoid Smith being executed.⁷³¹ The omission of this detail in the notice suggests that the notices acted partly as a deterrent for potential swindlers against the Society and its members. Moreover, the notices also provided an opportunity for the Society to demonstrate to its members that they were getting their money's worth. Other Old Bailey prosecutions included that of John Robins, who was convicted of fraud by false pretences in 1827.⁷³² Four other accused were successfully prosecuted at the Old Bailey in 1825 for cheating and defrauding several members of the Society. The notices also detail the sentences of the convicted fraudsters. For example, John Robins, alias John Horne, was convicted of fraudulently obtaining goods and was sentenced to seven years transportation.

Whilst a number of complaints were pursued in higher courts, the bulk of prosecutions brought by the Society were disposed of at summary level. The majority of the indictments were for obtaining goods by false pretences, or the ubiquitous 'fraud'. All but one of the accused was male, while all but one was brought within the Metropolis.⁷³³

These prosecutions were not actually undertaken to recover the lost goods *per se*. Goods could only be recovered for felony and not misdemeanour, such as the fraudulent obtaining goods by false pretences.⁷³⁴ One purpose of the prosecution may have been publicity. The Society was keen to advertise these prosecutions. Notices could have been published solely for the audience of the members in order

⁷³¹ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 17 April 2011), January 1831, trial of Frederick Smith (t18310106-4)

⁷³² *OBP*, April 1827, trial of John Robins (t18270405-86)

⁷³³ Henry Fanzen was prosecuted for conspiracy at the Surrey Sessions.

⁷³⁴ See Chapter 3

to justify their membership fees, but if the Society were to have considered deterrence part of their remit, it would have made more sense for them to publicise not only that they were willing to prosecute swindlers, but that such prosecutions had previously been successful.

Deterrence

The level of activity of a prosecution association should not be gauged by the number of successful prosecutions it brought, but rather by the level of security they offered their members.⁷³⁵ The Society's responses to fraud were designed to deter potential swindlers from targeting members of the Society. As such, the existence of the Society may have acted as both a general and specific deterrence, with high-level and frequent prosecutions serving as a warning to would-be swindlers in the capital.⁷³⁶ Moreover, membership of the Society may have lessened the likelihood of the individual members being targeted by swindlers, as they would be aware that the cost and complexity of prosecution would not prevent specific traders from undertaking criminal action against them. John Styles makes the argument that associations may have advertised lost goods or successful prosecutions in order to deter future swindlers.⁷³⁷ Of course, it is impossible to estimate the number of people who were deterred by such membership and consequently chose not to commit crime against specific members of an association.

It is also not clear how general members of the public would know which traders were members of the association and which were not. King has suggested that prosecution associations circulated lists of its members in order to inform the public and also to deter fraudsters and would-be thieves from targeting their premises.⁷³⁸ This explains why advertisement of the Society was so important. It is also conceivable that members displayed a sign in their shop windows, much like a

⁷³⁵ Philips, *Policing and Prosecution*, p.143

⁷³⁶ Schubert, *Policing and Punishment* p.34

⁷³⁷ Styles, John 'Print and policing. Crime advertising in eighteenth-century provincial England' in Victor Bailey (eds) *Policing and Punishment in Nineteenth Century Britain*. (London: Croom Helm, 1981) p.68

⁷³⁸ King, *Policing and Prosecution* p.204

neighbourhood watch sign or that members posted the notices of the Society behind counters within view of the general public. Alongside the publication of successful prosecutions, it was also common for associations to put up posters evidencing the confession of the accused in lieu of prosecution.⁷³⁹ King's argument relies on the assumption that those committing fraud were both informed and rational. Those committing fraud offences may have been better organised and planned their crimes more than in other offences that allowed for more opportunistic committal such as larceny. More significantly than whether being a member of a prosecution association deterred fraud is whether tradespeople *believed* that such publicity and membership of the Society would deter fraud against them. The extensive use of publicity would suggest that members believed it did reduce fraud against them.

Alongside an agenda of deterrence, members of the Society may have had to demonstrate they were taking legal steps to recover property before their insurance companies would cover any loss. This argument, and the significance of insurance companies in the prosecution of fraud, appears more frequently with regard to the nineteenth century⁷⁴⁰, but it cannot be ruled out in relation to the eighteenth century.

King has argued that, whilst prosecution associations were widespread, their impact was not felt in the higher criminal courts.⁷⁴¹ King argues this was because the organisation of such associations was poor and the financial structures and general appetite of the members did not allow for more complex and expensive legal action.⁷⁴² This argument is certainly not borne out by the records of the Association for the Protection of Trade, which not only had surplus funds at the end of every year, but also had an in-house solicitor and paid secretary employed that allowed for a well-organised and consistent association. Perhaps this level of organisation is what

⁷³⁹ Philips, *Policing and Prosecution* p.129

⁷⁴⁰ For the significance of insurance companies on fraud complaints see Gregory Anderson, *Victorian Clerks*, (Manchester University Press, 1976)

⁷⁴¹ King, *Policing and Prosecution* p.202

⁷⁴² *Ibid*

permitted the Society to bring so many prosecutions against swindlers, both in the lower and the higher criminal courts.

It cannot be known how many fraud indictments heard at the Old Bailey during this period were supported by prosecution associations. However, given the popularity of the associations and the frequent use with which they were used by shopkeepers and property owners, it can be concluded that some of the fraud cases would have been brought by members of such associations. The existence and widespread membership of such associations is particularly significant to the prosecution of fraud offences as it goes some way to explaining why so many misdemeanours were prosecuted within the expensive assize courts, when the quarter sessions or magistrates could have achieved a similar result for less expense. Membership of such organisations allowed shopkeepers and tradespeople to publicise the fraudulent crimes against them and other members of the organisation, and to very publically demonstrate that such offences would be prosecuted to the full extent of the law. Wilson argues that the existence of such dedicated associations reflects how fraud offences had gained wider social recognition.⁷⁴³ It further demonstrates the extent and development of traders' organising and pooling resources in order to protect themselves against an ever expanding commercial society that brought with it ever more insidious and ingenious opportunities for fraud.

Fraud and the Use of Policing and Magistrates' Agents

Prior to the establishment of the Metropolitan Police in 1829, it is anachronistic and misleading to refer to the 'Police'. However, there did exist organisations and agents that played an *ad hoc* role in the enforcement of the criminal law.⁷⁴⁴ A formal, London-wide police force was not introduced until 1829.⁷⁴⁵ However, there was sporadic and localised police coverage across the capital, with Middlesex in particular having an increasingly active police presence in the form of the Bow Street

⁷⁴³ Wilson, *British Journal of Criminology*, p.1079

⁷⁴⁴ For detailed explorations of the history of the police see: D. Hay and F. Snyder (eds), *Policing and Prosecution*; Durston, *Burglars and Bobbies*

⁷⁴⁵ David Philips, *Crime and Authority* p.54

Runners.⁷⁴⁶ As returned to time and again in this thesis, the growth and establishment of commerce and the need for a secure environment within which commercial relations could be encouraged and maintained led to property laws and wider property protection being made paramount within the criminal justice system. The police played an essential role in this process.⁷⁴⁷ Magistrates also played an indispensable role in the protection of property and, in particular, with the attempt to increase confidence and trust in the market with the aim of growing commercialism and attracting further investment and commercial activity. Within London during the eighteenth and nineteenth centuries, quasi-police forces were emerging, connected to local magistrates such as Bow Street. As this chapter is seeking to understand the methods and tools used by prosecutors of fraud when bringing cases to the Old Bailey, the role of policing agents, where present, is potentially significant.

Within the 469 fraud accusations under examination here, there is evidence of police involvement in approximately eleven percent of fraud indictments during the period. There has been little systematic research into the presence of police officers at Old Bailey trials and so, there are few comparisons with other offences to ascertain whether police involvement in fraud trials was average or otherwise. However, Beattie estimates that between 1770 and 1792, an average of eight or nine Bow Street Runners appear within each session.⁷⁴⁸ As Beattie was only focusing upon the Runners and not constables from other jurisdictions within the Capital, it may be suggested that there would have been more of a police presence than Beattie reveals. The presence of policing agents in fraud trials is consistent over the time period and, of the fifty-two fraud indictments in which policing agents played a role, there is no apparent clustering over time. The 1760s and the 1810s saw marginally more police agent involvement, but this is partly because these decades saw a number of joint enterprise fraud cases that were heard at the same time but have

⁷⁴⁶ For a detailed history of the Bow Street Runners see J. M Beattie, *The First English Detectives* (Oxford University Press, 2012)

⁷⁴⁷ Steven Spitzer and Andrew T. Scull, 'Privatization and Capitalist Development: the case of the private police' *Social Problems*, Vol.25, No.1 (Oct, 1977) pp.18-29.

⁷⁴⁸ John Beattie, 'Garrow and the Detective: Lawyers and Policemen at the Old Bailey in the Late Eighteenth Century' *Crime, History & Societies*, Vol.11. No.2 (2007) p.4

been counted separately.⁷⁴⁹ In these instances of joint enterprise, where a police agent is counted for one offender, the agent is counted for other offenders as well which gives the impression of greater police agent involvement.

Ascertaining the number of police involved in fraud trials has significant methodological challenges. The role of policing agents was in flux during this period and their role within the trial could vary as to importance and level of authority. Beattie is confident that the Proceedings are the most useful source in gauging the extent of police presence in criminal trials.⁷⁵⁰ As detailed in Chapter 2, evidence gleaned from the Proceedings is generally thought to be accurate, but by no means complete. Consequently, when using the Proceedings to ascertain the frequency with which the police were involved in fraud prosecution, it may be assumed that whilst there is little mention of police presence, this does not mean that policing agents were not involved in cases. It is very likely that police agents would have been present in other cases, but the Proceedings do not reveal this. Where there is police presence, this is clear from the court report and the police agent is generally referred to as 'constable', or later in the period, as 'officer'.⁷⁵¹

With no similar research having been carried out with regard to other offences, it is not possible to conclude whether police involvement in eleven percent of Metropolis fraud prosecutions is unusual. However, there are some possible conclusions to be drawn regarding the impact of police presence upon conviction rates.

⁷⁴⁹ See Chapter 2

⁷⁵⁰ Beattie, *History & Societies*. p.4

⁷⁵¹ At the turn of the nineteenth century, there is a change in lexicon from the term 'constables' to 'officers'. This move away from the lexicon associated with the traditional, night watch-style policing to the more formal title, invoking the clear association of duty to the new role of the modern force.

Table 6.1: Policing Presence and Verdicts

	Guilty	Not Guilty	Special Verdict	Total
No Policing Agent	271	145	1	417
Policing Agent	49	3	0	52
Total	320	148	1	469

Of the fifty-two indictments in which police were involved, forty-nine of these resulted in conviction. This is a conviction rate of nearly ninety-five percent. Where police were not involved in prosecutions, just under sixty-five percent were convicted. This figure of course involves trials in which prosecutors did not appear or where the accused raised no defence, but the contrast with police-involved indictments is stark.

Whilst the Proceedings provide some quantitative information regarding the presence of policing agents in the prosecution of fraud, little information about the depth and breadth of police involvement is revealed. There is no information regarding how or when the policing agents became embroiled in the particular accusation of fraud, or who employed them. However, glimpses of such information can be found in other sources. Bow Street Magistrates accounts submitted to the Treasury from the mid-eighteenth century indicate that Bow Street used constables and other personnel to great effect in the detection and prosecution of fraud.⁷⁵² This use of constables was for cases such as preventing illegal gambling, but also included a three day pursuit of ‘two cheats’ by two constables across Bedfordshire and Hertfordshire at a cost of £7, 4 shillings and 10 pence.⁷⁵³ Such dedication of resources to the capture of swindlers not only reflects how seriously such misdemeanours were taken, but also provides some insight into the level of involvement magistrates had in the prosecution of fraud. There are clear examples when magistrates and their

⁷⁵²Treasury Department Accounts – John Fielding’s Accounts at the National Archive reference T38/671

⁷⁵³ *Ibid*

officers take over the detention and apprehension of fraud accused. This illustrates how the lay prosecutor of fraud was not entirely unsupported in their action. Moreover, in light of the discussion above regarding the lay prosecutor's discretion in prosecuting for fraud, it would be astonishing if following such expenditure of resources the magistrates would not play a pivotal role in the next stage of the prosecution. This increased role in fraud prosecutions by magistrates evidences not only how much support lay prosecutors could receive from state actors, but also the beginnings of magistrates taking control of certain prosecutions. The significance of magistrates in the prosecution of fraud will be discussed in detail in the following chapter but it is significant that there were policing agents, who worked for magistrates, involved in fraud prosecutions and more significantly, that where they were involved, the conviction rates were remarkably high.

A further development that extended the role of policing agents in the criminal justice system was the increased use of police agents by public authorities and large organisations such as the Royal Mint, the Post Office, and the Bank of England.⁷⁵⁴ This involvement was primarily in relation to forgery and coining offences. For example, Bow Street had a dedicated coining expert, John Clarke, who had previously worked for the Royal Mint.⁷⁵⁵ The police were particularly widely employed by the Bank of England to both detect and assist in the prosecution of forgery cases.⁷⁵⁶ McGowen has demonstrated that such police involvement led to better detection and prosecution of forgery cases. The success of prosecutions where policing agents were present is reflected in fraud trials at the Old Bailey. As stated above, in nearly ninety-five percent of fraud indictments where there was a police presence, a conviction was achieved. However, whilst there appears to be a strong correlation between the presence of policing agents and convictions, a police presence was not the only factor

⁷⁵⁴ John Beattie, *History & Societies*, p.4

⁷⁵⁵ *Ibid* p.10

⁷⁵⁶ Randall McGowen, 'Managing the Gallows: the Bank of England and the Death Penalty, 1797-1821' *Law and History Review*, Vol.25, No.2 (Summer, 2007) pp.241-282 and Randall McGowen, 'The Bank of England and the Policing of Forgery, 1797-1821' *Past & Present*, No.186 (Feb, 2005) pp.81-116

that contributed to prosecutorial success. Another essential factor was the presence and role of counsel.

The Presence of Counsel in Fraud Trials

The presence and role of counsel in the prosecution of fraud is pivotal to our understanding of how fraud was prosecuted, how these prosecutions impacted upon the substantive laws of fraud, and how they were prosecuted in future trials. As shall become apparent, the presence of both prosecution and defence counsel allowed for the laws of fraud to be better tested and argued, and allowed for legal points to be addressed by the appeal judges in Crown Case Reserved hearings. Additionally, the presence of counsel for either the prisoner or the prosecutor impacted upon the level of reporting of the case within the Proceedings.⁷⁵⁷

There has been extensive and excellent research upon the growth in the number and role of counsel within the criminal trial.⁷⁵⁸ However, data derived from within these studies have, for the most part, been conducted through sampling the proceedings or through keyword searches.⁷⁵⁹ Sampling and keyword searches certainly give good estimations of the presence of counsel, but such keyword searches may of course miss examples when the words do not appear and also where counsel are referred to by name rather than as 'counsel'.⁷⁶⁰ This study of fraud has allowed a detailed exploration of *all* fraud indictments⁷⁶¹ during the period 1760-1820. It therefore provides data about how many prosecution and defence counsel were present in these trials and contributes to on-going discussions in the field.

⁷⁵⁷ See Chapter 2

⁷⁵⁸ John H. Langbein, "The Criminal *Trial before the Lawyers*," *University of Chicago Law Review*: Vol. 45: Iss. 2, (1978); John H Langbein, *Origins*; John H. Langbein, The Origins of Public Prosecution at Common Law, *American Journal of Legal History* 17, 313 (1973); John Beattie, *Crime and the Courts, 1660-1800* (Oxford University Press, 1986); John Beattie, *Law and History Review* (1991); Cairns, *Advocacy*; May, *The Bar*

⁷⁵⁹ Robert Shoemaker, 'Representing the Adversary Criminal Trial: Lawyers I the Old Bailey Proceedings, 1770-1800 in David Lemmings ed. *Crime, Courtrooms and the Public Sphere in Britain, 1700-1850* (Ashgate, 2012)

⁷⁶⁰ Shoemaker, *Crime, Courtrooms and the Public* p.89

⁷⁶¹ Barring the caveats as explored in Chapter 2

The use of prosecution counsel in fraud cases can reveal information about the prosecutor, such as the likelihood of being a member of a prosecution association, or being particularly wealthy and therefore willing to expend monies unrecoverable in the prosecution of a misdemeanour as was the case with fraud prosecutions. Additionally, by estimating the number of prosecution and defence counsel involved in fraud prosecutions, it may reveal something of how fraud offences were used within the prosecution system. Fraud is a particularly useful group of offences through which to measure the presence and influence of counsel as it includes both misdemeanours and felonies.⁷⁶² Though this study focuses upon the role of prosecutors of fraud offences to gain a better understanding of how the laws surrounding fraud were developed and how these offences were tried, it is useful to also understand and explore the role of defence counsel.

Whilst there is some debate as to when counsel began to play a role in the criminal trial, there was an increase in the presence of counsel from the mid-eighteenth century.⁷⁶³ This may be due to a number of reasons, most of which have been explored by Langbein and focus upon the deliberate acts of counsel to increase their influence and opportunity for increased legal fees.⁷⁶⁴ Brooks has persuasively argued that counsel also moved their practices from the civil courts to the criminal in the wake of the imposed taxes upon civil litigation, leading to its great decline in the mid-eighteenth century.⁷⁶⁵ The effect of the influx of lawyers into the criminal process was to lead to the increased complexity of criminal procedure and evidence, and the growing passivity of the judiciary leading to our modern adversarial system.⁷⁶⁶

⁷⁶² There has been little inquiry has been conducted into the presence of counsel in misdemeanour trials see May, *The Bar*, p.22.

⁷⁶³ Beattie, *Law and History Review* (1991); John H Langbein, *Origins*

⁷⁶⁴ Griffiths, *Law, Crime and History* p.37

⁷⁶⁵ Brooks, *Lawyers*

⁷⁶⁶ John H Langbein, 'Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources' *University of Chicago Law Review*, Vol.50, No.1 (Winter, 1983) p.3; John H Langbein, *The Origins of the Criminal Adversarial Trial*, (Oxford University Press, 2003); John H. Langbein, The Origins of Public Prosecution at Common Law, *American Journal of Legal History* 17, 313 (1973)

Of the 469 fraud indictments identified at the Old Bailey between 1760 and 1820, the table below details how many of these involved counsel and whether this representation was for the prosecution, the defence, or both sides.

Table 6.2: The Presence of Counsel in Fraud Trials at the Old Bailey

Counsel	Frequency	Percentage
Prosecution	55	11.7
Prosecution and Defence ⁷⁶⁷	42	9.0
Defence	28	6.0
None	344	73.3
Total	469	100.0

During this period, it is clear that counsel were still a rarity at the Old Bailey. Estimates in the general number of counsel present at assize trials vary, but there is some similarity in the findings. Beattie has claimed that between 1740 and 1800, no more than three per cent of assize trials involved prosecution counsel, and no more than ten per cent defence counsel. Shoemaker, using a keyword search, estimates that in the 1770s, counsel were present in between five and ten per cent of Old Bailey trials.⁷⁶⁸ Allyson May has made even bolder conclusions regarding the presence of counsel within the Old Bailey, estimating that by 1800, twenty-one percent of prosecutors instructed counsel, and twenty-eight percent of prisoners also had counsel.⁷⁶⁹ However, May claims that very rarely did counsel appear on both sides at the same time and estimates that in less than ten per cent of cases did Old Bailey trials see direct contest between counsel.

The timeframe under consideration is very sensitive. Certainly counsel for the defences began to be seen at the Old Bailey in the 1730s⁷⁷⁰, and by the start of the nineteenth century this presence was increasing. During the earlier stages of his

⁷⁶⁷ This number of combined counsel is in addition to the separate defence and prosecution figures.

⁷⁶⁸ Shoemaker, *Crime, Courtrooms and the Public*, p.77

⁷⁶⁹ May, *The Bar*, p.34

⁷⁷⁰ Langbein, *University of Chicago Law Review*, (1978) p.269

research, Langbein posited the hypothesis that defence counsel were only allowed into the felony trial due to the high number of prosecution counsel.⁷⁷¹ Judges felt that the felony trial was too harshly stacked against the prisoner and consequently allowed some minimal assistance from counsel in examining witnesses. However, this hypothesis has been undermined by quantitative studies on the presence of counsel. Beattie, May, and even Langbein himself agree that defence counsel were more prevalent in felony trials at the Old Bailey than they were for the prosecution.⁷⁷²

The presence of counsel in fraud cases clearly contradict the findings of May, Beattie and Langbein, and rather, support Langbein's earlier hypothesis that prosecution counsel were more prevalent than counsel for the prisoner.⁷⁷³ In fraud indictments, counsel are almost twice as likely to appear for the prosecution as for the defence and overall counsel appeared in nearly twenty-seven percent of indictments. The reasons for this discrepancy are myriad and will be explored by first considering the high presence of prosecution counsel, then the relatively low presence of defence counsel, before considering the relatively high number of fraud cases that were contested by counsel on both sides.

Prosecution Counsel

Prosecution counsel was permitted in all cases, whether felony or misdemeanour, and were permitted to address the jury, as well as examining witnesses and making legal pleadings.⁷⁷⁴ It is therefore understandable that lay prosecutors may have engaged the services of an advocate to present their case in court. Moreover, in hiring an advocate to represent them, lay prosecutors had the opportunity, through counsel, to speak directly to the jury, as lay prosecutors did not have rights of audience to address the jury.⁷⁷⁵ In his earlier work, Langbein argued that prosecutors frequently hired counsel to argue their cause and it was for this reason that defence

⁷⁷¹ Langbein, *Cambridge Law Journal*, p.319

⁷⁷² May, *The Bar*; Beattie, *Law and History Review* (1991); Langbein, *Cambridge Law Journal*

⁷⁷³ Langbein, John H, *Prosecuting Crime in the Renaissance: England, Germany, and France* (Harvard University Press, 1974) p.77

⁷⁷⁴ For an explanation of the rationale for this distinction see: Langbein, *University of Chicago Law Review*; Langbein, *Origins*; Langbein, *American Journal of Legal History*

⁷⁷⁵ Cairns, *Advocacy*, p.38

counsel were unofficially permitted by judges from as early as the 1730s.⁷⁷⁶ Following more detailed sampling of the Proceedings, Langbein later changed his view, acknowledging that actually, defence counsel was far more prevalent than prosecution counsel in the Old Bailey in the eighteenth century.⁷⁷⁷

As is apparent from the prosecution of fraud, prosecutors instructed counsel far more frequently than did the accused. One reason for this discrepancy can be found in the presence of public authority prosecutors.⁷⁷⁸ Solicitors and counsel appeared more frequently in cases brought by the Treasury, the Bank of England, the Post Office, and the Mint.⁷⁷⁹ What is clear from research into fraud is that another frequent prosecutor of fraud is the Navy.⁷⁸⁰

Table 6.3: Public Authority Prosecutors and the Presence of Counsel

	Public Authority Prosecution	Non-Public Authority Prosecution	Total
Prosecution Counsel	31	24	56
Defence Counsel	8	20	28
Prosecution and Defence Counsel	11	31	42
No Counsel	32	312	344
Total	82	387	469

Of the eighty-two indictments heard at the Old Bailey in which a public authority conducted the prosecution, counsel appeared for the prosecution in forty-two instances. In fact, of the ninety-eight instances in which prosecution counsel was involved in fraud prosecutions, forty-three percent were public authority led

⁷⁷⁶ Langbein, *Origins*, p.106

⁷⁷⁷ *Ibid* p.267

⁷⁷⁸ As discussed in Chapter 5

⁷⁷⁹ Langbein, *Cambridge Law Journal* (1999) p.325

⁷⁸⁰ This has been explored in detail in Chapter 5

prosecutions. Given the rarity of counsel at the time, this figure initially appears greatly significant. However, these were largely prosecutions brought for felony⁷⁸¹ in which costs of prosecution could often be recovered. They were also capital felonies and, as highlighted in Chapter 5, there were significant policy reasons driving these prosecutions, particularly emanating from the Navy. Consequently, it is not surprising that prosecutors would instruct counsel in order to increase their chances of a successful prosecution for fraudulently obtaining naval prize monies. Such use of counsel by the government may have influenced wealthier prosecutors to instruct counsel in lay prosecutions.⁷⁸² This partially explains why so many prosecutors of naval fraud employed counsel.

Table 5.4, below, details the presence of counsel in relation to the type of prosecutor bringing the case. The high rate of counsel employment by the Navy is unsurprising in light of the above arguments. However, with regard to other prosecutors, defence counsel were generally more prevalent.

Table 6.4: Occupation of Prosecutor and the Presence of Counsel⁷⁸³

	Prosecution	Defence	Prosecution and Defence	No Counsel
Tradespeople	8	14	14	134
Naval	28	4	8	27
Artisan	2	1	7	25
Public Official	3	3	1	9
Bank of England	1	1	3	1
Clerk	2	0	1	1
Servant	0	2	0	2
Other	0	0	1	1
Total	44	25	35	200

⁷⁸¹ Obtaining naval prize monies by false pretences or false personation

⁷⁸² May, *The Bar*, p.24

⁷⁸³ It is not possible to identify the prosecutor in the case of 147 indictments.

The higher level of defence counsel is likely to be because other prosecutors were pursuing misdemeanours and these allowed for defence counsel as of right. The prosecution of fraud was particularly significant for the developing role of counsel in the criminal courts. Prior to 1836⁷⁸⁴, the role of counsel within the criminal trial was not clear. Prosecution counsel was permitted in all instances, but defence counsel was only permitted in cases of misdemeanour and treason.⁷⁸⁵ Even within these trials, counsel was not permitted to put forward a clear narrative defence by addressing the jury, but rather, were limited to the examination and cross-examination of witnesses and to speak to any matter of law that might arise.⁷⁸⁶ In the case of felony, it was not until the Prisoners' Counsels Act of 1836 that defence counsel were allowed by right to examine witnesses; the role of defence counsel in felony was purely to speak to any matters of law or procedure. From the mid-eighteenth century onwards, there was a growing number of counsel appearing in felony cases for the defence, but this was at the discretion of the judge rather than being of right. As illustrated in Chapter 3, fraud offences included both misdemeanours and felonies. Because of this, we might expect to see varying levels of defence counsel across the 469 indictments. More importantly though, we would expect a greater presence of defence counsel as they were permitted by right.

Fifteen per cent of prisoners accused of fraud offences employed counsel. This initially looks like a relatively high figure compared with estimates of counsel supplied by other researchers. However, the status of fraud misdemeanours gave counsel ample opportunity to gain more business at the Old Bailey. Counsel, such as Adolphus, Silvester, Garrow, and Fielding (William), were present in fraud trials time and time again.⁷⁸⁷ Misdemeanour trials allowed counsel to play a more active role within the court and to gain more publicity for their skills. This publicity, in turn, may have led to more clients instructing them and would also bring them more public

⁷⁸⁴ 6 & 7 Will. 4, ch.14 (1836)

⁷⁸⁵ Langbein, *University of Chicago Law Review* (1978) p.308

⁷⁸⁶ Cairns, *Advocacy*, p.28

⁷⁸⁷ May, *The Bar*, p.35

attention in general. This opportunity for more advocacy would have been very attractive to counsel who were so often in the criminal rather than the civil courts.

With the exception of naval prosecutions, the relatively low number of prosecution counsel in relation to defence counsel may be explained by the already great cost of prosecution of misdemeanours. With no hope of recovering costs or losses, prosecutors may have attempted to limit their losses by conducting their own prosecutions. Moreover, should tradespeople have also been members of prosecution associations, such as The Society for the Protection of Trade, they would have access to a solicitor who could instruct the tradesman how to conduct the case without the additional expense of counsel.

Conclusion

Lay prosecutors used a variety of methods to ensure their prosecutions for fraud were successful. A key method was the use of prosecution associations that were prevalent in London, particularly with regard to tradespeople and merchants. Given the popularity of prosecution associations, particularly those concerned with protecting trade, it is highly likely that a number of the prosecutors of the 469 indictments under consideration were members of such associations. This would shed some light on why fraud misdemeanours were being prosecuted at such an expensive court when there was no hope of the recovery of goods or expenses.

This chapter has also provided some insight into the use of policing agents in the prosecution of fraud. As a quantitative approach to policing in the eighteenth century is yet to be taken up by many researchers, these particular findings are difficult to situate within wider research. However policing agents were certainly used in some instances of fraud prosecution, though it is unclear at this stage how commonly police were used in fraud cases in comparison with other offences. One stark finding that does emerge though is that where a policing agent was involved with a fraud prosecution, it was almost certain that there would be a guilty verdict.

With regard to the use of the legal profession, it is apparent that prosecutors were more likely to use counsel in naval fraud prosecution. Defence counsel were more likely to be utilised than in other offences, which is unsurprising given that the majority of fraud offences were misdemeanours and counsel was available to the prisoner. These findings compliment the more recent work of John Langbein and others, who have otherwise found that defence counsel were far more prevalent than prosecution counsel in the eighteenth century.

One essential conclusion of this chapter is the significance of clerks of indictment in determining what form an accusation of fraud might take, and to which offence the accusation would refer. Clerks of indictment were often the only legally trained court official with whom the lay prosecutor would converse with before the accusation entered the criminal justice system. Consequently, the advice of the magistrates' clerk had great significance to the next steps taken by the lay prosecutor. Equally as significant was that the clerk of indictment was personally liable for the form the indictment took. Whilst the lay prosecutor paid for the indictment⁷⁸⁸, it was the clerk who could be fined should the indictment be deemed sufficiently erroneous. It is therefore misleading to argue that lay prosecutors had full discretion when bringing an accusation of fraud. In fact, it is likely that lay prosecutors followed the advice of legally trained clerks without question.

Having explored the various methods and mechanisms utilised by prosecutors of fraud in their journey to the Old Bailey, the final question this thesis seeks to answer follows on from the conclusions of this chapter. In particular, this chapter has illustrated that lay prosecutors did not have full discretion in bringing their cases to the Old Bailey. This question can be further explored through consideration of the role and discretion of magistrates, to which this thesis now turns.

⁷⁸⁸ As discussed in Chapter 4, the nature of the indictment and the number of counts effected the overall cost of the drafting process.

Chapter 7 Fraud Trials within the Old Bailey

Having considered the most commonly prosecuted fraud offences, the most prevalent prosecutors of these offences, and the methods through which these prosecutions were brought⁷⁸⁹, this chapter will now demonstrate why these particular prosecutions came to be within the Old Bailey. In exploring why these cases were heard at the assize level, particular attention will be paid to the jurisdictional origins of the complaint, why these cases were disposed of at the assize level and not heard in the lower courts, and which juries were empanelled to adjudge fraud offences.

It will become clear that the City jury of the Old Bailey heard disproportionately high levels of fraud cases. In explaining why the City jury was hearing such a high level of fraud cases, this chapter will consider in greater depth how cases of fraud came to be heard at the Old Bailey, particularly how magistrates within the City and the rest of the capital disposed of fraud-based complaints. The potential variation in socio-economic conditions of Middlesex and the City will be explored to ascertain whether the citizens of the City of London experienced more fraud than their counterparts in Middlesex. The major focus of the chapter will examine the Magistrates courts and the magisterial and jurisdictional personalities of Middlesex and the City.

Having demonstrated how City magistrates were committing more fraud offences to the assize level and the Middlesex magistrates were disposing of them elsewhere, this chapter will then question whether Middlesex cases were assigned to City juries within the Old Bailey by way of a previously unacknowledged system of specialised juries.

⁷⁸⁹ See Chapters 3, 5, and 6

Table 7.1: Fraud Juries in the Old Bailey

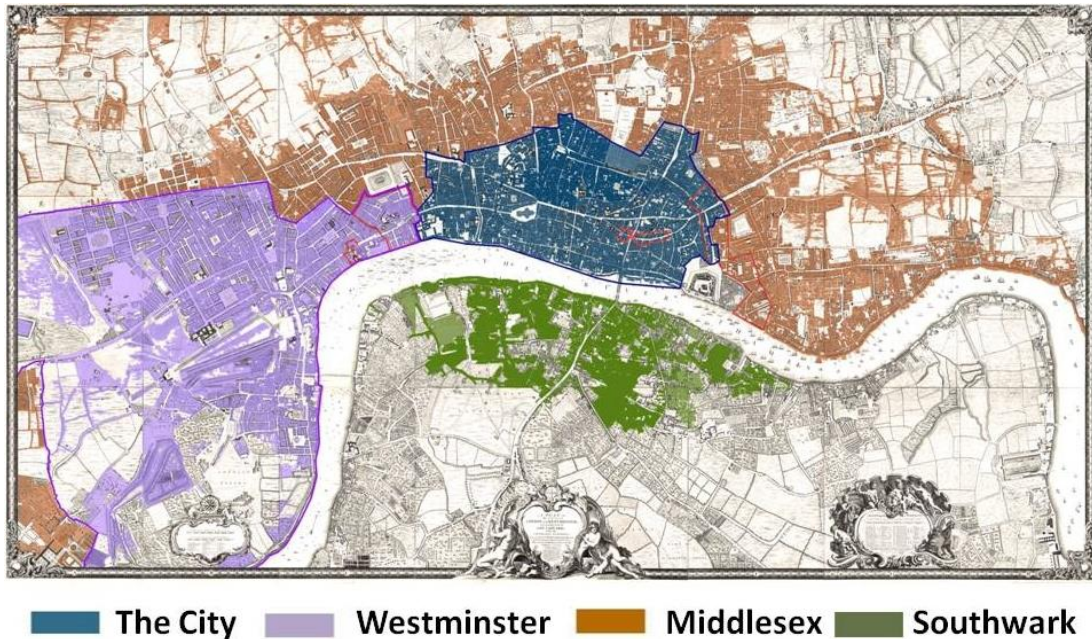
Jury ⁷⁹⁰	Frequency	Percentage
City	428	91.3
Middlesex	38	8.1
Westminster	3	0.6
Total	469	100.0

At every sitting, the Old Bailey empanelled at least two juries, one made up of City citizens and the other, Middlesex and Westminster citizens. It has long been accepted that these juries would hear the cases committed to the Old Bailey by their respective jurisdictions.⁷⁹¹ Moreover, if a crime was committed in Middlesex, prosecutors would be strongly encouraged to report this crime to the Middlesex magistrates, and vice versa should a crime be committed in the City. There are summary court records from the City of London that strongly suggest that if cases were reported in the wrong jurisdiction, they would be referred back. For example, in 1781, Mary Evans was brought before Alderman Hart on a charge of committing fraud by false pretences and was promptly handed over to Middlesex, as Hart identified that the incident had occurred in Middlesex.⁷⁹²

⁷⁹⁰ After approximately 1780, the Proceedings note the jury which heard the case at the end of the report. For the case reports missing jury details in the Proceedings, the remaining case juries were identified using the City of London gaol delivery records found at CLA/047/LJ.

⁷⁹¹ John Langbein, 'The Criminal Trial Before the Lawyers', *The University of Chicago Law Review*, Vol.45, No.2 (Winter, 1978) p.274

⁷⁹² Smith, *Summary Justice in the City*.

Image 7.1: London's Boundaries

Available at: <https://www.londonlives.org/static/WestminsterLocalGovernment.jsp>

In light of this practice, the data regarding juries in fraud trials would strongly suggest that City magistrates were far more inclined to commit fraud offences to the assize court, whereas Middlesex magistrates were far more likely to dispose of such cases elsewhere. There is also the potential argument that fraud offences were committed and/or reported more frequently in the City than in Middlesex. It is very difficult to estimate crime and reporting rates during this period, but as demonstrated in Chapter 4, there is supporting evidence from the quarter sessions records that fraud offences were disposed of differently by City and Middlesex officials, with Middlesex hearing fewer fraud offences at the quarter sessions than the City.

However, we must be very careful not to make assumptions regarding this data, as other possibilities must be considered, including cases where the prosecutor bypassed the magistrate, bringing that case directly to the Grand Jury at the Old Bailey. The other possibility is that fraud cases were indeed committed by Middlesex magistrates, but at trial, these cases were heard by a City jury for reasons of expediency or, expertise.

In evidencing these considerations, there are significant methodological challenges due to the dearth of archival evidence. However, by piecing together summary court and magistrate records from both the City and Middlesex, we can gain some insight into the prevalence of fraud complaints and also why the City magistrates would have been more inclined to commit these cases to the Old Bailey.

Before exploring this extraordinary division of juries in fraud offences, it must first be established whether fraud offences were more likely to be committed in the City than Middlesex. And perhaps more accurately, whether fraud offences were more likely to be reported in the City rather than in Middlesex.

Fraud in the City and Middlesex

A number of factors would have contributed to the proportion of cases emanating from either jurisdiction within London. Before estimating what proportion of fraud cases were committed by the City or Middlesex, it is necessary to give some context. The most important of these contributing factors were: the respective population of each jurisdiction; the prevalence of crime and use of the magistrates' courts; and the likelihood of fraud offences being committed in these areas.

There was an enormous growth in the population of London throughout the eighteenth century and with this came a numerical growth in crime. However, this growth in population and crime across London occurred not in the City, but in Middlesex⁷⁹³. At the turn of the eighteenth century, less than a quarter of the Metropolis lived in the City of London.⁷⁹⁴ By the end of the eighteenth century though, this figure had fallen to less than a sixth.⁷⁹⁵ The population of the City for the whole of the eighteenth century varied between 125,000 and 150,000.⁷⁹⁶ In light of such a small proportion of the population of the capital, it might be expected that a sixth of the crime ought to originate from within the City and thus, an approximate proportion should be expected to be reflected in the cases heard at the Old Bailey.

⁷⁹³ John Langbein, *The Origins of Adversary Trial* (Oxford University Press, 2003) p.108

⁷⁹⁴ <https://www.londonlives.org/static/Pretrial.jsp> (accessed 13th August 2016)

⁷⁹⁵ <https://www.londonlives.org/static/CityLocalGovernment.jsp> (accessed 13th August 2016)

⁷⁹⁶ *Ibid*

However, it cannot be concluded that, as the City held a sixth of the Capital's citizens, a sixth of all fraud offences were committed or reported within the City.

This period pre-dates the advent of national crime statistics making even the simplest of claims to the prevalence of fraud offending problematic. We can estimate the number of fraud cases heard at the assize level, but the number of fraud trials at the Old Bailey give us a very limited picture as these trials represent only a fraction of frauds that were prosecuted to the highest level. As highlighted throughout this thesis, the most common fraud offences, including obtaining goods by false pretences, false personation, and common law cheats, were misdemeanours and as such, were rarely found in the assize courts.

In order to estimate the frequency with which such offences were reported in the summary courts, we must now turn to the magistrates records. In light of this, and in order to estimate the prevalence of fraud offence complaints, the records of lower courts will also be analysed.

Fraud in the Magistrates' Courts

Magistrates' courts were courts of no record and because of this, little evidence exists of who used them and for what purpose. There are no systematic records of the types of offences tried or the outcomes, in either the City or in Middlesex. However, some records do exist that at least give a flavour of the fraud-based offences heard in the summary courts across London.⁷⁹⁷

As considered in Chapter 4, there is little evidence to suggest that the City summary courts were hearing large numbers of fraud offences. Even though in the City, summary justice was booming, with the Guildhall and Mansion House collectively hearing approximately 180 cases per week⁷⁹⁸, there is no suggestion from the summary court records that the City was hearing large numbers of fraud offences. Of these cases, the majority were disposed of at the initial summary hearing or, at a

⁷⁹⁷ These records have partly been discussed in Chapter 2

⁷⁹⁸ Gray, *Crime, Prosecution and Social Relations*, p.20

later hearing within the Magistrates' court.⁷⁹⁹ However, a quarter of the trials heard in the City justice rooms were committed to the assize court to be heard by the London jury at the Old Bailey.⁸⁰⁰

Samples of the Minute books from both the Guildhall and Mansion House suggest that there were regular, though not remarkably high, numbers of fraud complaints. As expected, the majority of these complaints were in relation to the fraudulent obtaining of goods and most were brought by prosecutors who were occupied within trade. Due to fire, very few comparable records exist for the Middlesex and Westminster Magistrates' offices. However, inferring retrospectively using the Proceedings, it may be suggested that the City magistrates committed more fraud offences to the Old Bailey than the Middlesex justices.

Decision-making in the Magistrates' Courts

The first significant area to explore when explaining the disproportionate use of City juries in fraud trials in the Old Bailey is the decision-making of the magistrates. This section will consider the factors that contributed to the City magistrates committing fraud offences to the Old Bailey, and the factors that prevented the Middlesex magistrates from utilising the assize court for fraud offences. These factors can loosely be categorised as social and demographic, institutional socio- and economic-political ends, individual ends, and administrative culture of the summary courts in the respective metropolis jurisdictions.

Society and Demography

To fully understand the workings and decision-making of the summary courts, the social context within which they operated must be considered. The wealth and occupational structure of London differed from the rest of the country in so much as there were greater concentrations of wealthier tradespersons, merchants, professionals, and manufacturers.⁸⁰¹ The Metropolis was not only very different to

⁷⁹⁹ Gray, *Crime, Prosecution and Social Relations* p.27

⁸⁰⁰ *Ibid* p.91

⁸⁰¹ Weatherill, *Consumer Behaviour* p.47

the rest of the country, but had significant internal differences, particularly between the City and Middlesex.

The eighteenth century saw a dramatic shift in both political economy and the markets throughout the country.⁸⁰² An increased preoccupation with commercialism was further propagated by the resultant increase of persons earning their living from, and within, the commercial sector. There were a growing number of shopkeepers across Georgian England and these shopkeepers were gaining increasingly influential positions within their communities.⁸⁰³ This was true across the entire country, but greater concentrations can be found in the metropolis.

Within the metropolis there were local variations in social and economic makeup. The City was a 'disproportionately wealthy conclave of Georgian England' and as such, the social make-up of the City and the types of business carried out within its jurisdiction differed from the rest of the Metropolis.⁸⁰⁴ The population of the City ranked amongst the richest and most influential, both politically and economically, in the country.⁸⁰⁵ Not only was the general populace of the City wealthier, but also the nature of business carried out in the City was also different to the rest of the capital. Due to the commercial nature of the City, it is perhaps not surprising that magistrates' records reflect a large number of cases that were essentially debt recovery.⁸⁰⁶

However, the City was not populated purely by the wealthy and it is estimated that seventeen to twenty percent of litigants who used the City magistrates' courts were the labouring poor or servants.⁸⁰⁷ This is significant when comparing the types of lay prosecutors found at the Old Bailey. There is evidence that either less wealthy

⁸⁰² See Chapter 5

⁸⁰³ Weatherill, *Consumer Behaviour*, p.14

⁸⁰⁴ Gray, *Crime, Prosecution and Social Relations* p. 1

⁸⁰⁵ Faramerz Dabhoiwala, Summary Justice in Early Modern London, *The English Historical Review* (2006) CXXI (492): pp.796-822. p.798

⁸⁰⁶ Gray, *Crime, Prosecution and Social Relations* p.84

⁸⁰⁷ <https://www.londonlives.org/static/ProsecutorsLitigants.jsp> (accessed 18th August 2016)

prosecutors were filtered out at an early stage of the justice system, or that poorer people did not prosecute fraud offences.

Middlesex and Westminster were also centres of industry and commerce, though in less concentrated form than the City. However, there were still increasing numbers of shops and artisans throughout the whole of the metropolis. For example, the most significant occupations within Westminster were victuallers, carpenters, chandlers, shopkeepers, bakers, and butchers.⁸⁰⁸ When recalling the types of fraud appearing at the Old Bailey, it cannot be concluded that fraud, which rested upon commercial interactions, could only have been carried out in the City. Middlesex and Westminster may have had less concentrated commercial activity but there was still an abundance of shops and persons providing their skills. The typology of fraud explored in Chapter 5 reflects that the majority of fraud offences were committed through the methods of false servant, fraudulent financial instruments, or through an abuse of a consumer relationship.⁸⁰⁹ The opportunities to commit these offences were abundantly present in Middlesex and Westminster and consequently, we cannot conclude that the City committed more fraud offences for trial at the Old Bailey purely because these offences happened overwhelmingly more frequently in the City.

Institutional socio- and economic-political ends

The respective political ends of the magistrates' offices within the City and Middlesex go a long way in explaining the radically different treatment of fraud offences in the summary courts of these two jurisdictions. Each of these areas will be considered in turn and it shall be revealed how the City Aldermen and Mayor were using the summary courts to bring attention to what they saw as the social and economic significance of fraud to the City. Likewise, the individual approach of Middlesex magistrates to fraud complaints reflects a different, but no less vigorously pursued agenda of criminal justice.

⁸⁰⁸ Weatherill, *Consumer Behaviour*, p.48

⁸⁰⁹ Naval frauds will be considered separately below.

Prior to the middle of the eighteenth century, the City of London had long held significant political influence both locally and nationally. This influence had included wider criminal justice policy. For example, the Transportation Act of 1718 was introduced into Parliament by a group of MPs that included two City Aldermen who were trying to introduce alternative sentencing options.⁸¹⁰ The City of London authorities, including the Lord Mayor and Aldermen, also had far greater control over the events within their borders than state officials in other jurisdictions, including Middlesex or Westminster. For example, the City authorities could control who practised a retail trade⁸¹¹ and within the City, there existed a parliament writ small, which allowed for the passing of bylaws and other locally applicable regulations.⁸¹² In light of this extensive control, it is understandable that the Aldermen and Lord Mayor would take a proactive role, beyond the limitations of the administration of justice, to further political, economic, and as shall be seen later, personal endeavours. City officials were accustomed to having wide-ranging powers over their jurisdiction and they were confident in governing, as well as administering justice.

As repeatedly demonstrated throughout this thesis, and in particular in Chapter 5, the prosecution of fraud offences within the Old Bailey reflect the increasing onus upon the protection of values and circumstances vital to the maintenance and development of commerce. This was no less true in the City of London. The primary objective of the Lord Mayor and the Aldermen of the City of London was to promote the success of the City. In a City that was fuelled by commerce, it was the interests of commerce and capitalism that reigned supreme. As a place of trade, the City authorities had an interest in ensuring trade proceeded smoothly⁸¹³, both in order to maintain its reputation as a safe place to conduct business, and also in order to attract future investment from around the world. Arguably, this bolstering of commercialism was a motivation for all magistrates from the middle of the

⁸¹⁰ John Beattie 'London Crime and the Making of the 'Bloody Code, 1689-1718' in Lee Davison et al (eds) *Stilling the Grumbling Hive: The Response to Social and Economic Problems in England, 1689-1750*. (Palgrave Macmillan, 1992) p.58

⁸¹¹ Gray, *Crime, Prosecution and Social Relations*, p.14

⁸¹² <https://www.londonlives.org/static/CityLocalGovernment.jsp> (accessed 13th August 2016)

⁸¹³ Gray, *Crime, Prosecution and Social Relations*, p.91

eighteenth century onwards⁸¹⁴, but none more so than in an area that symbolised and thrived upon the development of commerce.

Again, the significance of trust, both in the market and in the character with whom one was dealing, was at the heart of commercialism in the City. The City justices were concerned with issues impacting upon trust within their jurisdiction and this included trust of character, as well as credit. This is well illustrated by the petition put before Parliament by the Lord Mayor and Aldermen at the beginning of the eighteenth century for a registration of servants that would allow employers to have a better idea of the people they were employing and letting into their homes.⁸¹⁵ This was by no means an original request and, as has been shown in Chapter 5, Sir John Fielding in Middlesex was equally concerned with the need to identify, locate, and verify the character of servants. However, it does demonstrate the priorities of the City justices in securing and promoting commercial trust within the City.

The Lord Mayor and Aldermen of the City used their role within the criminal justice system to ensure that fraudulent offences, particularly against the tradespeople of the City, would not be tolerated. More so, the justices acted to deter fraud within the City through the prosecution of such offences at the highest and most public court, the Old Bailey. It is for this reason, more than any other, that the City of London justices were far more ready to commit fraud complaints to the Old Bailey. It also explains why the City jury at the Old Bailey heard considerably more fraud complaints than the Middlesex jury.

Middlesex

In contrast to the City, it can be concluded that Middlesex and Westminster justices referred very few fraud complaints to the Old Bailey. This act of disposing of fraud at a summary level, away from the additional public gaze of the Old Bailey, was very much deliberate. To understand the political and economic motivations of the Middlesex justices from the mid-eighteenth century, we must turn our attention to

⁸¹⁴ Wiener, *Reconstructing the Criminal*, p.53

⁸¹⁵ Beattie, *Stilling the Grumbling Hive* p.69

Bow Street. Whilst there were a number of magistrates throughout Middlesex and Westminster, the Bow Street model was rolled out by the government in earnest from 1792.⁸¹⁶ However, for thirty years preceding this, the Bow Street office was at the forefront of changing the nature of summary justice in the metropolis and acted as a blueprint for other magistrates' offices.

Much has been written about the Fieldings that does not need to be reproduced here.⁸¹⁷ However, John Fielding in particular was extremely successful in changing the nature and remit of the role of magistrate. Unlike the other Middlesex magistrates, Bow Street received a government stipend, and it was the retention and extension of this stipend that drove many of Fielding's innovations and changes in policy. Fielding was very successful in his endeavours and he achieved this success through a series of policies that can broadly be categorised as: public promotion of the office resulting in more business for Bow Street; the Prevention Plan; and his policies to eradicate fraud. The first category acted to increase Bow Street and Fielding's popularity with the citizens of London, while the second two served to enamour his policies to the government and wider authorities in order to receive greater powers and financial support.

Public Promotion

John Fielding was possibly the greatest self-publicist of his age. Fielding vociferously encouraged reporting of the activities at Bow Street in both local and national newspapers, publishing directly from Bow Street, as well as providing a desk and materials for journalists in his court.⁸¹⁸ This promotion however was less about Fielding himself, than it was to promote his vision of justice across the country.⁸¹⁹ Both Henry and John Fielding were extremely proactive magistrates and shared a vision of their office becoming a seat of crime detection, resolution, and

⁸¹⁶ J. M Beattie, *English Detectives*, p.9

⁸¹⁷ See for example: David J. Cox, *'A Certain Share of Low Cunning': A History of the Bow Street Runners, 1792-1839* 2nd edition (Routledge, 2012) and Beattie, *English Detectives*

⁸¹⁸ Beattie, *English Detectives* p.96

⁸¹⁹ John Styles, 'Sir John Fielding and the Problem of Criminal Investigation in Eighteenth-Century England' *Transactions of the Royal Historical Society*, Vol.33 (1982) pp.127-149. p.128

consequently, prevention. The significance of John Fielding's reputation as a magistrate who could not only detect crime, but also eradicate it, was fundamental to the success, mythical or otherwise, of Bow Street. Fielding took steps to establish his reputation as the most effective magistrate in London, most notably through his Prevention Plan.

The Prevention Plan

The central theme of Fielding's vision for summary justice is best illustrated by the 'Preventative Plan'.⁸²⁰ Fielding wrote to his benefactor, the Duke of Newcastle, laying out what he saw as the greatest criminal threats to society at that time. He included crimes such as robbery, housebreaking, shop-lifting, pickpockets, gamblers and common cheats 'which were likewise very numerous'.⁸²¹ Both Fieldings believed lower-level frauds to be a serious problem in the metropolis. As described in Chapter 3, it was John Fielding who lobbied for and drafted the 1757 Act that codified the laws relating to obtaining goods by false pretences and so, it is clear that fraud was a major focus of Fielding's clamp-down on crime in Middlesex and Westminster. In light of this, we may ask why it was that Middlesex and Westminster were not referring these cases to the Old Bailey in the same way that the City justices were, who also felt that fraud offences were a scourge on society?

The reason lies in the myth of success that Fielding wove around Bow Street. During the 1740s, violent crime had been rife and it was this that Fielding used as leverage to gain more financial support from the government. Fielding asserted that in return for a government stipend, he could identify and prosecute highway and street robbery, and in a short time period, eradicate violent property crime. Fielding's efforts included the use of mounted Bow Street Runners who pursued robbers on their way out of the Metropolis. Fielding's efforts were indeed successful, but this success was greatly assisted by the outbreak of the Seven Years War.

⁸²⁰ Styles, *Transactions of the Royal Historical Society* p.135

⁸²¹ John (and Henry) Fielding: *An Account of the Origin and Effects of a Police set on Foot by the Duke of Newcastle 1753*

The War, as often happened, led to a dramatic reduction in violent crime, thereby giving the impression that Fielding had significantly reduced crime in Middlesex. With the War continuing and Fielding's *raison d'être* rapidly diminishing, he moved his attention to other offences and wider regulation of behaviour, such as drinking and gambling.⁸²² Fielding equated gambling with other relatedly dishonest criminal offences, such as fraud⁸²³, and was particularly concerned with 'dishonest practice', which he viewed as a great threat to the thriving commercial society.⁸²⁴

Fielding relied upon the government stipend that paid for his office. It was therefore crucial that he could demonstrate how his methods garnered results. Consequently, when Fielding very publically claimed through his open letter to the Duke of Newcastle in 1757 that he had fraud offences in his sights, he put himself in a position where he had to deliver the same result as he ostensibly had for highway robbery. This result was not the high-level prosecution of such offences, but the dramatic reduction, if not eradication of these offences. Because of this ultimate aim, Fielding disposed of fraud cases very differently from the City and in a manner that did not necessarily draw public or official attention.

Fielding was keen to address criminal accusations, particularly fraud complaints, through a range of negotiations, mediations, and lesser punishments. This is not to say that Fielding did not strongly encourage the reporting of crime to his office. For example, in 1755, he published a pamphlet encouraging men of property to subscribe to prosecution associations.⁸²⁵ Fielding most certainly wanted to continue attracting business to the Bow Street office. However, it was not just the reporting of fraud that would have demonstrated the success of his methods, which he so assiduously claimed. Rather, while Fielding wanted to attract the business that would result from complaints of fraud, his primary objective was to dispose of these cases in a less formal manner in order to give the impression that fraud levels were significantly improved by his policies.

⁸²² Beattie, *English Detectives* p.42

⁸²³ *Ibid*

⁸²⁴ *Ibid* p.43

⁸²⁵ *Ibid* p.35

While it is difficult to confirm due to a dearth of detailed record, it may be concluded that Fielding achieved his aim of ostensibly reducing the amount of fraud in Middlesex using a number of methods. One such method was the siphoning of young male offenders away from the criminal justice system and into the Navy. During the 120 years between 1695 and 1815, England was at war for sixty-three years.⁸²⁶ Filling the regiments and ships was a constant worry, but it was a problem that could be partly addressed by the criminal justice system. In every war of the eighteenth century, the government used varying forms of conscription. These included enlisting accused persons before the magistrates either through a volunteer-style system, or by using more proactive encouragement such as the threat of criminal punishment.⁸²⁷ Magistrates were very successful in contributing 'volunteers' to the Navy and crime rates consequently fell during times of war, largely because the magistrates used conflicts to punish offenders by sending them into the armed forces.⁸²⁸

This policy of recruiting boys into the Navy from the magistrates' courts was not limited to any one part of the capital. The City, Middlesex, and Westminster justices were all involved with societies, such as the Marine Society, that acted to recruit poorer boys into the Navy. Henry Fielding was heavily involved with and supportive of the Marine Society, and in 1753, he agreed to supply *The Barfleur* with thirty boys.⁸²⁹ Sir John Fielding was also an enthusiastic supporter of the Marine Society to the extent that he appealed to the Duke of Newcastle to secure further funding for his office in order to better carry out the conscription of boys and men from those appearing before him.⁸³⁰ John Fielding's motivations for conscripting these young offenders into the Navy rather than into prisons or more serious courts are complex. One reason was certainly to further demonstrate how useful his office was to the government, which simultaneously served to emphasise how important the

⁸²⁶ George, *London Life* p.262

⁸²⁷ Brewer, *Sinews of Power* p.49

⁸²⁸ Innes and Styles, *Journal of British Studies*, p.393

⁸²⁹ Henry and John Fielding, *An Account of the Origin and Effects of a Police Set on Foot by His Grace the Duke of Newcastle in the Year 1753: Upon a Plan Presented to His Grace by the Late Henry Fielding, Esq. : to which is Added a Plan for Preserving Those Deserted Girls in this Town, who Become Prostitutes from Necessity*, p.21

⁸³⁰ Fieldings, *Origin and Effects*. p.22

continuation of the government stipend was for his work. It has been suggested that Fielding was not an ardent believer in the use of prisons for the young. Rather, his approach to 'saving boys' from pestilential cells was to deliver them into a 'useful life' in the Navy.⁸³¹ A further motivation may have been to bolster the magistrate's civic position, with both Fieldings extremely aware of their reputations. The Marine Society was often referred to as being a 'patriotic institution' that was both 'charitable and benevolent'.⁸³² Both Fieldings would therefore have been enthusiastic to be associated with such popular organisations.

Fielding could not however dispose of juveniles into the Navy at will. There is much evidence to suggest that the Navy was deeply reluctant to accept any criminals onto ships, apart from minor debtors and smugglers.⁸³³ In 1759, a City magistrate had attempted to have all members of a notorious pick-pocketing gang, the Black Boy Alley Gang, sent away to sea, but the Navy refused to accept such criminals.⁸³⁴ In fact, impressment of any type was extremely unpopular and enforced far less frequently than popular culture would suggest.⁸³⁵ This was not due to the abhorrence of taking an individual's liberty to supply the Navy, but rather, the Navy only wanted qualified and able men. Petty thieves and young boys would require too much training and were considered especially unreliable.

Political Strategies: the extension of power and influence of individual magistrates

The motivations of John Fielding will be explored in more detail throughout this chapter. This will provide insight into the reasons why Fielding disposed of fraud complaints in ways other than referring to the Old Bailey. These reasons were a combination of both the interests of Bow Street and the interests of Fielding himself; undoubtedly the success of Bow Street reflected the success of Fielding. However,

⁸³¹ Anthony Babington, *A House in Bow Street Crime and the Magistracy London 1740-1881*. 2nd Ed. (Chichester, Barry Rose Law Publishers, 1999) p.11

⁸³² Unknown Author, *A View of London, or The Stranger's guide through the British Metropolis* (B. Crosby & Co, 1803)

⁸³³ N.A M Rodger, *The Wooden World*, p.170

⁸³⁴ Rodger, *The Wooden World*, p.170

⁸³⁵ *Ibid* p.151

this symbiosis between office and individual is not as clearly established in the case of the justices within the City.

The City

Unlike other parts of the country, the City of London justices of the peace were also political figures, making up what was the upper legislative chamber in a distinct jurisdiction administered by a bi-cameral system.⁸³⁶

In determining the individual motivations of City Justices, it is illuminating to see their occupations as stated when elected as Alderman. A detailed study of the Aldermen in place during the period of 1760 to 1820 reveals a broad range of occupations for Aldermen. It has been suggested that the Aldermen of London were, for the most part, hard-nosed businessmen from the same background as the 'middle sorts', and certainly were not aristocrats.⁸³⁷ Aldermen were certainly rooted in occupations associated with trade and industry. Rogers has suggested that sixty-three percent of Aldermen serving between 1738 and 1762 were bankers, financiers and merchants.⁸³⁸ Rogers' study of Aldermen found that over half of office holders also had significant investments in international trade.⁸³⁹ A study of the occupations of Aldermen during the period of this thesis, reflects how the majority of alderman increasingly came from, and pursued occupations, based in trade and industry.

⁸³⁶ For more details on the City of London see <https://www.londonlives.org/static/CityLocalGovernment.jsp> (accessed 13th August 2016)

⁸³⁷ Gray, *Crime, Prosecution and Social Relations*, p.153

⁸³⁸ Nicholas Rogers, *Social History*, p.442

⁸³⁹ Rogers *Social History*, p.437

Table 7.2: Occupations of Aldermen, 1760-1820

Occupation ⁸⁴⁰	Number	Percentage
Tradesman ⁸⁴¹	63	48.5
Artisan ⁸⁴²	57	43.8
Other ⁸⁴³	10	7.7
Total	130	100.0

As with prosecutors of fraud at the Old Bailey, there is a prevalence of tradesmen elected as City Aldermen during this time. A large number of artisans are also present, far more than is the case with Old Bailey prosecutors. As discussed in Chapter 5, Thompson made the important observation that the imposition of nineteenth century concepts of class upon the eighteenth century should be avoided. A significant reason for this avoidance is that in the eighteenth century, people did not think of themselves as belonging to a class per se, as laid down by horizontal relationships with other people of different occupations.⁸⁴⁴ Rather, Thompson argues that relationships between groups were vertical in that people associated themselves with those of the same trade, much as they had under the old guild system.⁸⁴⁵ Consequently, whilst the modern observer would think of the Aldermen as being a similar class to the well-to-do merchant, albeit in a much higher class than the average City shopkeeper, the eighteenth century observer would see a keen affinity between these occupational groups.

Likewise, the guild system was still deeply influential with regard to skilled artisanal occupations, such as the goldsmith.⁸⁴⁶ Putting aside the specifics of occupations, it can be concluded that in order to be an Alderman, these men were required to be

⁸⁴⁰ Information extracted from Alfred B. Beaven, *The Aldermen of The City of London* (Eden Fisher & Company, 1908)

⁸⁴¹ Those occupied in trade were of similar job titles to those of prosecutors: grocers, haberdashers, and victuallers.

⁸⁴² These tended to be goldsmiths, joiners, and carpenters.

⁸⁴³ Such as a cook, a scrivener, and three musicians.

⁸⁴⁴ Thompson, *Social History*, p.135

⁸⁴⁵ E. P Thompson 'Patrician Society, Plebeian Culture' *Journal of Social History*, Vol.7 No.4 (Summer, 1974) pp.382-405. p.396

⁸⁴⁶ Of the fifty seven aldermen occupied as artisans, thirteen were goldsmiths.

wealthy. The duties involved in this office cost Aldermen a great deal of money. A large part of their role, as today, was to attend and host formal dinners and events that required purchasing extremely expensive clothes, wines, and other necessary luxuries.⁸⁴⁷ Being an Alderman may well have furthered the individual's business interests, but the office itself was costly. As Rogers succinctly states: 'No Alderman could rely on making a fortune in civic office; he had to have one before he started'.⁸⁴⁸ Clearly, many Aldermen had modest sounding occupations, but these conceal what must have been a well-earning enterprise, whether through trade or manufacturing.

The affinity with which Aldermen may have associated themselves with other merchants and retailers provides context for the justices' prioritisation of fraud committed against tradespeople. However, alongside these interests, the City justices continued to be motivated by wider commercial considerations, as Gray explains: 'City interests, predominantly trade and finance, must have informed decision-making at Guildhall and Mansion House'.⁸⁴⁹ As with the superior courts, summary justices were not adverse to disseminating propaganda through their courts.⁸⁵⁰ As such, the City of London Justices sought to maintain their political significance, whilst promoting their commercial agenda and furthering agendas of personal power and influence.

The desire for greater political influence certainly appears to be a factor in the careers of many City Aldermen. Between 1770 and 1809, nearly twenty percent of City Aldermen served as Members of Parliament.⁸⁵¹ These men of commerce did not become Aldermen directly for financial gain⁸⁵², but rather for power and influence. It was common practice during this period for long-serving Aldermen to be knighted, or more commonly, made baronets. Such a title required at least a decade of service, although long service did necessarily guarantee a title. Nathaniel Newnham Jr. was

⁸⁴⁷ Rogers, *Social History*, p.439

⁸⁴⁸ *Ibid*

⁸⁴⁹ Gray, *Crime, Prosecution and Social Relations*, p.32

⁸⁵⁰ Norma Landau, *The Justice of the Peace*, p.47

⁸⁵¹ Gray, *Crime, Prosecution and Social Relations*, p.31

⁸⁵² The office of Alderman actually cost the holder rather than supplying a lucrative income. See Rogers *Social History*, p.439

Alderman for Vintry Ward for thirty-five years, between 1774 and 1809, and despite such long service and acting as Lord Mayor from 1782 to 1783, he was never given a knighthood.⁸⁵³

In a time of continuing 'Old Corruption', the emerging groups of bankers and merchants that made up the Aldermen of the City were gaining power through means other than direct political involvement.⁸⁵⁴ Whilst a number of Aldermen sought to enter Parliament, others were indirectly ensuring the promotion of their business interests, whether trade or finance, through their application of the law. In committing fraud offences to the Old Bailey, these Aldermen were demonstrating a prioritisation of the protection of trade and commercial transactions in an effort to increase trust in the City, thereby establishing it as a place within which to invest and trade. By bolstering the reputation of the City for commerce, these Aldermen were successfully both assuring their political success and their individual success.

Administrative Culture: Clerks

The role of the court clerk is so often over-looked and yet, clerks were essential to the administration of justice in the Metropolis. The significance of the clerk of indictment has been explored in Chapter 6. Here the significance of the day-to-day activities of the magistrates' clerk will be considered. Magistrates' clerks had four main roles: as adviser to the magistrates; as adviser to the lay prosecutors; to provide administrative and bureaucratic consistency for the overall office; and in a quasi-official role as either prosecuting solicitor, or representative of the magistrate at other courts.

Clerks were often the only legally trained people involved in the summary justice system and acted therefore as legal and procedural adviser to the magistrate, who was likely not to have any formal grounding in law.⁸⁵⁵ We must be careful not to overstate the influence of clerks on magistrates' individual decision-making as it is

⁸⁵³ Beaven, *Aldermen*

⁸⁵⁴ Nicholas Rogers, *Social History*. p.439

⁸⁵⁵ John Langbein 'The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors' *Cambridge Law Journal* 58(2) (July, 1999) pp.314-365. p.352

unclear whether clerks were seen as legal advisers, or more as servants to the magistrates.⁸⁵⁶ However, clerks were employed to advise Justices on the more complex and procedural matters before them and assumedly, this advice was frequently followed. In an area of law with inherent ontological and substantive complexities, such as fraud, the role of the magistrates' clerk would have been greater than for more straightforward offences such as larceny.⁸⁵⁷ It cannot be known if magistrates were more inclined to follow the opinion of clerks in matters of greater legal complexity, but the role of clerks was certainly highly valued, in monetary terms at least. Archives relating to the accounts of Middlesex Magistrates' offices will be considered in more depth below, but it is apparent from these records that the three clerks at Bow Street at the turn of the nineteenth century were paid a salary of between £100 and £160. The two junior justices in the office were paid a £500 salary.⁸⁵⁸ At the Hatton Garden Magistrates' Offices, the justices were paid a smaller salary of £400, but the chief clerk was still paid £150, and the junior clerk £100.⁸⁵⁹ There is a suggestion that clerks across Middlesex Justices' Offices had a set wage, as the senior clerk and junior clerk at the Great Marlborough Street Office were also paid £150 and £100 respectively.⁸⁶⁰ This is a significant difference, but it does reflect that the role of clerk was not seen purely as an administrative assistant position, but enough to warrant an enviable salary.

There is evidence to suggest that in some offices, clerks assumed additional important roles that would further support the impression that clerks were seen as more than humble servants to the magistrates. Well into the nineteenth century, the chief clerk of Bow Street Magistrates', John Stafford, was paid an additional £15 on top of his salary to act as editor-in-chief of the offices' publication, *The Hue and Cry*. It is unclear whether Stafford had overall editorial authority to decide which cases and which notices to put into *The Hue and Cry*. Certainly when John Fielding had been

⁸⁵⁶ Landau, *The Justice of the Peace* p.229

⁸⁵⁷ For an in-depth discussion on the laws of larceny see G. Fletcher, *The Harvard Law Review*.

⁸⁵⁸ Treasury Department Accounts – Accounts of divers offices at the National Archive reference T38/672

⁸⁵⁹ Treasury Department Accounts – Hatton Garden – Police Office at National Archive –reference T38/676

⁸⁶⁰ Treasury Department Accounts – Great Marlborough Street – Police Office at The National Archive reference T38/675

alive thirty-five years earlier, it was Fielding who dictated the content of the publication. However, by the nineteenth century, it is unknowable whether Stafford held such influence over the public face of Bow Street Magistrates', which would have included the prioritisation of certain offences over others.⁸⁶¹ Nevertheless, this duty was highly influential and defined the business of the office that was revealed to the wider public. Again, such responsibility would be unlikely to be given to any low-level servant, which further suggests that clerks such as Stafford were well-trained professionals who were given a great deal of responsibility by the Magistrates.

The second role of the clerk was to advise the lay prosecutor. When bringing information to the magistrate, it is likely that the first person the complainant would encounter would be the clerk. As discussed earlier, the clerks would fulfil a number of functions including the drafting of indictments.⁸⁶² However, their role was far broader than this. Lay prosecutors had to be heavily advised as to the options available for warrants or indictments, so in practice, clerks led the prosecution process. Again, it is unknowable whether a lay prosecutor would follow the advice of the clerk, but it is highly probable that, when faced with the majesty and the inherent chaos of the criminal justice system, the lay prosecutor would be happy, if not grateful, to follow advice from a court official. Consequently, clerks could greatly influence the outcome of a complaint of fraud from the very beginning of the process. This influence could result in the complainant not pursuing the matter any further, or deciding to pursue a particular offence over another, such as obtaining goods by false pretences rather than forgery, or vice versa.

This extensively influential role of the clerk was not purely to assist the magistrates, but rather, as Sidney and Beatrice Webb claimed, to protect the defendant against the magistrates through application of the rule of law.⁸⁶³ This argument can be

⁸⁶¹ Further research into the Hue and Cry and other publications during the turn of the century would need to be carried out to better gauge the types of offences prioritised by the Bow Street office.

⁸⁶² Gray, *Crime, Prosecution and Social Relations*, p.79

⁸⁶³ Cited in Douglas Hay 'Dread of the Crown office: the English Magistracy and King's Bench, 1740-1800', *Law, Crime and English Society, 1600-1830*. Ed Norma Landau (Cambridge University Press, 2002) p.22

equally applied to the lay prosecutor who was just as likely to be at the mercy of an opinionated magistrate as the defendant. Even in the cases of possible felonies, magistrates had been known to dispose of cases at the summary level, thereby dramatically altering the outcome of the complaint, quite possibly against the wishes of the prosecutor. There was no appeal for this circumstance beyond bringing a case against the Magistrate in the King's Bench, which would be expensive and very likely to fail.⁸⁶⁴ The presence of the clerk may have acted to curb the capriciousness of an individual magistrate and allow space within the initial hearing for the wishes of the complainant to be at least heard, if not acted upon. This may have affected the disposal of fraud complaints in either way, whether to treat the complaint more seriously than strictly required and have it committed to the assize court to go before the Grand Jury, or to treat it less seriously and dispose of it at the summary level or quarter sessions.

Again, it should be remembered that the most commonly prosecuted fraud offence was obtaining goods by false pretences, a misdemeanour capable of being tried in any of the criminal justice courts, from summary to assize. As such, given the limited capacity of the assize court, it continues to be surprising that these cases appear at the Old Bailey at all. In light of the legal advisory role of the magistrates' clerks, it is likely that these men had enormous influence as to where these fraud cases were heard.

The third role of the clerks was more subtle, but partially explains the consistency with which magistrates disposed of fraud complaints. Clerks provided consistency and stability to an otherwise changeable system of justice. A system that gave almost carte blanche discretion to magistrates to dispose of misdemeanours as they saw fit may be expected to have resulted in a justice system characterised by irregularity, inconsistency and individual whim. However, the distribution of fraud offences amongst Old Bailey juries would strongly suggest that far more cases were appearing at the Old Bailey from the City of London over a sixty-year period. These committals were consistent, not only during the office of certain magistrates, but across two

⁸⁶⁴ Hay, 'Dread of the Crown office'

generations of magistrates. Given the turnover of justices in both Middlesex and the City, this regularity is extraordinary, unless there are factors that ensured a consistent approach to the treatment of fraud.

There were a number of summary courts in Middlesex and Westminster⁸⁶⁵, and summary justice in the City was conducted by the Lord Mayor in Mansion House, and the Aldermen in Guildhall. Clerks in Guildhall in particular provided a consistency to summary justice that could not be achieved in a rotational system. With different justices sitting from week to week, and being a court of no official record, the rulings meted out at the Guildhall could easily become wholly arbitrary and unpredictable. There are limited records regarding the clerks within the City, but the rough Minute Books they kept suggest that individual clerks remained in office for years rather than months.⁸⁶⁶ From the financial accounts kept by some of the Middlesex magistrates, a clearer picture of the clerks posted at the offices becomes available. These records reflect how clerks, certainly within some of the Middlesex Magistrates' offices, were not only highly paid, but also stayed in office for many years, often dying in office.⁸⁶⁷ The clerks, particularly chief clerks, were the 'touchstone for institutional definition'.⁸⁶⁸ The clerks were also the principal actors involved in communication between quarter and petty sessions, acting to unite many levels of dispersed administration.⁸⁶⁹ This knowledge of the inner workings of the different levels of the criminal court system placed the clerks in an ideal position to communicate with their respective colleagues in upper courts, which may have paved the way for particular cases to be committed upward.

The fourth function of the magistrates' clerk was to, on occasion, represent the magistrate at later hearings in superior courts and also to take the lead on prosecutions when required. Clerks often undertook the role of prosecuting solicitor.⁸⁷⁰ They were also representatives of the justices they served and often

⁸⁶⁵ These offices were: Bow Street, Great Marlborough Street, Hatton Garden, Queen's Square, Worship Street, Whitechapel, Lambeth Street, Shadwell,

⁸⁶⁶ This assertion is based upon analysis of the handwriting within the Minute Books.

⁸⁶⁷ Such as William Upton of Hatton Garden Magistrates' office who died in office, 1796: T38/676

⁸⁶⁸ Landau, *The Justice of the Peace* p.232

⁸⁶⁹ *Ibid* p.229

⁸⁷⁰ Langbein, *Cambridge Law Journal* p.338

attended quarter and assize sessions on behalf of the justices. The City in particular had a tradition of taking responsibility for prosecutions and from the 1730s the City of London solicitor was prosecuting various felonies.⁸⁷¹

Magistrates taking a prosecutorial lead was not unheard of in Middlesex and Westminster. In fact, due to the extension of the nature of summary justice by the Fieldings, the Bow Street office had a sizeable clerical staff that were heavily involved not only in the administration of the hearing themselves, but also with the wider investigative process.⁸⁷² By the 1790s, this developing role of the magistrates' clerk could be found across Middlesex and Westminster. One such example in which the magistrates' clerk was instructed to undertake the prosecution at the higher court is that of the 1805 prosecution, *R v Vincent Wright, Anne Fagan and William Elson*.⁸⁷³ The initial complaint of conspiracy and fraud had been presented to Great Marlborough Street Magistrates' Office by six separate complainants. The prosecutors claimed that the accused had taken a house at Woodstock Street off Oxford Street and 'feigned characters of merchants' in order to have 'cheated and defrauded divers tradesman, and others out of their goods'. Having been committed to Newgate, there was a 'misunderstanding taking place between them [the prosecutors] and the clerk of indictments, on the misdemeanor [sic] side, they informed the sitting magistrate ... one of the committing magistrates, ordered me [the clerk] to go down to the Sessions...carry on with the prosecution for them'.⁸⁷⁴ Such an example is illustrative of the increasing influence of clerks over not just the summary proceedings, but within the higher courts as well.

The Naval Exception

As identified in Chapters 3 and 5, a large number of fraud offences heard at the Old Bailey concerned the fraudulent obtaining of naval prize monies. These offences

⁸⁷¹ David Lemmings, 'Symposium: The Origins of Adversary Criminal Trial' *Criminal Trial Procedure in Eighteenth-Century England: The Impact of Lawyers*. *The Journal of Legal History*, Vol.26, No.1 (April, 2005) pp.73-82. p.73

⁸⁷² Beattie, *English Detectives* p.12

⁸⁷³ T38/675

⁸⁷⁴ T38/675

have been left until now as they have to be understood in the context of felony rather than misdemeanour.

In the case of misdemeanour, magistrates had far more flexibility in how to dispose of cases. However, as has been explored in Chapter 4, there were significant restrictions on the prosecution of felony. Magistrates' roles in the prosecution of felony were limited to the gathering of sufficient evidence, binding over prosecutors, and in some cases, executing warrants against the accused before committing these complaints to a superior court. There were undoubtedly occasions when magistrates went beyond their jurisdiction and disposed of felonies at the summary level, even if only to dismiss the prime facie weak complaints. However, there is no evidence to suggest that magistrates disposed of cases of the fraudulent obtaining of prize money at a summary level. This is to be expected given the severity with which such an offence was punished and given the high profile nature of such cases.⁸⁷⁵

Table 7.3: Naval Cases and the Old Bailey Juries

Jury	No. Naval Cases	Percentage
City	56	84.8
Middlesex	10	15.2
Total	66	100.0

Again, the disproportionate number of naval cases being heard in the Old Bailey by the City jury demands attention. As outlined in Chapter 5, the naval pay system oscillated between order and chaos. Many sailors upon disembarkation would have attended the Naval Office in order to be paid, but there were a number of other arrangements by which sailors could collect their pay and prize money.⁸⁷⁶ However, whilst a number of Naval Offices were to be found in Westminster, the Clerk of the Acts and the Treasurer of the Navy (more commonly known as the Pay Office) were

⁸⁷⁵ See Chapters 2 and 5

⁸⁷⁶ For an overview of naval pay see N.A M Rodger, *The Wooden World*; Daniel A. Baugh, *British Naval Administration in the Age of Walpole* (Princeton, University Press Princeton, 1965)

based within the heart of the City of London.⁸⁷⁷ Given the flexibility of the naval pay system, it was possible that sailors would receive their pay once they had been discharged from the ship. As such, they would not be reimbursed at the Naval Office, but in one of the London docks, primarily within the City. The majority of these locations providing opportunities for naval fraud were therefore within the City of London.

The remaining small number of naval frauds heard by the Middlesex jury at the Old Bailey can be explained by the chaotic nature of the naval pay system. On a number of occasions, sailors may have sought to be paid outside of the City. When a ship had docked further east than the City and pay agents had set up in a tavern within Middlesex, it may have created an opportunity for fraud outside of the City. Likewise, after 1756, sailors who required admittance to hospital immediately upon disembarkation could be given a pay ticket immediately upon leaving the ship to be paid at a later time and place.⁸⁷⁸ A further opportunity for prize money fraud was created by the 1728 Navy Act that allowed family members to collect wages at six monthly intervals.⁸⁷⁹ Such pay systems allowed ‘false sailors’, as well as ‘false family members’, the opportunity to commit naval fraud. These opportunities could be carried out against a naval agent anywhere within the capital. Frauds involving false family members were also more likely to be conducted in Middlesex, as widows and other family members were expected to apply for their family member’s wages at the Naval Office in Westminster, rather than at the Pay Office. Consequently, any fraudulent applications for deceased sailor’s pay discovered in that office would be pursued within that jurisdiction, which ultimately meant the Middlesex jury would hear the cases.

The Old Bailey and the Specialised Jury

Evidence would suggest that the majority of fraud complaints heard at the Old Bailey came through the City of London magistrates’ offices. However, given the paucity of

⁸⁷⁷ Baugh, *British Naval Administration* Ch.2

⁸⁷⁸ Rodger, *The Wooden World* p.131

⁸⁷⁹ *Ibid*

the summary court records, and also the possibility that complaints could be brought directly to the assize court, it cannot be shown conclusively that all cases heard by the City jury had been referred by a City justice. In light of this possibility, there may have been occasions in which the City jury heard cases that, according to accepted Old Bailey practice as understood in the historiography, should have been heard by the Middlesex jury. If this is the case, there are two possible explanations. First, the disproportionate weight of cases on the Middlesex jury led to some cases being heard by the London jury. And second, that this is evidence of the informal use of special juries within the Old Bailey.

The first explanation is understandable given that Middlesex and Westminster were substantially larger than the City and were growing at a rate that far out-stripped the City. Consequently, assuming that crime rates rose in relation to the population growth, the Middlesex jury would hear far more cases than the City jury. We may therefore ask whether this imbalance was addressed by some Middlesex cases being heard by the City jury. It would seem not. It was common for there to be two juries per jurisdiction operating within each session at the Old Bailey so that deliberation time would not slowdown the day's business.⁸⁸⁰ However, there is evidence within the Proceedings that there was a third and, even on occasion, a fourth Middlesex jury attending sessions at the Old Bailey.⁸⁸¹ It would seem therefore that this was the method adopted to address the greater number of cases heard by Middlesex. This solution does appear more long-term as the number of Middlesex cases would be higher, even if it was assumed that the crime rate was consistent across the capital. Had the City jury been used to systematically support the Middlesex jury, this would have been identified previously within the historiography. Whilst fraud offences were deeply significant for all the reasons explored in this thesis, fraud offences were numerically a very small part of the business being conducted within the Old Bailey.

⁸⁸⁰ For example, Mary Tuff was tried by the 'Second Middlesex Jury': *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 17 April 2011), February 1783, trial of Mary Tuff (t17830226-86) and Joseph Lemaire was tried by the 'second London jury': *OBP*, January 1798, trial of Joseph Lemaire (t17980110-78)

⁸⁸¹ *OBP*, September 1819, trial of Richard Custins (t17850914-186); *OBP*, September 1785, trial of Alexander Lauder (t18190915-217)

If the City jury was taking Middlesex cases for the purpose of alleviating numerical pressure, this would be more apparent in studies of other offences.

Given that fraud was such a niche set of offences, if the City jury were hearing all fraud offences within the capital, this would suggest a deliberate decision by the Old Bailey bench to allocate fraud offences to the City jury. This may have been for wider practical purposes, such as the alleviation of pressure on the Middlesex jury, but if such a decision were made, it was far more likely to be due to the nature of fraud offences. As explained in depth in Chapter 3, fraud offences sat in the margins of criminal law and overlapped considerably with civil law. Fundamentally, fraud offences could have been construed as breaches of contract, although this would have been out of step with the everyday routine matters ordinarily heard at the Old Bailey. The trying of these offences arguably required some specialist insight into commercial relationships and workings. It is possible that the Old Bailey bench believed that fraud offences needed juries made up of more commercially-minded men who would understand the subtle and opaque world of commerce and commercial morality.

Within nineteenth century criminal trials for fraud, there was much judicial commentary on the interconnectedness of the civil and the criminal, as well as the need to have an understanding of the commercial world in order to find guilt in criminal matters. These comments were primarily made during the high-profile banking and company frauds that came to light following the explosion of joint-stock banking and public involvement in new companies and investment. There were examples of judges being baffled by the intricacies of the financial world and in their doubt, prompting juries to find against a charge of fraud. An example of one of these cases was the 1869 prosecution of Overend, Gurney and Company. Following the collapse of a bank, the directors were prosecuted on a charge of fraudulently making false statements in the prospectus to new shareholders, knowing the bank to be in financial peril. The judge struggled with the concept of criminality in such an instance and instructed the jury to return a verdict of not guilty. Judicial reluctance to find criminal fault by company directors and promoters can best be reflected by the

judgment of Lord Justice Brett in *Wilson v Church*⁸⁸², in which he held: “I must confess to such an abhorrence of fraud in business that I am always most unwilling to come to the conclusion that a fraud has been committed”. As discussed in Chapter 4, such attitudes are ascribed to the nineteenth century, but in fact there is evidence of such mentalities permeating fraud in the eighteenth century. Examples of Old Bailey fraud cases being dismissed because the judge ruled they ought to have been pursued in civil courts have been explored in earlier chapters.⁸⁸³ Even in this early-modern period, there is a suggestion that the criminal benches were sensitive to the interconnectedness of civil and criminal fraud trials.

As has been stressed throughout this analysis, the bench of the Old Bailey was partly made up of the ‘Twelve Judges’ who sat in civil as well as criminal courts. This is highly significant in light of the deepening discourse surrounding the expert jury in commercial matters. From the thirteenth century, tradesmen and merchants had contrived to establish commercial courts where commercial matters could be arbitrated in a way they saw as more efficient and incorporating of the nuances of commercial activity.⁸⁸⁴ By the seventeenth century, this call for commercial arbitration had become more widespread and was taken up by influential actors such as John Locke, and later, Lord Mansfield.⁸⁸⁵ Arbitration in the civil courts was becoming ubiquitous by the middle of the eighteenth century⁸⁸⁶ and such fundamental changes within the civil law courts would have influenced the jurisprudence within the criminal courts.

Chapter 4 explored the litigation options of fraud complainants and as illustrated, litigation costs were increasing to such an extent in the eighteenth century that litigants were seeking alternative forms of redress. The increased use of arbitration in commercial disputes gained popular support from litigants and the wider

⁸⁸² Vol 12 Ch D 454

⁸⁸³ *OBP*, November 1803, trial of John Edwards (t18031130-59)

⁸⁸⁴ Michael E Tigar and Madeleine R. Levy, *Law and the Rise of Capitalism* (Monthly Review Press, 1977) p.xv

⁸⁸⁵ Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts. A Sociological Study of the English Legal System 1750-1965* (Heinemann Educational Books Ltd, 1967) p.18

⁸⁸⁶ Christian R Burset ‘Merchant Courts, Arbitration, and the Politics of Commercial Litigation in the Eighteenth-Century British Empire’. *Law and History Review* August 2016, Vol.34. No.3 p.617

commercial community, a fact that cannot have escaped the attention of those sitting on the Old Bailey bench, primarily because they themselves were part of this commercial community. All judges within England and Wales occasionally sat on the Old Bailey bench, including the Attorney General, Lord Mansfield, who sat at the Old Bailey on numerous occasions between 1757 and 1768.⁸⁸⁷

Mansfield believed the law needed to reflect contemporary trade and had included elements of civil law into the King's Bench in an attempt to include commercial realities into criminal trials.⁸⁸⁸ Mansfield was particularly keen on the use of special juries in commercial disputes that would require members of this jury to be from a commercial background.⁸⁸⁹ Lord Mansfield's vociferous attempts to introduce special juries in commercial disputes may well have influenced his sittings on the Old Bailey bench. If the disproportionate use of the City jury to hear fraud cases is to be partly explained by case allocation with the Old Bailey itself, the influence of an Attorney General, for whom the most pressing policy change of the time was the introduction of commercial juries, would certainly have explained such a decision. Discussions regarding alternative dispute avenues for commercial litigation were roughly separated into a dialectic between the creation of specialised commercial courts and the use of informed, expert commercial juries within the existing court system.⁸⁹⁰

Juries were made up of men who met a minimum financial income.⁸⁹¹ This requirement ensured that only men of a certain social standing could adjudge in criminal matters. Grand Juries were formed by men of a higher class, while the petty juries sitting within the trials at the Old Bailey were formed by sufficiently financially secure men, but certainly not gentlemen or gentry.⁸⁹² These men would be drawn from the financially successful classes within the metropolis and would broadly reflect the upper-middle class demographic. In the case of the City, this demographic

⁸⁸⁷ Linebaugh, *The London Hanged*, p.360.

⁸⁸⁸ Martin A. Kayman, *Eighteenth Century Fiction*, p.386

⁸⁸⁹ Lemmings, *The Journal of Legal History*. p.79

⁸⁹⁰ Burset, *Law and History Review* p.640

⁸⁹¹ 3.Geo.2 c.25

⁸⁹² For an in-depth account of the use of middling classes in petty juries see John Beattie, *Crime and the Courts in England, 1660-1800* (Oxford University Press, 1986) Ch 8

would have been overwhelmingly occupied by tradesmen. The Middlesex jury however would have been more demographically diverse due to Middlesex being a mix of both urban and rural areas.⁸⁹³ The Middlesex jury would be comprised of some tradesmen, but also farmers and, as industry grew throughout the century, artisans and those working in manufacturing. If the Old Bailey bench had been seeking a petty jury with practical knowledge of the commercial world, they had the country's most commercially knowledgeable jury at hand and sitting at every sessions in the form of the City jury.

Conclusion

In assessing which juries heard fraud complaints within the Old Bailey, it is clear that the City of London played a leading role, both in the committal of fraud cases to the highest criminal court and in judging these matters through the over-whelming use of the City jury in fraud trials. This can be explained by magisterial policing agents and the use of discretion to further the macro and micro ends of City and Middlesex magistrates. City of London magistrates prioritised the commercial condition of the reputation of the City as a trusted commercial centre and used the criminal justice system to further this end. By committing all breaches of commercial trust within the City to the assize court, and thereby furthering the will of tradespeople, the City magistrates were making a very public declaration that commerce and the conditions of trust required in a commercial centre were at the centre of City administration.

Middlesex justices, on the other hand, wanted to reflect the successes of their policies, such as the Prevention Plan, in order to illustrate their public value within the justice system as a mechanism to filter cases away from the over-burdened assize court. The Middlesex Magistrates decision to dispose of fraud accusations below the level of assize further demonstrates how the priorities of such justices were not nearly so wedded to commerce as their City counterparts.

⁸⁹³ Shoemaker, *Prosecution*

The remarkable distribution of fraud complaints between the two Old Bailey juries suggests the informal, and as yet unrecognised, use of specialist commercial juries in criminal matters. There is such a dearth of archival evidence regarding the selection and allocation of juries and cases within the Old Bailey that this cannot be conclusively argued. However, by identifying the relevant juries, it is clear that the City jury was hearing disproportionately more fraud accusations than Middlesex and should future archives be discovered, this anomaly may become clearer. Nevertheless, it does demonstrate that future problematizing of the allocation of juries within the Old Bailey is required.

Chapter Eight Conclusion

Fraud Offences

This thesis has answered three fundamental questions: what offences made up ‘fraud’ by the early nineteenth century? – Who was prosecuting these offences? – and, how was fraud being prosecuted at this time? This thesis has, for the first time in legal and historical literature, traced the major offences of fraud from the Tudor period through to the early nineteenth century. This identification and critique of the laws of fraud have not been limited to the criminal law and rather, have explored the interaction between the criminal and the civil law. Whilst this approach has been undertaken by legal historians in some instances⁸⁹⁴, crime historians have continued to view property offences in a criminal law vacuum. This thesis has explored the interconnection between the civil and the criminal laws of fraud to better contextualise the law and also to explain the changes in the laws up to this period.

The first step in assessing the prosecution of fraud was the identification of fraud itself. Fraud offences up to the turn of the nineteenth century have largely been ignored by academics, or conflated with forgery offences. Equally as significantly, fraud offences have primarily been identified as misdemeanours, which may explain why so little research has been conducted in this field. This thesis has identified both the misdemeanours and the felonious forms of fraud. By exploring the legislation and case law surrounding all aspects of fraud, this thesis has taken some steps in explaining the complexities of fraud laws rather than glossing over the details of these offences.

What was most apparent from this exploration of fraud offences, is the underlying doctrines that shaped the definition and prosecution of these offences. By identifying the five central doctrines of fraud, this thesis provides an original framework through which to understand how fraud offences developed and why they developed in the way they did. This framework provides a better understanding of the ontologies of

⁸⁹⁴ As referred to in Chapters 1 and 2

fraud as well as providing a framework to understand and critique the jurisprudential arguments surrounding fraud, particularly in the eighteenth century. This thesis not only provided a thorough identification of the laws of fraud, it has also provided an explanation for the changes these laws saw throughout the eighteenth century. Again, using the five doctrines of fraud, the shifting attitudes to the role of the courts in assigning blame in fraudulent commercial dealings has been exposed.

It has been demonstrated, particularly in Chapter 3, that there was a clear jurisprudential shift during the eighteenth century in both the criminal laws of fraud, and the approach towards fraudulent misrepresentation at contract law. In an increasingly commercialised society, with the influence of pro-commercial judges such as Lord Mansfield, there was a move away from more paternalistic thinking in contract law towards a greater reliance and use of doctrines such as *caveat emptor*. This doctrinal development better reflected the reinforcement of the liberal tradition, particularly within contract law⁸⁹⁵, placing responsibility increasingly upon the individual contractor. In contrast to this, the criminal law was more readily finding fraud within commercial dealings through the reduction in the use of narrowing doctrines such as that the law would not act to protect a fool, and that fraud needed to have some public harm to be criminal.

Consequently, the later-eighteenth century saw the recourse for fraud and fraudulent misrepresentation move from the civil into the criminal courts. This thesis has argued that this transfer into the criminal courts can be explained by the actions of a growing and increasingly influential commercial class. Such a class, largely made up of tradesmen and merchants, as well as prominent local politicians, recognised fraud as an invidious blight on commercial activity. This blight undermined systems and relationships of credit and trust which were essential at a time of proto-Capitalism, when Britain, and particularly the City of London was trying to establish itself as the world's commercial centre. Because of this, any crime, particularly fraud, was prosecuted in the most senior and public criminal court. The use of the criminal court and the option for bodily punishment declared to the public that fraudulent

⁸⁹⁵ Atiyah, *Rise and Fall*

dealings in the Metropolis would not be tolerated, and went against the central values of the capital, the most significant being the trust underpinning all commercial activity.

From a strongly liberal position, relying upon *caveat emptor* and the doctrines of the law not protecting a fool, instead requiring that the individual take steps to protect themselves, the courts moved to a more protectionist stance. Sympathy for the credulous was extended and the definition of a 'public harm' was widened. This shift allowed for far more accusations of fraud to appear in the criminal courts. This thesis has argued that in utilising the criminal justice system to pursue claims of fraud, the legal system was making a declaratory statement that such acts were an attack on the community itself, and would not be tolerated. The reason for such a declaration was the increasing awareness of the need for trust in commercial dealings, particularly in a time of greatly extending commerce and trade, what this thesis has called 'Proto-Capitalism'; a time when Capitalism was embryonic and the Industrial Revolution was gathering momentum. Consequently, seemingly minor frauds that could have been disposed of at a lower court were propelled into the Old Bailey, the work of which was the most publicized in the country.

In creating a typology of fraud to better understand the nuances of how fraud was committed, this thesis reveals that the most common methods of carrying out fraud did not entail the breach of a trust but rather, the exploitation of some inside information. The false servant form of fraud was most common and required little more than knowing the names of the wealthier families in the area of the tradesman they wished to defraud. The social and economic background of the perpetrators of fraud cannot be discerned from the Proceedings or other records. However, it is apparent from the circumstances within which fraud were committed that many of the accused were either servants or pretending to be servants. This reiterates a key finding of this thesis, that fraud offences were not the preserve of the middle classes.

Again, one is struck by the everyday nature of fraud and reminded that these frauds were misdemeanours, capable of being disposed of in a lower and much cheaper court. Again, this thesis has revealed a paradox in the prosecution of fraud which can

only be explained by reference to a wider theoretical understanding of the changing purpose of the criminal justice system of this time. The protectionism placed around the need for trust in commercial relationships, was at the foundation of the developing proto-capitalism spreading from the City of London across the country, including the use of the criminal law.

The second most common type of fraud at the Old Bailey was that committed against the Navy and their agents. Naval fraud has been largely ignored by legal and crime historians as well as by naval historians. This thesis has not only shone a light on this important area of fraud, but also reveals how common was fraud against the navy at a time when the navy was increasingly modernising and expanding. To truly understand why the law was being enforced in the way it was, this thesis also explored who was prosecuting these cases, and how they were doing so.

Prosecutors of Fraud

The second question at the heart of this thesis – who prosecuted fraud – has been answered through a detailed analysis of the Old Bailey Proceedings. This thesis has revealed the prevalence of tradespeople as prosecutors of fraud during this period. This is unsurprising given that the most common methods by which fraud prosecuted at the Old Bailey was committed were through pretending to be a servant or have authority to collect goods. What is notable however, is that it was tradespeople who were bringing their cases of fraud to the Old Bailey, rather than pursuing the matter at a lower court. By identifying the occupations of those bringing fraud prosecutions, this thesis has illustrated not only how keen tradespeople were to demonstrate a no-tolerance approach to frauds against them, but also the allowance of the justice system for these prosecutors to bring so many misdemeanours into the assize court.

A key finding of this thesis regards the presence of public authority prosecutors routinely appearing at the Old Bailey from the middle of the eighteenth century. This is significant as it reflects the early stages of the state acting as public prosecutor. As discussed in detail in Chapters 4, 5, and 7, the presence of public authority prosecutors during this time of lay prosecution is unexpected, particularly in relation

to Randall McGowen's work on the Bank of England⁸⁹⁶. McGowen puts this change in prosecutorial policy around 1820. Existing research on the development of public prosecutions has identified fraud cases as a catalyst for state involvement in prosecutions but this research has focused upon the banking fraud scandals of the nineteenth century⁸⁹⁷. This thesis has revealed that fraud offences were being identified as requiring public prosecution as early as 1760, over a hundred years before banking and corporate fraud resulted in the establishment of the Director of Public Prosecutions.

The presence of naval agents prosecuting fraud in the Old Bailey for the fraudulent obtaining of prize monies and wages, demonstrates the presence of state actors in the criminal justice system. The consistent and numerically significant presence of naval agents as public prosecutors of fraud at the Old Bailey challenges McGowen's thesis that the Bank of England was unusual in its organising and bringing of prosecutions and more significantly demonstrates how the state was actively involved in prosecutions two generations before previously appreciated.

Methods of Fraud Prosecution

The final of the research questions of this thesis referred to the methods and mechanisms of fraud prosecution. The question of how frauds were prosecuted has taken the analysis of the prosecution of fraud beyond the assize court. The in-depth exploration of the process of indictment drafting has allowed for the painting of a far more detailed illustration of the role of clerks, both magistrates' and within the assize court. This analysis of a largely overlooked group of actors has revealed the extent of their influence and challenged perceptions of the lay prosecutor within criminal justice system as having full discretion in the prosecution process. Furthermore, it contributes to other research which has suggested that discretion lay in the hands of certain actors within the criminal justice system.⁸⁹⁸ This thesis has highlighted that the clerks of any of the courts should not be ignored when considering which actors

⁸⁹⁶ As discussed in Chapter 5. See also McGowen, *Law and History Review*

⁸⁹⁷ Wiener, *Reconstructing the Criminal*, p.261

⁸⁹⁸ Though very little research exists regarding the significance of the role of the clerk.

had discretion within the criminal justice system, and also that there is scope for further research into the role of the court clerk.

In considering the role of prosecution associations in the prosecution of fraud, this thesis has analysed a previously un-researched archive relating to The Society for the Protection of Trade against Sharpers and Swindlers. Prosecution associations have never been fully considered in relation to the prosecution of fraud, and this particular archive, has never before been analysed in any depth. The analysis within this thesis has uncovered how widespread and organised this particular association was with nearly 900 members and an annual budget most companies of the day would envy. Sadly, it has not been possible to trace the prosecutors of fraud at the Old Bailey during the time period as the records do not begin until ten years later. However, given the great numbers of members, and the location of the association within the City of London, it has been concluded that some prosecutors of fraud during this period *must* have been members of such organisations. The consequence of such a finding is to demonstrate something of the mechanisms by which tradespeople funded and organised prosecutions. In being members of collectives which provided legal advice and financial support for prosecutions, it is more understandable that tradespeople would bring expensive prosecutions for misdemeanours. As stated throughout this thesis, such prosecutions were propelled into the highest and most publicized court due to the belief that fraud was an insidious group of offences which threatened the commercial trust and investment that was essential in this time of growing commercialism and proto-capitalism. The existence of such prosecution associations, which spread the cost of prosecution, further explains why individuals were willing to fund such highly publicised prosecutions.

Whilst data regarding the presence and use of policing agents has been gathered within this thesis, without comparable studies, it is difficult to place these findings in a wider context. However, the significance of the data collected should not be overlooked. First, policing agents were present in over ten percent of fraud indictments heard at the Old Bailey. Given that during this period there was no professional police force and policing agents were attached to magistrates' offices in an informal

manner, the presence of policing agents in so many fraud trials is notable. The presence of policing agents is particularly significant when viewed as agents of magistrates, who were organs of the state. This is a further example of how fraud was being prosecuted, or prosecutions of fraud were being supported, by the state.

A further sub-question addressed within the wider question of how fraud was prosecuted within the Old Bailey relates to the presence of counsel. It has been demonstrated that counsel were often present in fraud cases. A central finding of this thesis challenges the claim by Langbein that counsel were more commonly representing the defence. In instances of fraud prosecution, trials were sometimes contested on both side, and more often prosecution counsel were present than defence. This is surprising as the majority of cases were misdemeanours and therefore counsel were allowed by right. Also, it has widely been agreed that in cases of capital felony, defence counsel were allowed, if not encouraged by the judge. However, fraud offences, whether misdemeanours or capital felonies, saw more prosecution than defence counsel. This reinforces the hypothesis that prosecutors of fraud were likely to be members of prosecution associations and would thereby have financial support in their cases, allowing for the hiring of counsel.

Perhaps the biggest finding when questioning the manner in which fraud was pursued at the Old Bailey comes from the identification of the juries hearing fraud cases. As discussed at length in Chapter 7, it is very surprising that one group of offences should be so greatly emanating from one jurisdiction within the Metropolis, in this case, the City of London. The methodology undertaken for this thesis, carrying out a close-reading upon one offence within the Old Bailey, has allowed for analysis of the petty juries in a way not before undertaken. By using the Old Bailey jury as a starting point to work backwards through the criminal justice system, this thesis has not only thoroughly analysed fraud within the Old Bailey, but also within the Magistrates courts.

By starting with the conclusion that over ninety percent of fraud indictments heard at the Old Bailey were before the City jury, this thesis allowed for a detailed study of the processes of summary justice with regard to fraud offences. Again, this has never

been undertaken before and by comparing Middlesex with the City of London, it is clear that the different systems and jurisdictions of summary justice had very different agendas. Middlesex, led by the Fieldings at Bow Street, was actively trying to change the role and reputation of Magistrates by influencing policy and demonstrating a reduction in certain types of crime, including fraud. Where such crimes were still reported, Middlesex justices were demonstrating that they could dispose of these cases at the summary level, thereby bolstering their year-on-year claim for more funding.

The City of London however did not rely upon central government for funding and rather, had a very different agenda. Increasingly the City was becoming not only the commercial centre of Britain, but also of an ever-growing empire. As a commercial centre, the City relied upon the conditions required for commerce, by far the most significant being trust; trust that debt would be paid, trust that the person one was dealing with was who they said they were, and trust that the goods one bought were of the quality and measure agreed upon. The Aldermen, the Magistrates and politicians of the City of London could not eradicate fraud, but they could demonstrate that any fraud, no matter how small, would be prosecuted and punished to the full extent of the law. Rather than quietly disposing of these cases within their own courts, the Aldermen propelled cases of fraud into the most public and senior criminal court in the country, the Old Bailey. This demonstrated that the City was a safe place to do business, even if that meant using the justice system, and was essential to the development of the conditions of commerce which allowed for the development of this period of proto-capitalism. Such detailed analysis of the workings of the summary courts in the Metropolis contributes not only to the scant literature surrounding the petty jury within the Old Bailey, but also to our understanding of summary justice in the capital.

Detailed analysis of the petty juries within the Old Bailey has also raised the question of specialist juries at trial of first instance. This argument has not been fully explored in this thesis as it deserves more attention and requires far more archival work. However, the use of the City of London jury to hear over ninety percent of fraud

indictments at the Old Bailey, at a time when prominent judges were trying to introduce specialist juries in commercial matters, does beg the question whether these initiatives were being utilised in the criminal courts.

Concluding Thoughts and Future Research

The prosecution of fraud during this period exposes the extent to which the criminal justice system operated in such a way as to promote the interests of commerce and members of the commercial classes. This period in particular reveals how even relatively minor instances of fraud against tradespeople were propelled into the assize court in order to bring publicity to the trial and punishment of such crimes. Partly this reflects a desire to deter future frauds, but mostly this was calculated to publically declare how seriously London, in particular the City of London, saw any threat to the conditions required for a growing commercial market.

Fraud is an ideal offence through which to analyse the mechanisms of the criminal justice system. As a collection of offences which unites misdemeanour with felony, and which sits at the interface between the criminal and the civil law, fraud provides a lens through which to assess the social groups using the criminal law, and the priorities of the criminal justice system. This thesis demonstrates that the criminal justice system in the eighteenth century was operating to protect the conditions of commercialism and proto-capitalism by moving fraud out of the civil courts and prosecuting fraud within the most public and senior criminal court in the country. This declaration of zero-tolerance of an offence which undermined commercial activity acted not only to develop proto-capitalism, but also to strengthen the system by which merchants and tradespeople profited. Douglas Hay and Alan Norrie were both correct in their assertions that the criminal justice system prioritised the protection of property. This thesis has demonstrated one of the ways in which this was achieved, through the aggressive criminalisation of fraud and enforcement of activity that threatened the business of the ever-influential commercial classes.

This thesis began by asking whether the modern day prosecution and regulation of fraud and financial crime can be explained by the historical prosecution of fraud. One

great confusion in the modern day prosecution of fraud rests in the multiple organisations undertaking these cases. A direct comparison with the eighteenth century on this matter would be futile given the period of lay prosecution. However, the prosecution of naval frauds by agents of the Navy, and using legislation specified to that particular offence, was certainly successful in the eighteenth century. A lesson that may be learned from this is the need for more clearly delineated areas of fraud and more clearly established lines of jurisdiction and expertise between modern-day prosecution agencies.

Another lesson that can be learned from the eighteenth century prosecution of fraud, is the perspective that the criminal justice system will operate to protect commercialism and the now-established conditions of capitalism, as defined by those who most prosper from this. The eighteenth century, like today, had perfectly effective fraud laws which would apply to the majority of instances of fraudulent activity. The frauds which were propelled into the highest courts were those which threatened the interests of a growing social strata of merchants and tradesmen. This thesis does not seek to make any wide-reaching critique or political statement regarding the modern enforcement of financial regulation but it does aim to hold up a mirror to modern-day fraud prosecution in an attempt to demonstrate that when considering the effectiveness of fraud laws, we should look less to the substantive law, and more to the actors involved in the criminal justice system.⁸⁹⁹

This thesis has answered three fundamental questions: what offences made up ‘fraud’ by the early nineteenth century? – Who was prosecuting these offences? – and, how was fraud being prosecuted at this time? The answers to these questions have provided a comprehensive exploration of the prosecution of fraud in the eighteenth century and have provided a platform from which to explore other aspects of fraud in and the criminal justice system. This thesis has told a vital part of the story of the prosecution of fraud, the essential first steps identifying the ontology of fraud offences and who prosecuted such offences. But this story has the potential to

⁸⁹⁹ For an extension of this argument in regard to Victorian fraud see James Taylor, *Why Have no Bankers Gone to Jail? History and Policy* (14 November, 2013)

continue, in particular to ask questions surrounding the sentencing of fraud offences and how those convicted for fraud were treated within the criminal justice system and beyond. This thesis has raised other significant questions which open up potential future research. One in particular relates to the construction of petty juries within the Old Bailey, and the question of whether such juries were acting as specialist commercial tribunals.

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- OBP*, October 1766, trial of Stephen Willoughby (t17661022-58)
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