The execution of Charles I, painting by Jan Weesop, source: Wikimedia commons

# Crime and Punishment in Early Modern England

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I F ONE IS TO POSE THE QUESTION: "did the punishment fit the crime in early modern England," there is only one fundamental way to answer. The only correct answer is one that completely removes every preconceived notion of modern crime and punishment from the equation. Early modern England's legal system was so different from anything any modern reader will have ever encountered that this actually presents a difficult challenge. From the start, it is important to note that a "crime" only refers to a *convicted* offence. For this reason, J.A. Sharpe makes it clear that anyone interested in early modern English crime must understand the concept of a "dark figure" of unrecorded crime.[1] This concept

further obscures a historian's ability to understand the full scope of crime and punishment. Nonetheless, that is not to say that there was not a definite spectrum of crime and punishment in early modern England. More serious punishments were the result of more serious crimes, and vice versa. Due to the very existence of this spectrum in and of itself, one can argue that, in early modern England, the punishment did in fact fit the crime. This article will argue this idea by analyzing the range of punishments on the spectrum from petty crimes to serious felonies. As previously mentioned, this is only a possible argument to make if one completely agrees to remove any notions at all about modern crime and punishment. This is

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[1] J. A. Sharpe, *Crime in Early Modern England 1550-1750* (New York: Longman 1984), 44.

not a question of whether the punishment for theft, for example, fits the crime in a way a modern lawyer would accept. Rather, this is an effort to paint the picture of varying degrees of criminality associated with varying degrees of punishment within the accepted societal standards of early modern England.



Punishment of the pillory, source: Wikimedia commons

The first step one must take to argue that the crime did fit the punishment in early modern England is to recognize that there was no contemporary definition of crime. The word "crime" did exist, but with no exact meaning: the contemporary legal commentator Giles Jacob did not include the word in his 1729 *Law Dictionary*.[2] This is because, as Geoffrey Rudolph Elton argues, the definition of crime depended on the identification of penalties, on the possibility of conviction in a court with predictable consequences.[3] Contemporaries knew only of felonies and trespasses, and understood that felonies were identifiable by the threat of capital punishment. With this, one begins to see the existence of a spectrum of crime and punishment in early modern England. The very fact that there was a recognizable delineation

between types of transgressions immediately signals an understanding of the varying degrees of crime and punishment in relation to each other. With this framework in mind, one can begin to examine specific examples of the crime fitting the punishment in early modern England. For organizational purposes, it is useful to first analyze the most serious of crimes and to continue down the spectrum until one touches on mere antisocial behavior.

Murder is a good place to start the discussion because, as Malcolm Gaskill argues, it struck at the heart of order in the Protestant state. Murder challenged God's right to give and take life, and was thus symbolic of rebellion against providence, nature, authority and Christian society.[4] That said, instances of murder are critical pieces of evidence for the spectrum of crime and punishment in early modern England because there was a contemporary understanding of degrees of heinousness within the crime itself in addition to in comparison to less serious offences. Despite the fact that homicide had been punishable in common law since the Norman Conquest, the appreciation of different degrees of the offence emerged in the early modern period.[5] As Gaskill observes, the most important change was the distinction between willful murder and manslaughter;[6] and then, even within willful murder, a distinction between the five most serious felonies (poisoning, suicide, infanticide, stabbing, and the killing of law officers).[7] Various legislative changes beginning in the late fifteenth century re-emphasized the heinousness of these types of murders in particular and established appropriate punishments with respect to the varying degrees. For example, according to an Act in 1531, poisoning was punishable by boiling.[8] The severity of the punishment aligns with the view expressed in 1614 by Sir John Croke, Justice of the King's Bench, that poisoning was the worst of the murders because it was secretive and cowardly and the most against nature.[9]

[2] Julia Rudolph, "That 'Blunderbuss' of Law: Giles Jacob, Abridgment, and Print Culture," in *Studies in Eighteenth Century Culture*, 37, ed. Linda Zionkowski and Downing A. Thomas (Baltimore, MD: Johns Hopkins University Press, 2008), 197-215.

[3] Geoffrey Rudolph Elton, "Crime and the Historian," in *Crime in England 1550-1800*, ed. James Swanston Cockburn (London: Methuen, 1977), 2.

[4] Malcolm Gaskill, *Crime and Mentalities in Early Modern England* (Cambridge: Cambridge University Press, 2000), 210.

[5] Ibid., 206.

[6] Ibid., 207.

[7] Sir Peter Leicester, *Charges to the Grand Jury at Quarter Sessions 1660-1642*, ed. Elizabeth M. Halcrow (Manchester: Chetham Society, 1953), 11.

[8] John Bellamy, *The Tudor Law of Treason* (London: Routledge & Kegan Paul, 1979), 49.

[9] British Library, MS Harley 583, fol. 29: *Discoverie of witchcraft*, as cited in Gaskill, *Crime and Mentalities*, 208.

Similarly, suicide was punished with increasing severity because it was a "sin transcendent beyond law and mercy,"[10] as was infanticide. A 1624 "Acte to prevent the murthering of Bastard Children"[11] required the defendant to prove their innocence - a stark difference from the contemporary norm of the prosecution attempting to prove guilt. There was also further delineation between the severity of types of murder weapons. Stabbing was considered the most heinous and various statutes were put into place as preventative measures, such as the 1604 Stabbing Act.[12] Even worse than stabbing in and of itself was killing those in positions of authority because of the assumption that it was a direct challenge to the Crown.[13] Sir William Blackstone, a very important and influential jurist, re-emphasized the notion that crimes of rebellious murder - that is, of a wife murdering her husband or a servant his master - were treasonous because they attacked the social order "both of natural and civil relations."[14]


The execution of the Duke of Buckingham,
Source: Wikimedia commons

The contemporary attitude was that murderers were sinners beyond earthly redemption, and thus capital punishments were "divine writs of *certiori* by which serious crimes passed to heavenly jurisdictions."[15] The compound of both variety within the distinct crime of homicide, and the strong correlation with sin these crimes presented, is compelling evidence to support the idea that contemporary Englishmen had an understanding of crimes (and their deserved punishments) in relation to one another. This idea of relativity is important to the argument because it fully supports the notion that in order for a crime to fit a punishment there had to be varying degrees of punishment associated with varying degrees of crime. The fact that there was such an understanding of murder being so heinous a transgression that it warranted judgment before God by means of capital punishment is indicative of the social understanding of degrees of offences and fitting punishments. J.A. Sharpe argues that "a person accused of an unusually heinous crime, or a multiple offender, was often felt to be deserving of death."[16] Furthermore, the very variation within the actions characterized as murder reinforces the idea that there was a spectrum of crime. This spectrum is the crucial framework within which one must understand early modern crime and punishment, and the analysis of homicide fundamentally fits in this notion.


Punishment of the stocks
Source: Wikimedia commons

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[10] John Sym, *Lifes preservative against self-killing* (London, 1637), p. 293.
[11] Robert W. Malcomson, "Infanticide in the Eighteenth Century," in *Crime in England 1550-1800*, ed. James Swanston Cockburn (London: Methuen, 1977), 187-209.
[12] Gaskill, *Crime and Mentalities*, 208.

[13] Ibid., 209.
[14] Blackstone quoted in J. M. Beattie, *Crime and the Courts in England 1660-1800* (Oxford, Clarendon Press 1986), 100.
[15] Gaskill, *Crime and Mentalities*, 212.
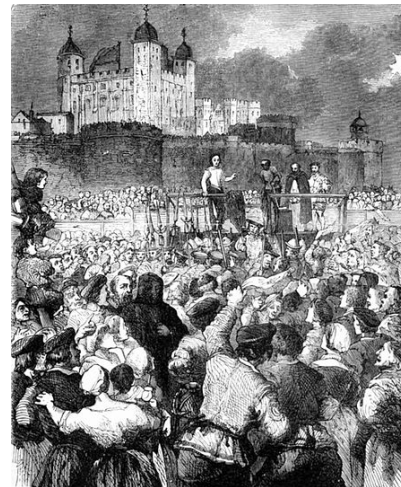[16] Sharpe, *Crime in Early Modern England*, 69.

As one moves down the spectrum of crime and punishment towards less severe transgressions, meaningful evidence emerges about the anxieties of early modern English society. The idea of public spectacle inherent to contemporary punishment must be noted here. Punishments such as branding, whipping, and other forms of public humiliation, such as the pillory or stocks, were meant to deter community onlookers from committing the same crimes.[17]
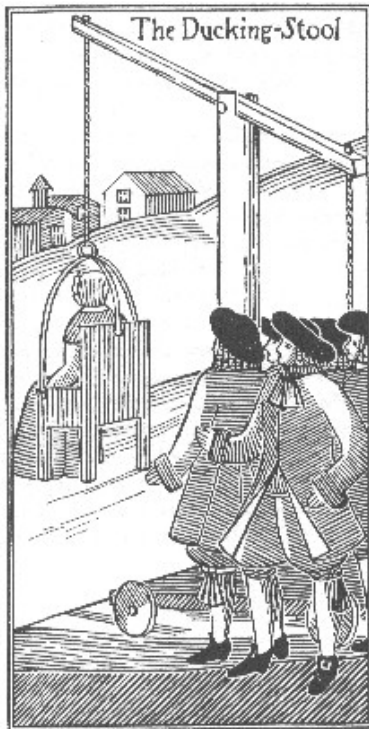


Punishment of the ducking stool
Source: Wikimedia commons

Theft is an interesting example to discuss with respect to the dynamic nature of the law. Sharpe notes that "theft of goods worth more than a shilling constituted grand larceny, and might be punished by death: theft of goods worth less than that amount was petty larceny, most often punished by whipping."[18] As Martin Ingram discusses, inflation, population expansion and economic turmoil caused extensive upheaval, which in turn increased social tensions between the rich and the poor and exacerbated the courts' abilities to uniformly regulate minor transgressions.[19] Because of this inflation, jurors, judges and prosecutors sometimes altered the value of goods given on the indictment to avoid punishment by death.[20] This sort of mitigation of sentencing is important evidence for flexibility within the framework of crime and punishment in early modern England. First, the fact that more serious thefts were punished more severely is further evidence of the contemporary understanding that, for a fitting punishment, there had to be consideration about the motivation behind the crime. For example, burglary was punished more severely than robbery. Burglaries, which by definition occurred at night, provided more opportunity for violence and harm than their daytime counterparts. Similarly, horse-theft was one of the two offences (along with infanticide) for which people were most commonly executed because it posed a threat to the victim's ability to maintain their livelihood.[21] Although a person accused of an unusually heinous crime was often felt to be deserving of death, the mitigation of sentences for lesser offences proves a willingness to mitigate the consequences of minor transgressions, with regard to the danger that offence would pose to society and its accepted cultural norms.



Public execution of the Duke of Northumberland
Source: Wikimendia commons

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[17] Chris Kyle, "Crime," class lecture, Early Modern England (Syracuse University, October 13, 2020).
[18] Sharpe, *Crime in Early Modern England*, 67.
[19] Martin Ingram, *Church Courts, Sex and Marriage in England, 1570-1640* (Cambridge, Cambridge University Press 1987), 81.
[20] Sharpe, *Crime in Early Modern England*, 68.
[21] Kyle, "Crime".

There was not a "one size fits all" punishment for any single crime, and serious attempts were made to provide an opportunity for the criminal to demonstrate repentance and prove that their character could overcome the perpetual struggle against its own weaknesses.[22] In this way, degrees of punishment, especially in public, clearly signal that different levels of crime were associated with varying dimensions of societal transgression. An obvious category of likely candidates for the gallows were those who could find no local notable to intercede for them.[23] This is strong evidence to support the nature of early modern crime and punishment being directly related to social standing and peers' views on the defendant's morality. The complex nature of public opinion in both trial and punishment further indicates a direct correlation between social anxieties surrounding major and minor transgressions and appropriate punishments.

In conclusion, through an analysis of multiple levels of crime and punishment in early modern England, the picture that emerges is of a clear relativity of transgressions. This relativity in and of itself demonstrates that the crime fit the punishment at the time. An understanding of varying degrees of transgressions and how they should be punished is evidence of a spectrum of different levels of threat to the contemporary social order. Again, this argument is not whether certain punishments seem appropriate for certain crimes by modern standards. Rather, it is about showing that ideas about crime and how it should be punished were embedded in cultural values and judgments about what was appropriate in each case.

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[22] Ibid.

[23] Sharpe, *Crime in Early Modern England*, 69.