

Women Prosecutors in Thirteenth-Century England

Daniel Klerman*

Women played a surprisingly large role in the prosecution of crime in medieval England. Although law, custom, and even Magna Carta tried to restrict women's ability to prosecute, original archival research reveals that more than a third of all thirteenth-century private prosecutors were women. Women brought nearly two-thirds of the homicide private prosecutions and all of the rape prosecutions. This Article provides the first sustained analysis of female prosecution in pre-modern times. Using an extensive data set from contemporaneous records, it attempts to explain why women were so prominent in the private prosecution of crime, compares their success to that of men, and investigates the social significance of women's prosecutions.

Private prosecutions were criminal cases initiated and controlled by ordinary persons, usually the crime victim, or, in homicide cases, a relative. Prosecution involved pleading the case publicly before

* Professor of Law and History, USC Law School. dklerman@law.usc.edu. Phone: 213 740-7973. Fax: 213 740-5502. The author thanks Albert Alschuler, Barbara Babcock, John Baker, Robert Bartlett, Lisa Bernstein, Paul Brand, Emily Buss, Isaiah Cox, Richard Craswell, Charles Donahue, Mary Dudziak, Laura Edwards, Catherine Fisk, Christina Foster, Jack Goldsmith, Charles Gray, Thomas Gallanis, Thomas Green, Roger Groot, Ariela Gross, Richard Helmholz, Morton Horwitz, John Hudson, Susanne Jenks, Margaret Kerr, Julius Kirshner, Jacob Klerman, Lisa Klerman, Kevin Kordana, Pnina Lahav, John Langbein, Jonathan Lehigh, Janet Loengard, Ed McCaffery, Tracey Meares, Martha Nussbaum, Richard Posner, Eric Rasmusen, Jonathan Rose, Stephen Schulhofer, David Seipp, Steven Shavell, Clyde Spillenger, Matthew Spitzer, Nomi Stolzenberg, Henry Summerson, Eric Talley, Eugene Volokh, Sue Sheridan Walker, participants in law school faculty workshops at Boalt Hall, Hebrew University, Interdisciplinary Center Herzliya, Stanford University, Tel Aviv University, University of California Los Angeles, University of Chicago, University of San Diego, and University of Southern California, and attendees at the 1998 American Society for Legal History annual meeting and the 1999 Medieval Academy of the Pacific annual meeting for their advice, assistance, and critical comments at various stages of this project. The author especially thanks Paul Brand for his many helpful suggestions and for his generous references to manuscript sources cited in footnotes 42, 71, 78, and 89. This research was supported by a Fulbright scholarship, the National Science Foundation (Law and Social Science Program, grant # SBR-9412044), the Social Science Research Council, a USC Law School Summer Research grant, and the Herbert and Marjorie Fried and Robert B. Roesing Faculty Funds at the University of Chicago.

multiple courts over a period of several years. Legal representation in criminal cases was uncommon, so ordinarily this pleading was performed by the prosecutor herself. Nevertheless, because of the nature of thirteenth-century trials, prosecution did not involve examination or cross-examination of witnesses.

That women brought so many private prosecutions is surprising given their low status in the thirteenth century and middle ages more generally. The most prominent thirteenth-century philosophers taught that women were mentally inferior and thus naturally subordinate to men.¹ Governments excluded women from nearly all positions of power. Inheritance customs bestowed the lion's share of wealth on sons. And family law gave husbands the right to use physical force to chastise their wives as well as nearly absolute control over property that either spouse brought into the marriage or acquired during it.

Nevertheless, recent studies have uncovered women's role in unexpected aspects of medieval life, from warfare and estate management to civil litigation.² These studies have begun to enrich our understanding of medieval women and show how women acted both within and in opposition to prevailing gender norms. No one, however, has rigorously analyzed women's large role in criminal prosecution from quantitative and social as well as legal perspectives.³ A few historians have discussed the inefficacy of restrictions on female prosecution,⁴ but because these scholars did not analyze the full range of

1. See generally Part I.A.

2. Rowena E. Archer, *"How Ladies . . . Who Live on Their Manors Ought to Manage Their Households and Estates": Women as Landholders and Administrators in the Later Middle Ages*, in *WOMAN IS A WORTHY WIGHT* 149 (P.J.P. Goldberg ed., 1992); Emma Hawkes, *"[S]he Will . . . Protect and Defend Her Rights Boldly by Law and Reason . . .": Women's Knowledge of Common Law and Equity in Late-Medieval England*, in *MEDIEVAL WOMEN AND THE LAW* 145, 148-51 (Noel James Menuge ed., 2000) (women constituted 5% of litigants in King's Bench and Common Pleas and 15% of litigants in Chancery); Megan McLaughlin, *The Woman Warrior: Gender, Warfare and Society in Medieval Europe*, 17 *WOMEN'S STUD.* 193 (1990); Sue Sheridan Walker, *Introduction to WIFE AND WIDOW IN MEDIEVAL ENGLAND* 1, 6 (Sue Sheridan Walker ed., 1993) (noting that in one court session in 1225, 20% of all civil cases were brought by women seeking their dowers).

3. Even Doris Mary Stenton, whose pioneering work on early plea rolls made her an expert on private prosecution, mentioned appeals only in passing in her book on women's history, *DORIS MARY STENTON, THE ENGLISHWOMAN IN HISTORY* 66 (1957). While female prosecutors have received little attention, female criminals are discussed in Barbara A. Hanawalt, *The Female Felon in Fourteenth-Century England*, in *WOMEN IN MEDIEVAL SOCIETY* 125 (Susan Mosher Stuard ed., 1976).

4. See, e.g., C.A.F. Meekings, *Introduction to 1 THE 1235 SURREY EYRE* 123-25 (C.A.F. Meekings ed., 31 Surrey Record Society 1979); Patricia R. Orr, *Non Potest Appellum Facere: Criminal Charges Women Could Not—but Did—Bring in Thirteenth-Century English Royal Courts of Justice*, in *THE FINAL ARGUMENT: THE IMPRINT OF VIOLENCE ON SOCIETY IN EARLY MODERN EUROPE* 141 (Donald Kagay & L.J. Andrew Villalon eds., 1998).

manuscript sources, they did not notice the extent of women's participation. Nor did they plumb the social implications of female prosecution.

The study of female prosecutors provides a unique perspective on ordinary women's lives during the middle ages. Much historical writing focuses on royal or aristocratic women, in part because the sources for them are substantially richer.⁵ One advantage of legal records is that the law touched nearly all classes, so legal history can provide information on the lives of both the humble and the elite. Since peasants far outnumbered aristocrats, understanding their lives is crucial to a full understanding of the past.

To comprehend women's prosecutorial role, it is necessary to go beyond formal statements of the law and investigate the law in action. Even though treatises, Magna Carta, and abstract statements in legal decision purported to restrict women's ability to sue, judges opened the courts to women's prosecutions by ignoring these restrictions unless the defendant objected. Since defendants seldom had counsel, they usually lacked the legal knowledge and skill to object; when they did object, judges enforced the letter of the law and quashed the prosecution. Nevertheless, judges often sent objecting defendants to jury trial anyway under the fiction that the king was prosecuting the defendant, thereby reviving the prosecution *de facto*.⁶

This Article focuses on the thirteenth century, which was probably the zenith of female prosecution in England. During the second half of the thirteenth century, private prosecutions, whether brought by men or women, became much less common, and presentment, a form of public prosecution that excluded women, became the most common method of initiating criminal cases.⁷

Part I of this Article sets out the social and legal background of private prosecution and uses two cases to illustrate its basic features.

5. See, e.g., Barbara A. Hanawalt, *Lady Lisle's Networks of Influence*, in *WOMEN AND POWER IN THE MIDDLE AGES* 188 (Mary Eler & Maryanne Kowaleski eds., 1988); Lois L. Huneycutt, *Intercession and the High-Medieval Queen: The Esther Topos*, in *POWER OF THE WEAK: STUDIES ON MEDIEVAL WOMEN* 126 (Jennifer Carpenter & Sally-Beth MacLean eds., 1995); Jo Ann McNamara & Suzanne Wemple, *The Power of Women Through the Family in Medieval Europe, 500-1100*, in *WOMEN AND POWER IN THE MIDDLE AGES*, *supra*, at 83; Elizabeth McCartney, *Ceremonies and Privileges of Office: Queenship in Late Medieval France*, in *POWER OF THE WEAK*, *supra*, at 178; John Carmi Parsons, *The Queen's Intercession in Thirteenth-Century England*, in *POWER OF THE WEAK*, *supra*, at 147. For a notable exception, see Judith M. Bennett, *Public Power and Authority in the Medieval English Countryside*, in *WOMEN AND POWER IN THE MIDDLE AGES*, *supra*, at 18 (focusing on peasant women).

6. See generally Part II.C.

7. Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 L. & HIST. REV. 1 (2001).

Part II documents the number and variety of cases brought by women and tries to explain why women brought so many prosecutions. While women prosecuted all kinds of crime, their role was largest in homicide and rape. One reason that women brought so many criminal cases was that legal rules usually required the prosecutor to be the crime victim. In addition, when more than one person could be the prosecutor (as in homicide cases), women were probably favored because they were immune from trial by battle. Part III analyzes the outcomes of women's prosecutions. It finds that women were more likely than men to settle their cases and that juries were equally likely to convict those accused by women as those accused by men. Part IV explores the social significance of female prosecutors. The ability to prosecute gave women a modicum of power and allowed them to assume a public role, albeit a limited one. The power and public role of prosecution was not limited to an elite: female prosecutors were remarkably diverse, including rich and poor, never-married, married, and widowed. Nevertheless, private prosecutions by women probably sometimes reflected family pressure as well as female power, and the public role that prosecution afforded women was limited by the fact that prosecution at this time seldom involved presentation of evidence or examination of witnesses.

I. BACKGROUND

A. The Position of Women in Thirteenth-Century England

Whether one looks to government, church, law, or the family, thirteenth-century women occupied a subordinate position. Women were excluded from nearly all official positions in government. There were no female sheriffs, judges, or jurors.⁸ The church denied women

8. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 483 (Cambridge Univ. Press 1968) (1898) (noting that women were excluded "from all public functions. . . subject to few if any real exceptions"). As with many generalizations, there were occasional exceptions. For example, the daughters of Robert de Vipont became sheriffs of Westmoreland upon their father's death because the office of sheriff in that county was hereditary. Even this, however, is the exception that proves the rule. Westmoreland was unusual, because it was one of only five hereditary shrievalties. The daughters' husbands were also made sheriffs of Westmoreland, and a male deputy performed the duties of the office. WILLIAM ALFRED MORRIS, *THE MEDIEVAL SHERIFF TO 1300*, at 179-80 (1927); see also JOHN H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 530 (3rd ed. 1990). Similarly, there was one kind of jury—the "jury of matrons"—on which women (and only women) could serve. This jury investigated whether women were pregnant in order to determine either whether a widow was bearing her deceased husband's child or whether a woman convicted of a capital crime was entitled to a stay of execution until the child was born. See Judy M. Cornett, *Hoodwink'd by Custom: The Exclusion of Women from Juries in Eighteenth-Century English Law and Literature*, 4 WM. & MARY J. WOMEN & L. 1, 17-34

positions as bishops or priests. Universities and guilds were similarly exclusionary.⁹

Family was a key institution for both men and women, although women's exclusion from many other institutions made the family even more central for them. One area in which there was at least formal equality was the formation of marriage. In contrast to customs prevailing in the early middle ages, by the thirteenth century, canon (ecclesiastical) law insisted that marriage required the free consent of both husband and wife.¹⁰ Nevertheless, there is substantial evidence that women were often pressured, if not coerced, into marriages arranged by their relatives.¹¹

Under canon law, both husband and wife had "equal rights to marital sex."¹² Each had an obligation to "respond to the sexual needs of the other by paying the conjugal debt upon demand."¹³ While the law was formally equal, in practice the concept of conjugal debt could justify something very close to marital rape. For example, the pious Margery Kempe, unable at first to convince her husband to live chastely, "complied" with his sexual demands only "with much weeping and wailing that [she] could not live in chastity."¹⁴

During marriage, women were expected to be subordinate to their husbands. Men could physically punish their wives, while a wife had to rely on persuasion or on social or legal pressure to influence her husband.¹⁵ Husbands controlled their wives' property,¹⁶ and married women could not bring lawsuits without joining their husbands as co-

(1997); James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 171-72 (1983).

9. BARBARA A. HANAWALT, "OF GOOD AND ILL REPUTE": GENDER AND SOCIAL CONTROL IN MEDIEVAL ENGLAND 71 (1998).

10. Charles Donahue, Jr., *The Canon Law on the Formation of Marriage and Social Practice in the Later Middle Ages*, 8 J. FAM. HIST. 144 (1983).

11. R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 90-94 (1974); HENRIETTA LEYSER, MEDIEVAL WOMEN: A SOCIAL HISTORY OF WOMEN IN ENGLAND, 450-1500, at 117-22 (1995).

12. JAMES A. BRUNDAGE, LAW, SEX AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 358 (1987); see generally *id.* at 93, 198, 358-60, 447.

13. *Id.* at 198.

14. THE BOOK OF MARGERY KEMPE 32 (John Skinner trans., Image Books/Doubleday 1998) (1436).

15. HELMHOLZ, *supra* note 11, at 105-06 (Ecclesiastical courts would grant a divorce only if husband inflicted severe and unjustified physical injury.); 2 POLLOCK & MAITLAND, *supra* note 8, at 436 (Royal courts intervened only if husband maimed or killed his wife or if wife feared "violence exceeding reasonable chastisement."); James A. Brundage, *Domestic Violence in Classical Canon Law*, in *VIOLENCE IN MEDIEVAL SOCIETY* 183-95 (Richard W. Kaeuper ed., 2000); Jacqueline Murray, *Thinking About Gender: The Diversity of Medieval Perspectives*, in *POWER OF THE WEAK*, *supra* note 5, at 1, 10.

16. Paul Brand, *Family and Inheritance, Women and Children*, in *AN ILLUSTRATED HISTORY OF LATE MEDIEVAL ENGLAND* 58, 65 (Chris Given-Wilson ed., 1996).

plaintiffs.¹⁷ Hemmed in by these and other restrictions, a married woman was known as a *feme covert* (a woman “covered” by her husband), and the legal regime governing married women was called “coverture.” Of course, the reality of marriage varied considerably from couple to couple. No doubt there were many marriages in which husbands treated their wives decently. And some wives, like Chaucer’s wife of Bath, surely managed to get the upper hand over their husbands, in spite of prevailing institutions and norms.

Women’s subordinate position was justified by the philosophy and theology of the day. The most prominent thirteenth-century philosopher and theologian, Thomas Aquinas, followed the Aristotelian view that women were naturally inferior to men. Women were born “defective,” because “the active power in the seed of the male tends to produce something like itself, perfect in masculinity; but the procreation of a female is the result either of the debility of the active power, or of some unsuitability of the material”¹⁸ This congenital defect meant that women were lesser in intellect as well as body. As a result, “woman is by nature subject to man, because the power of rational discernment is by nature stronger in man.”¹⁹ Eve’s sin in eating the forbidden fruit was also invoked to bolster men’s dominant position, as was Paul’s admonition in his Letter to the Ephesians: “Wives, be subject to your husbands as to the Lord; for the husband is the head of the wife, as Christ is the head of the Church. As the church is subject to Christ, so let wives also be subject in everything to their husbands.”²⁰ Other, less influential theologians sometimes portrayed women in a better light, emphasizing Paul’s doctrine of spiritual equality: “There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus.”²¹

In spite of these beliefs and conditions, some women—especially widows and nuns—managed to carve out some autonomy. While widows were often impoverished, their husbands’ deaths freed them

17. Unfortunately, there seems to have been little writing about this aspect of coverture in the middle ages. Nevertheless, it appears that, at least in most circumstances, the rule was applied. 2 POLLOCK & MAITLAND, *supra* note 8, at 406, 408; Bennett, *supra* note 5, at 22-23; Thomas Lund, *Women in the Early Common Law*, 1997 UTAH L. REV. 1, 24-30. Books from the early modern period treat the issue more comprehensively. See, e.g., A TREATISE OF FEMES COVERTS OR THE LADY’S LAW 83-109 (Rotham Reprints 1974) (London, 1732). That same treatise, however, makes an exception for appeals of rape. *Id.* at 50.

18. 13 THOMAS AQUINAS, SUMMA THEOLOGIAE 37 (Blackfriars eds. & trans., 1964) (Part I, Question 92).

19. *Id.* at 38.

20. *Eph.* 5:22-24.

21. *Galatians* 3:28. See Murray, *supra* note 15, at 1-26.

from coverture.²² They thus had full legal control over their property and full capacity to sue and be sued in their own name. Widows were entitled to their dower, which was typically one third of their husband's landed property.²³ If the husband was sufficiently wealthy, the dower could allow women to live independent lives. Similarly, by entering the cloister, a woman could escape the inequality of marriage and inhabit a world largely governed by other women. Nevertheless, even an abbess's authority was frequently circumscribed by the appointment of a master or guardian.²⁴

B. Legal Background and Two Sample Cases

In thirteenth-century England, crimes could be prosecuted in two ways: by presentment and by appeal. Presentment was accusation by a local jury and can be seen as an early form of public prosecution. An appeal, on the other hand, was a private prosecution by the victim herself or, in homicide cases, by a relative of the victim. Unlike modern appeals, these medieval appeals were not means of correcting errors by lower courts. Rather, to appeal someone meant simply to prosecute him for crime.²⁵ The prosecutor and defendant were often called "appellor" and "appellee" respectively. Appeals were initiated in county court, a local court held by the sheriff every four weeks. According to custom and Magna Carta, however, the sheriff could not try appeals, because they involved allegations of a breach of the king's peace. Trial was therefore postponed to the general eyre, a court held by royal justices as they traveled through the countryside every few years.²⁶

Appeals could be brought for many offenses. In order of descending frequency, they were brought for assault (including beating, wounding, and mayhem), homicide, theft, and rape.²⁷ Appeals were criminal prosecutions in that, if the prosecutor were successful, the defendant was fined and the money went to the royal treasury rather than to the victim. Sometimes, especially in homicide or theft cases,

22. Walker, *supra* note 2, at 3.

23. Janet Senderowitz Loengard, *Rationabilis Dos: Magna Carta and the Widow's "Fair Share" in the Earlier Thirteenth Century*, in *WIFE AND WIDOW IN MEDIEVAL ENGLAND*, *supra* note 2, at 59.

24. JANET BURTON, *MONASTIC AND RELIGIOUS ORDERS IN BRITAIN, 1000-1300*, at 171 (1994).

25. For general information on appeals, see Klerman, *supra* note 7.

26. Some appeals, however, were heard in the central courts (King's Bench and Common Bench), and in the second half of the thirteenth century it became common for appeals to be heard by justices specially commissioned to hear particular cases. The eyre remained, however, the place where most appeals were heard. *See id.* at 31-33.

27. This ordering by frequency is based on the cases in the data set described in Part I.C.

the defendant was hanged. Although appeals were classified as criminal cases, to modern eyes they have at least one civil aspect. For much of the thirteenth century, the prosecutor and accused could settle. When they settled, the prosecutor would usually receive some compensation for her injury.²⁸ In addition, through skillful pleading, most offenses prosecutable by appeal could be prosecuted in royal court by a civil action of trespass or in local courts. Although this Article focuses on appeals, the role of women in these alternatives also merits study.

The best way to understand women's appeals is to examine typical cases. The first of two such cases was heard in the Bedfordshire eyre in 1227:

Alan Parvus of Middletown slew Thomas Brekaspere and fled. And he was in tithing at Middleton, and the tithing was amerced at another time before the Justices; therefore nothing. His chattels were of two shillings, whereof the Sheriff answers. Alan was outlawed at the suit of Agnes wife of the said Thomas.²⁹

Like most, this case provides little information about the parties or the incident giving rise to the prosecution. In fact, the four lines quoted above are the entirety of the surviving information about the case. Nevertheless, the basic facts are clear. Agnes brought a private prosecution against Alan Parvus, whom she accused of killing her husband. Alan was summoned to court four times, but did not appear, because he had fled. As a result, he was outlawed, which meant that it was illegal to give him food or shelter, and that he could be killed without further legal process, if he resisted arrest. In addition, an outlaw forfeited all his property to the king and his feudal lord. The case mentions that Alan had two shillings in personal property, for which the sheriff was responsible. Each male villager was required to be in a "tithing," a group of approximately ten men who were obligated to ensure that each appeared in court, if summoned. Since Alan fled, his tithing failed in performing its duty and was "amerced," that is, fined. Since they had already paid this fine, they were recorded as owing nothing.

Fortunately, some cases are reported in greater detail. The case below, from Kent in 1241, contains one of the fuller reports.

Gunora daughter of John Gronge appealed Geoffrey son of William Broketherl that he forcibly lay with her and deflowered

28. For more on the settlement of appeals, see *id.* at 15-18.

29. ROLL OF THE JUSTICES IN EYRE AT BEDFORD, 1227, case 372 (G. Herbert Fowler ed. & trans., 3 Bedfordshire Historical Record Society 1916).

her, etc. And Geoffrey comes and denies everything and puts himself on the country [that is, pleads “not guilty” and submits to jury trial]. And the jurors say that, in fact, the aforesaid Geoffrey lay forcibly with the aforesaid Gunora and deflowered her, because immediately afterwards she was seen by the headborough and by respectable men and women who saw that she was sticky with blood and had been mistreated. Therefore let Geoffrey be taken into custody. Later, the aforesaid Geoffrey comes and with permission [of the court] gives the aforesaid Gunora two acres of land in Mundham with their appurtenances. Therefore the sheriff is ordered to cause her to have seisin [that is, legal possession of the property]. And she retracts her appeal. She is poor [and is therefore not fined for retracting her appeal]. And Geoffrey made fine for his amercement by four marks [that is, promised to pay the king four marks] by sureties [names of sureties omitted].³⁰

The report of this case is much fuller, and the facts revealed are much more interesting. Gunora accused Geoffrey of rape. He appeared for trial, and the jury found him guilty. The jury was persuaded of his guilt because Gunora promptly reported the incident to the relevant authority (the headborough), and the headborough deputized men and women who examined her and found physical evidence to corroborate her claim. Because of the jury verdict, the judges ordered Geoffrey to be jailed, probably as a prelude to amercement (fining). Sometime later, Geoffrey and Gunora settled the case. Geoffrey gave Gunora two acres of land, and Gunora withdrew her appeal. The judges instructed the sheriff to enforce the settlement. Gunora would ordinarily have been fined for withdrawing from prosecution, but the judges forgave her fine, because she was poor. In spite of the settlement, Geoffrey still paid a fairly large fine (four marks) to the king.

Although every case presents unique features, the two cases quoted above are typical of most women’s appeals. They involved homicide and rape, the two crimes most often prosecuted by women, and they resulted in outlawry and settlement, two of the most common case resolutions. Although the first case is more typical in its extremely brief report, the greater detail in the second case sheds light on actions and procedural steps which were probably common to

30. Public Record Office, JUST 1/359 m. 35d (transcription and translation by the author). All citations beginning “JUST” or “KB” refer to documents in the England’s Public Record Office, Kew, Surrey.

many cases, but left unrecorded by the laconic style employed by most judicial clerks.

Whether the prosecutor or the defendant in an appeal was ordinarily represented by counsel is an important, but difficult issue.³¹ There were two kinds of legal representatives in medieval England, pleaders and attorneys. Pleadors (known as serjeants or narrators) were generally entrusted with speaking for the party. For a prosecutor, a pleader would have spoken the count, that is, set forward the formal words of the appeal. For a defendant, a pleader would have responded to the count by pleading defenses. Although a pleader spoke for a party, his words could be disavowed by the party. By the 1220s or 1230s, there were a number of full-time, professional pleaders.³² Before that time, however, pleaders would have been non-professionals, perhaps friends or neighbors of the parties.³³

An attorney's primary function was to appear for the party in court, perhaps most importantly to prevent a default, to set in motion the procedures to secure the defendant's presence, and to seek default judgment if the defendant did not appear.³⁴ While the attorney did not usually make arguments to the court, whatever the attorney did say bound the party. Unlike a pleader, an attorney could not be disavowed. Professional attorneys are not clearly identifiable until the late 1250s. Before that time, however, non-professionals often acted as attorneys.³⁵

It is clear that there were very few attorneys in appeals. Medieval treatises flatly prohibit the use of attorneys in appeals unless the party herself was incapacitated,³⁶ and this rule seems to have been generally observed in practice. So, for example, to the extent that out-lawry would have required an appellor to appear five times in court

31. On the thirteenth-century legal profession more generally, see PAUL BRAND, *THE ORIGINS OF THE ENGLISH LEGAL PROFESSION* (1992). On the history of defense counsel, see J.B. Post, *The Admissibility of Defense Counsel in English Criminal Procedure*, *J. LEGAL HIST.*, Dec. 1984, at 23.

32. BRAND, *supra* note 31, at 55.

33. *Id.*; 1 POLLOCK & MAITLAND, *supra* note 8, at 212.

34. BRAND, *supra* note 31, at 87.

35. *Id.* at 65.

36. 2 BRACON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 353 (George E. Woodbine ed. & Samuel. E. Thorne trans., Harvard Univ. Press.1968-77) ("And note that no one may sue against another for felony by attorney, provided that he who complains and ought to sue is able to do so himself; if he is temporarily incapacitated . . ."); 1 BRITTON 101 (photo. reprint 1983) (Francis Morgan Nichols ed. & trans., Oxford, Clarendon Press 1865); *PLACITA CORONE OR LA CORONE PLEDÉE DEVANT JUSTICES* 1 (J.M. Kaye ed. & trans., 4 Selden Society Supplementary Series 1966) ("[L]et the plaintiff take care to make suit in county courts fully and in person, for such is the custom and legal mode of procedure."). The prohibition on attorneys in appeals was part of the more general rule against attorneys in cases in which a party might be imprisoned. BRAND, *supra* note 31, at 45.

to press her case, the female prosecutor would have had to appear herself each time. She could not have sent an attorney to appear for her. The case records usually indicate explicitly that the prosecutor or defendant did or did not come to court, and they almost never indicate that attorneys appeared for absent parties.³⁷ The *Placita Corone*, a mid-thirteenth-century treatise, provides some sample courtroom dialogues which confirm that the parties were themselves present in court. One dialogue involving a rape accusation is particularly pertinent. When the judge questioned the prosecutor, he addressed her as "Girl," and she responded in the first person: "Sir, if it please you, no matter what he says against me, I say openly that he was the first man who ever made carnal approaches to me, and did so wrongfully and against my free will."³⁸ Similarly, the defendant himself responded to the judge's queries.³⁹ The dialogues suggest no role for an attorney in appeals.

It is less clear whether there were pleaders or serjeants in appeals. The presence of pleaders is difficult to detect in the official legal records which are the primary sources for this Article. Even in civil cases, where pleaders were known to have been employed from the early thirteenth century, their presence is not usually explicit, because the records attribute their words to the parties. Nevertheless, there are three principal ways in which the presence of pleaders can be detected: by judicial punishment of pleaders for misconduct, by disavowals of their words, and through unofficial reports, which usually indicate if a pleader spoke, often mentioning the pleader by name.⁴⁰ These methods make clear that pleaders were common in

37. I have found only two cases in which attorneys appeared for appellors, neither of them women. 3 PLEAS BEFORE THE KING OR HIS JUSTICES, 1198-1212, pl. 725 (Doris Mary Stenton ed., 83 Selden Society 1967) (Shropshire 1203); 6 CURIA REGIS ROLLS 392 (1932) (case from 1212). Although it is not apparent from the records, these cases may have involved appellors who were incapacitated. They might, therefore, have been in accord with the general rule forbidding attorneys in appeals.

38. PLACITA CORONE, *supra* note 36, at 9.

39. *Id.*; *see also id.* at 17 (forbidding defendant representation in appeals).

40. The treatises are not very helpful in determining whether pleaders were common in appeals. *Glanvill* is silent on the issue. GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL (photo. reprint 1993) (G.D.G. Hall ed. & trans., Nelson 1965). *Bracton* and *Placita Corone* are ambiguous. On the one hand, they generally put the pleadings in the third person, which suggests that they were spoken by someone other than the parties, that is, by a pleader or serjeant. 2 BRACTON, *supra* note 36, at 416, 419; PLACITA CORONE, *supra* note 36, at 4-5, 7-8; BRAND, *supra* note 31, at 54. On the other hand, the inference from the use of the third person to the employment of pleaders is weak, because the *Placita Corone* explicitly bars pleaders for the defendant, even though its pleading examples use the third person. PLACITA CORONE, *supra* note 36, at 17. *But see* David J. Seipp, *Crime in the Year Books, in* LAW REPORTING IN BRITAIN 15, 25 (Chatal Stebbings ed., 1995) (arguing that *Placita Corone* merely required the defendant to answer the charge, but allowed lawyers to make arguments to the court). Most probably, the pleadings were in the

civil cases from the early thirteenth century.⁴¹ In addition, some cases from the 1290s suggest that serjeants were employed, at least occasionally, in appeals.⁴² These cases come from the central courts, that is, from King's Bench and Common Bench, which heard a relatively small proportion of appeals.⁴³ The implications of the evidence for this Article are unclear, because the appeals examined here are from the eyre in the period 1194-1294. Thus, the evidence of pleaders in appeals comes from the very end of the period studied in this Article and from different courts (the central courts rather than the eyre).⁴⁴ There is no evidence, neither from disavowals nor from lawyer discipline nor from the unofficial reports, that serjeants spoke for either party in eyre appeals. On the other hand, disavowals and lawyer discipline were rare and few eyre reports survive, so it is possible that there were some serjeants representing prosecutors or defendants in the eyre, even though there is no evidence for it. Nevertheless, the most plausible inference is that serjeants in eyre appeals were very rare in the early thirteenth century and, at most, occasionally present later in the century.

Although representation at trial seems to have been uncommon, both sides might have consulted lawyers or local, non-professional legal experts for advice before trial. In fact, because at least five people from every village had to attend each eyre to participate in the adjudication of appeals and other cases, it is likely that both prosecutors and defendants would have been able to learn the basics of the relevant procedures by consulting neighbors who had previously been involved in such cases.⁴⁵

third person simply as a matter of convention. In civil cases, which were far more common than appeals, serjeants had become common by the mid-thirteenth century, when *Placita Corone* was written. As a result, it was conventional for pleadings to be put in the third person, and that practice was probably carried over to appeals, even though serjeants may not have been common. *Britton* explicitly states that serjeants were allowed in appeals, but does not indicate how common they were. 1 BRITTON, *supra* note 36, at 10-02 (mentioning the possibility that a serjeant might speak for an appellor or an appellee).

41. BRAND, *supra* note 31, at 47.

42. KB 27/148 m. 4 (King's Bench 1296) (noting that "John of Tilton prosecuted the aforesaid appeal in the name of the appellor as her serjeant"); British Library MS. Egerton 2811 ff. 100r-v (Common Bench 1297) (serjeants made arguments on behalf of both appellor and appellee); Y.B. 32-33 Edw. 192-95 (Easter 1304) (serjeants in King's Bench made arguments for both appellor and appellee). For evidence of lawyers in fourteenth- and fifteenth-century appeals, see Seipp, *supra* note 40, at 22-26.

43. Klerman, *supra* note 7, at 33.

44. This Article focuses on appeals in the eyre, because that is where most appeals were heard. See *supra* note 26.

45. HANAWALT, *supra* note 9, at 128; Klerman, *supra* note 7, at 50.

C. Sources

The cases used in this Article come from a data set compiled by the author containing over one thousand two hundred appeals.⁴⁶ Some of the cases have been printed and translated, while others exist only in Latin, on parchment manuscripts stored in England's Public Record Office. The next two pages contain pictures of one of the manuscripts used in compiling the data set. The cases come from select districts in fourteen English counties, ranging from Kent and Wiltshire in the south, to Shropshire on the Welsh border, Norfolk and Essex in east, and Yorkshire in the north. In the map following the pictures, the counties whose records were used are shaded. The districts included in the data set were chosen because a larger percentage of their records survive. Although the cases in the data set are not a random sample of all thirteenth-century appeals, there is no reason to suspect that the cases are in any way unrepresentative. The survival of records for a particular district has more to do with random factors—such as whether the judge transmitted his records to the exchequer, as a 1257 order required,⁴⁷ or whether moisture or rats happened to damage records of a particular district—than factors plausibly correlated with women's appeals. The fact that the database includes cases from every part of England and from the entirety of the century also suggests that the cases are representative. The use of such a large and representative database drawn from both printed and unprinted sources allows for quantitative as well as qualitative analysis of the issues raised by women's appeals and is one of the factors which distinguishes this Article from prior analyses of women's appeals.⁴⁸

All cases analyzed were heard in the eyre, which was the principal forum for appeals in the thirteenth century. Records from county courts do not survive in sufficient numbers to allow quantitative analysis of the preliminary stages of appeals. Those that do survive are not very informative, and what information they do contain is usually also available in the eyre records.⁴⁹

46. For a more detailed description of the data set, see Klerman, *supra* note 7, at 21-22, 61-63.

47. DAVID CROOK, RECORDS OF THE GENERAL EYRE 12 (PRO Handbooks No. 20, 1982).

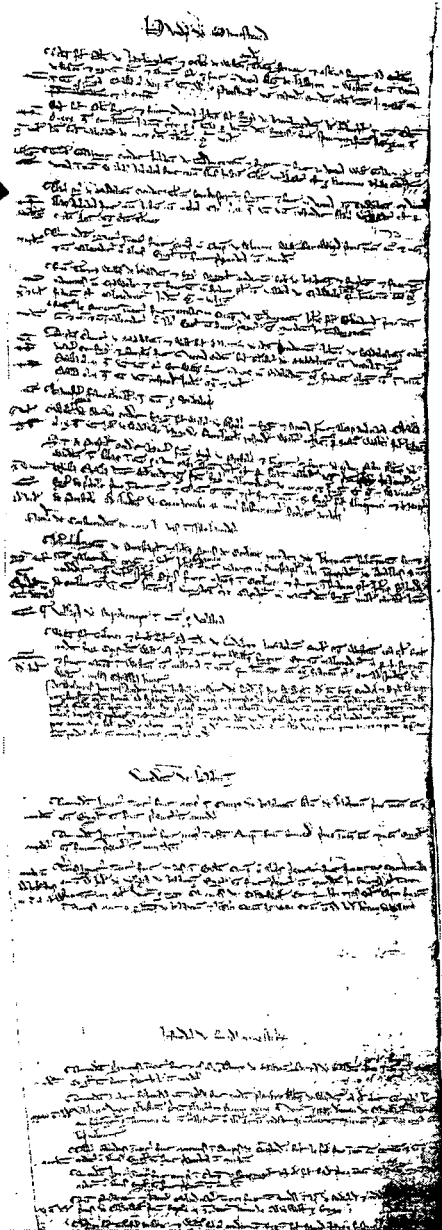
48. See, e.g., Meekings, *supra* note 4, at 123-25 (relying principally on records from a single eyre in a single county); Orr, *supra* note 4, at 141 (relying exclusively on printed sources). For an example of the pitfalls of relying on such a narrow base of source material, see *infra* note 51.

49. County court records were kept by the coroner. For more on the coroners' rolls and their relationship to eyre records, see Klerman, *supra* note 7, at 63-64.



This is a copy of the manuscript from which the case on page 286 was taken. The document is made of parchment and is just over two feet long and seven inches wide.

The case on page 286 is only one of many cases visible on this page. The next page reproduces, in larger scale, the case on page 286. The case begins at the spot marked by an arrow. The next page also contains a transcription of the manuscript by the author of this article.



PRO JUST 1/2 m. 13d

PRO JUST 1/2 m. 13d

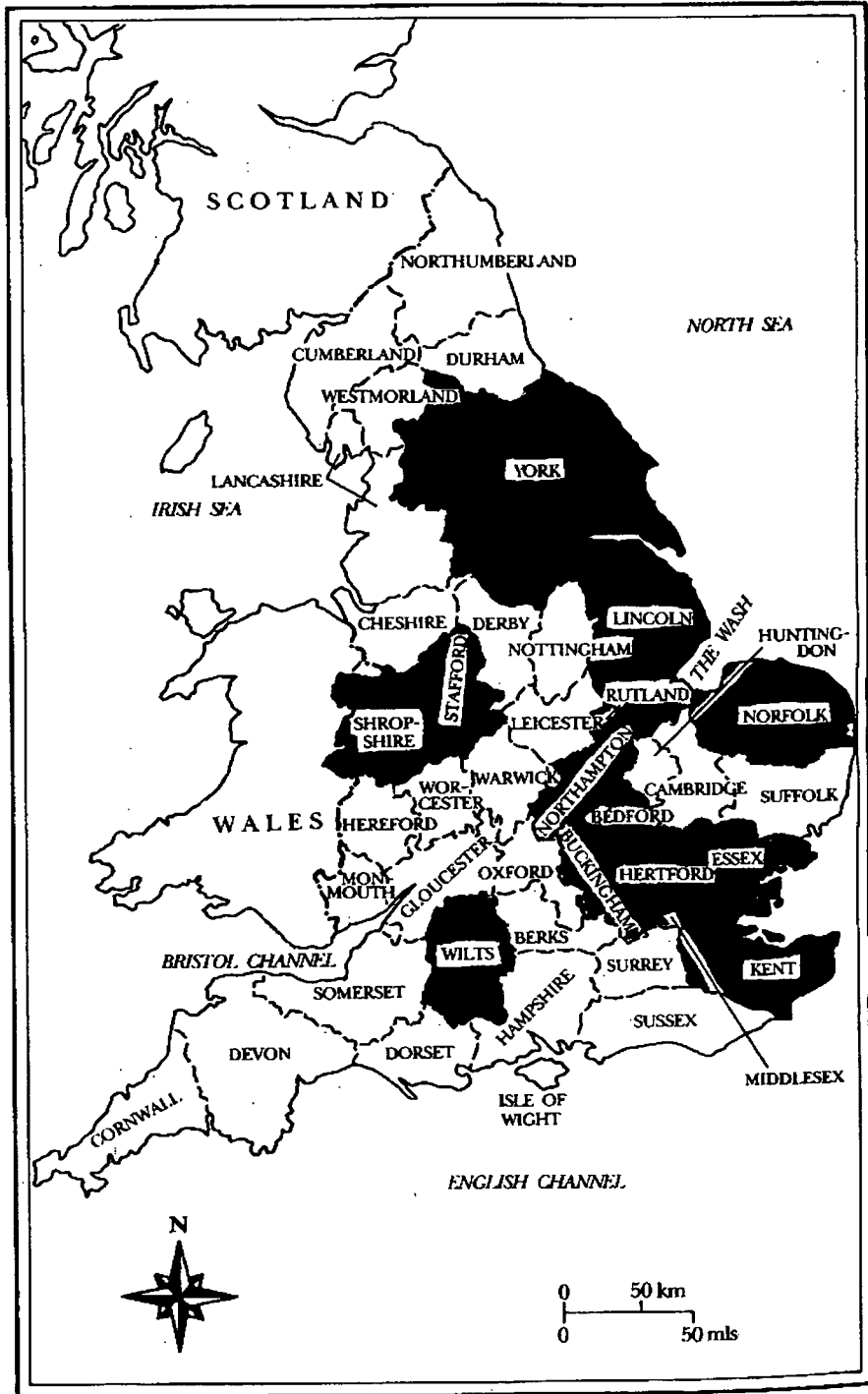
Handwritten title: *Alanus de Brekeker*

Handwritten Latin text in Gothic script, containing the original manuscript entry.

Transcription: Alanus parvus de Middelton occidit Thomas Brekesper et fugit et fuit in decena apud Middelton et decena alias amerciata fuit coram iusticiariis. Ideo nichil. Catalia eius ii solidi unde vicecomes responder.

Additional handwritten notes in Gothic script, providing further details or corrections.





II. DOCUMENTING AND EXPLAINING THE PREVALENCE OF FEMALE PROSECUTORS

A. Crimes Prosecuted by Women

Using the data set described in Part I.C, it is possible to ascertain the prevalence of women's appeals. Table 1 classifies appeals by the sex of the prosecutor and by the offense alleged.

Table 1. Appeals by sex of prosecutor and offense, 1194-1294

	Assault ^a	Homicide	Theft ^b	Rape	Other crimes ^c	All crimes
Number of appeals brought by women	53	223	30	126	20	452
Number of appeals brought by men	426	121	120	0	126	793
Number of appeals brought by woman and man together	4	3	2	0	3	12
Percent of appeals brought by women ^d	11%	65%	20%	100%	14%	36%

a. The assault column includes beating, wounding, and maiming.

b. The theft column includes larceny, robbery, and burglary, but excludes thefts committed in the course of other crimes. Such cases are counted in the column for the other crimes.

c. This column includes cases where the case record does not identify the crime.

d. In calculating the percentage of appeals brought by women, I have excluded appeals brought by a woman and man together (the third row). Since the number of such appeals is so small, inclusion would not alter the figures by more than one percent. In four cases, the sex of the appellor could not be determined. These cases have been excluded from the table.

As the lower right-hand corner of the table indicates, women's appeals constituted a sizable fraction (36%) of all appeals. Although the role of women prosecutors has not been systematically studied in other times and places, it appears that 36% is unusually high.⁵⁰

50. Procedural differences complicate comparison to other times and places. For example, in early modern England, most crimes were prosecuted by indictment. In such cases, the victim was not technically a party. Nevertheless, because such cases usually required considerable victim initiative to secure a conviction, the victim in such cases is often referred to as a private prosecutor. Douglas Hay, *Controlling the English Prosecutor*, 21 OSGOODE HALL L.J. 165, 167-70 (1983). In Staffordshire, during the years 1740-1800, only 6% of prosecutors were women. *Id.* at 168; Douglas Hay & Francis Snyder, *Using the Criminal Law, 1750-1850*, in POLICING AND PROSECUTION IN BRITAIN 1750-1850, at 18 n.39 (Douglas Hay & Francis Snyder eds., 1989). Women's participation in the prosecution of misdemeanors in late seventeenth-century and early eighteenth-century Middlesex approached the numbers reported here for thirteenth-century appeals. Women were responsible for 18.2% of all indictments and 34.9% of all non-indicted recognizances in quarter sessions. ROBERT B. SHOEMAKER, PROSECUTION AND PUNISHMENT: PETTY CRIME AND THE LAW IN LONDON AND RURAL MIDDLESEX, c. 1660-1725, at 208 (1991). These percentages are only approximate, because in many cases the gender of the

The first row of the table shows that women brought appeals for all sorts of crimes. Their largest role was in rape and homicide. Homicide appeals account for nearly half of all appeals brought by women (49% or 223/452) and rape appeals account for more than a quarter (28% or 126/452). Women brought appeals for other crimes, including assault and theft, but as the table shows, such appeals were less common.

The bottom row suggests that women's role in the prosecution of homicide, the most serious felony, was especially noteworthy. Women brought nearly two-thirds (65%) of all homicide appeals.⁵¹ As would be expected in a system that presumed the victim would be the appellor (except in homicide or other special cases⁵²), all rape appellors were female. While women's role in prosecuting other crimes (including batteries and thefts) was much smaller, it was still appreciable. The infrequent prosecution of batteries and thefts may reflect legal prohibitions against such actions.⁵³ The lower rate of appeals of thefts also probably reflects the fact that married women could not own chattels and that never-married women usually owned little.

The second-to-last row shows that a woman occasionally brought an appeal together with a man (typically her husband). It is unclear why appeals were brought in that form. One possibility is that such appeals reflect coverture, the idea that a woman's legal personality was suspended during marriage. One consequence of coverture was that a married woman could not sue or be sued without her husband being joined in the action.⁵⁴ As will be discussed below, this explanation is not persuasive because the rule against married female appellors seems to have been largely ignored, although it is possible that it exerted some force even though under-enforced.

prosecutor could not be ascertained. In mid-fourteenth-century Florence, women seem to have been responsible for only about 10% of all prosecutions, and that percentage dropped precipitously as the century progressed. SAMUEL K. COHN, *WOMEN IN THE STREETS: ESSAYS ON SEX AND POWER IN RENAISSANCE ITALY* 27, 33 (1996). (The percentage of female prosecutors was calculated by dividing the number of female plaintiffs in Table 2.2 by the total number of prosecutions in Table 2.1.).

51. In his analysis of the 1235 Surrey eyre, C.A.F. Meekings noted that four out of seven homicide appeals resulting in outlawry in county court were brought by women and that five out of six homicide appeals heard in the eyre were brought by women. He thought "[s]uch a preponderance of women's appeals. . . not typical of appeals of homicide in the surviving rolls. . . ." Meekings, *supra* note 4, at 120. Nevertheless, based on his figures, one can calculate that 69% $((4+5)/(7+6))$ of homicide appeals recorded in the 1235 Surrey eyre were brought by women. This is within four percentage points of the figure I derived after looking at more than fifty eyre rolls. Thus, contrary to Meekings's view, this preponderance of women's appeals was indeed typical.

52. *See infra* p. 298.

53. *See infra* pp. 302-03.

54. *See supra* pp. 283-84.

The cases in the table are only a small sample of all cases prosecuted by appeal. They were chosen because they come from districts whose records survive with some abundance. Records for other districts, however, survive only in more fragmentary form and were not examined. Nevertheless, to appreciate the scope of women's prosecution, it is helpful to have a rough sense of the total number of women's appeals. I estimate that there were about 8000 appeals by women during the period 1194-1294.⁵⁵

Another way to contextualize the number of appeals by women is to compare prosecutions by appeal and presentment. As mentioned in the beginning of Part I.B, presentment was accusation by a local jury. Homicide and theft were often presented. Although it is difficult to ascertain the relative frequency of appeal and presentment, I have estimated that about one-third of all homicide prosecutions were brought by appeal in the early thirteenth century, but that the proportion dropped to about one-tenth by the end of the century.⁵⁶ Theft probably followed a similar pattern. Thus, if one calculated women's homicide appeals as a fraction of all homicide prosecutions, one would find that women prosecuted about 20% of homicides in the beginning of the century, but less than 7% by the end. Similarly, women's appeals would drop from about 7% of all theft prosecutions at the turn of the century to about 2% by the end. Assault and rape, however, were prosecuted in royal courts exclusively by appeal for most of the century,⁵⁷ so the percentages in the bottom row of the table for these crimes accurately describe women's appeals as a percentage of all prosecutions of these offenses.

55. This figure was calculated in three ways. First, I calculated the average number of appeals per year per district in the database and multiplied that number times the total number of districts. For enumeration of the districts, I relied on CROOK, *supra* note 47, at 196-252. Second, using *Domesday Book* population figures, I calculated the rate of appeals per year per person for the four counties for which I have data from nearly all districts and then multiplied that rate times the entire population of England. H. C. DARBY, *DOMESDAY ENGLAND* 336 (1977) (figures from 1086). Third, I repeated the second calculation using population figures from 1377 poll tax returns. JOSIAH COX RUSSELL, *BRITISH MEDIEVAL POPULATION* 132-46 (1948). The estimates produced by these three methods were remarkably similar, ranging from 8086 to 8260. These methods somewhat underestimate the total number of women's appeals because they consider only appeals heard in the eyre, not appeals heard in the central courts, in gaol delivery, or under special commissions.

56. See Klerman, *supra* note 7, at 57.

57. Rape was probably not presentable until the 1275 enactment of the first Statute of Westminster. See Roger D. Groot, *The Crime of Rape temp. Richard I and John*, 9 J. LEGAL HIST. 324, 325-26 (1988); Henry Ansgar Kelly, *Statutes of Rapes and Alleged Ravishers of Wives: A Context for the Charges Against Thomas Malory, Knight*, 28 VIATOR 363, 364-66, 382-83, 387-88 (1997); J. B. Post, *Ravishment of Women and the Statutes of Westminster*, in LEGAL RECORDS AND THE HISTORIAN 150, 154-55 (J.H. Baker ed., 1978). Even after 1275, rape presentments were rare.

B. Why Did Women Bring So Many Appeals?

The previous section suggests that women brought over a third of all private prosecutions. The prevalence of women's appeals is a phenomenon that requires explanation. I suggest five reasons.

1) Women were often victims of crime, and the legal rules governing appeals tended to restrict prosecution to the victim herself. Contemporary legal treatises note that the appellor must have been an eyewitness to the crime. She must "speak of her own sight and hearing."⁵⁸ For most crimes, the victim was the most likely and often the only eyewitness. In addition, *Bracton* says that, except in extraordinary circumstances, only the victim herself (or relatives in the case of homicide) can bring appeals.⁵⁹ Since women were often victims of crime, they would frequently have been the only individuals legally qualified to appeal.

Explaining the high rate of women's appeals by the legal rules that restricted suits to victims is problematic, however, because those rules may not have been enforced. I have seen no case in which a defendant objected to an appeal because the appellor was not the victim, and only infrequently did the defendant allege that the appellor did not speak "of sight and hearing."⁶⁰ While it is possible that such objections were rare because the rules were seldom violated, the evidence regarding other defenses suggests that one cannot infer conformity to law from the absence of objection.⁶¹ Defendants, who were not ordinarily represented by counsel, probably lacked the legal knowledge and sophistication to raise such technical objections even when they were applicable.

Using the eyewitness rule to explain the substantial rate of prosecutions by women is also problematic because it cannot explain the fact that women brought two-thirds of the homicide prosecutions. While it is possible that women were twice as likely to witness homicides as male relatives, this suggestion seems implausible.⁶²

58. 2 BRACTON, *supra* note 36, at 397 ("Item cadit appellum ubi appellans non loquitur de visu et auditu.").

59. *Id.* at 398-99, 413.

60. JUST 1/358 m. 22 (Kent 1227) (Appellee in homicide case claimed that appellor did not mention sight and hearing in his appeal, but the judges did not address this issue and the appeal was quashed for other reasons.); JUST 1/62 m. 1 (Buckinghamshire 1232) (Appellor did not want to prosecute homicide case because he could not plead that he had been an eyewitness.); JUST 1/359 m. 32d (Kent 1241) (Homicide appeal quashed because appellor did not plead that she was eyewitness.).

61. See *infra* pp. 305-06.

62. At least one historian has suggested that the eyewitness rule did not apply in homicide cases. WILLIAM SHARP MCKETCHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 452* (2d ed. 1958). There is some evidence for this in *Glanvill*, but the

2) A more plausible explanation for women's dominant role in prosecuting homicide is that, unlike most men, women who brought appeals did not risk trial by battle. When a case was tried by battle, the outcome hinged on personal combat between prosecutor and defendant. Although the overwhelming majority of appeals were tried by jury, trial by battle was often a possibility.⁶³ A male appellor was required to offer proof by battle. Before 1215, the appellee could choose either trial by battle or trial by ordeal.⁶⁴ After 1215, jury trial replaced the ordeals. If the appellee opted to defend by battle, the appellor's life was in danger. Female appellors, however, never waged battle. Those accused by women had to submit either to the ordeal (before 1215) or to jury trial (after 1215). Since the rule restricting appeals to eyewitnesses seems not to have been enforced, in practice it seems likely that any relative could appeal, and thus that there were often several potential appellors—husband, wife, mother, father, sister, brother, niece, nephew, aunt, uncle, etc.⁶⁵ Homicide

formulae set out by *Bracton* require appellors to allege and swear that they saw the homicide. GLANVILL, *supra* note 40, at 174; 2 BRACTON, *supra* note 36, at 388, 399; *see also id.* at 397. While it is possible that everyone understood the eyewitness requirement to be a formality, as seems to have been the case with champions in land cases, there is no evidence to support this conjecture. In fact, the cases in which I have seen the eyewitness rule invoked were all homicide appeals. *See supra* note 60.

63. Defendants in a small but significant number of cases claimed their right to trial by battle. In nearly all of those cases, the prosecutor then withdrew or settled the case. *See* Meekings, *supra* note 4, at 116 (finding trial by battle to have been scheduled in about 1% of cases—fifteen out of “well over a thousand”—in the period 1234-49). Only very rarely was battle fought. *Id.* (finding no battles fought in non-approver appeals during the period 1234-49). *But see* JUST 1/358 m. 20 (Kent 1227) (battle fought and won by defendant in mayhem appeal). The fact that prosecutors nearly always withdrew or settled if defendants claimed trial by battle suggests that prosecutors greatly feared trial by battle. The small number of cases in which battle was waged can probably be explained by two facts: (1) potential prosecutors who feared that they would lose in trial by battle did not appeal at all, and (2) defendants who feared that they would lose in trial by battle chose trial by jury. These facts suggest that even though trial by battle was rare, fear of battle may have influenced the decisions of defendants and potential prosecutors in many cases.

64. The most common ordeal was the ordeal of cold water, in which the defendant was bound and thrown into a pool of water. If he sank, he was pulled out of the water and declared innocent. If he floated, he was guilty and hanged. *See* Margaret H. Kerr et al., *Cold Water and Hot Iron: Trial by Ordeal in England*, 22 J. INTERDISC. HIST. 573, 582-83 (1992). On the significance of 1215 and the end of ordeals, *see infra* p. 306. In this Article, I generally refer to defendants as males because the overwhelming majority of thirteenth-century defendants were in fact male. For a discussion of female defendants, *see* JAMES GIVEN, *SOCIETY AND HOMICIDE IN THIRTEENTH-CENTURY ENGLAND 135-49* (1977); Hanawalt, *supra* note 3, at 125.

65. *Britton*, a treatise written in the early 1290s, asserts that only the wife or the “the male nearest in blood” can appeal. 1 BRITTON, *supra* note 36, at 109, 111, 114. Although this formulation implies that the right to appeal was not available to any kinsman, it still meant that there were two potential appellors in most cases, the wife and the nearest male relative. I have found only one thirteenth-century case mentioning the idea that the nearest relative alone could appeal. STATE TRIALS OF THE REIGN OF EDWARD THE FIRST, 1289-1293, at 81 (T.F.T. Tout & Hilda Johnstone eds., 1906) (appeal quashed because homicide victim had “brothers who were closer in blood [than the appellor] and sisters”). *But see* Y.B. 32-33 Edw. 192-93 (Easter 1304)

thus presented the deceased's family with substantial choice. That nearly two-thirds of homicide appeals were prosecuted by the wife or other female relative, thus, most likely reflects the fact that a woman's appeal would spare male relatives the peril of trial by battle. When a family had already had one member killed by the defendant, it would have been understandably reluctant to put another member at risk in judicial combat. The fact that married women sometimes brought appeals for their husbands' injuries⁶⁶ and for property that legally belonged to their spouse⁶⁷ may also reflect women's immunity from the peril of battle.

The value of immunity from the battle declined, however, in the late thirteenth century because judges put defendants to jury trial "at the king's suit" even when the appellor had dropped the case.⁶⁸ This policy effectively gave male appellors the same immunity from battle as women. If a man had appealed and then dropped the prosecution he could avoid battle while nearly guaranteeing that the defendant would be put on trial. Even so, women retained three advantages. First, to avoid battle, a man would have to drop his prosecution, and thus would be fined, whereas a woman could avoid a battle even if she pursued her case to judgment. Second, while nearly all late-thirteenth-century non-prosecuted appellees were put to the jury, such defendants were sometimes, for reasons that are not clear, let off without trial. Thus, a dropped prosecution by a male prosecutor might not be as effective as a woman's appeal. Finally, it was sometimes said that sanctions at "the king's suit" after a dropped appeal were not as harsh as the sanctions that would have been imposed if

(defendant's argument that the eldest son should appeal the death of his father was rejected, because "farthest off in blood can prosecute the appeal in default of one nearer in blood"). It is also notable that *Britton*, the treatise asserting the rule, was written at the very end of the period studied in this Article. *Bracton*, a treatise written principally in the late 1220s and early 1230s, does not contain any such restriction, except in an interpolation relating to the situation where several relatives simultaneously appealed. *Bracton* says that "the nearer kinsman is always preferred to the more remote." 2 BRACTON, *supra* note 36, at 352. Nevertheless, even this formulation left the family free to choose a more remote relative as appellor, as long as the closer relative did not also appeal. The 1304 case cited above supports that interpretation. In addition, it is not clear what *Bracton* meant by "preferr[ing]" the closer relative. For example, unlike *Britton*, *Bracton* does not say that an appeal can be quashed if it was made by a remote relative when a close relative was alive. Compare 2 BRACTON, *supra* note 36, at 399 with BRITTON, *supra* note 36, at 111.

66. See *infra* Table 2.

67. THE EARLIEST NORTHAMPTONSHIRE ASSIZE ROLLS, A.D. 1202 AND 1203, at 70 (Doris M. Stenton ed., 5 Northamptonshire Record Society 1930); JUST 1/358 m. 21d (Kent 1227); JUST 1/4 m. 29d (Bedfordshire 1247); JUST 1/232 m. 10d (Essex 1248); THREE ROLLS OF THE KING'S COURT IN THE REIGN OF KING RICHARD THE FIRST, A.D. 1194-1195, at 91 (Frederic William Maitland ed., 14 Pipe Roll Society 1891).

68. See Klerman, *supra* note 7, at 38-40; see also discussion *infra* pp. 306-08.

the case had been diligently prosecuted.⁶⁹ If so, this difference would mean that female appellors possessed an additional advantage.

3) Over half of all homicide appeals were widows prosecuting those allegedly responsible for their husbands' death. This phenomenon may stem from a norm or custom that a wife prosecute her husband's murderer. That treatises, cases, and Magna Carta explicitly allow appeals in this situation⁷⁰ probably reflects that custom. This explanation and the previous one—women's immunity from battle—may have been related. No thirteenth-century source barred male relatives from appealing the death of a married man.⁷¹ The custom that widows prosecute those responsible for the deaths of their husband may have arisen because the widow, as a woman, was immune from battle.

4) Rape prosecutions constitute over a quarter of all women's appeals. In later centuries, the often humiliating nature of rape trials discouraged such prosecution. Women usually had to describe the rape publicly in shameful detail, and defendants often were allowed to introduce evidence of the woman's sexual history and reputation.⁷² The nature of thirteenth-century jury trial may have curbed these disincentives. The jury was "self-informing," that is, it was expected to have gathered its evidence before trial.⁷³ As a result, trial did not usually involve the testimony (much less cross-examination) of the victim/prosecutor.⁷⁴ Thus, the trial of a rape appeal would not have subjected the rape victim to potentially shameful examination. As

69. *Bracton* reports that some people thought that capital punishment was not possible on the king's suit, although the treatise seems to side with the view that it was possible. 2 BRACTON, *supra* note 36, at 403. *Placita Corone* is contradictory on the subject. In some places it seems to agree with the position that capital punishment was not possible on the king's suit. PLACITA CORONE, *supra* note 36, at 2, 3, 27. But in other places, the treatise insists on full punishment. For example, in discussing the king's suit after a quashed rape appeal, it insists upon the "judgment appropriate to the case; that is to say he will be blinded or castrated or both." *Id.* at 9. Similarly, in discussing the king's after a quashed woman's homicide appeal, the treatise insists on "full judgment," which may mean capital punishment. *Id.* at 6, 28.

70. See *infra* pp. 302-03.

71. Some fourteenth-century sources, however, suggest that male relatives could not appeal when the widow was still alive. See Lincoln's Inn MS Misc. 738, fol. 20v; Cambridge University Library MS LI.4.17, fols. 219r-v; Susanne Jenks, Occidit . . . Inter Brachia Sua: *Change in a Woman's Appeal of Murder of Her Husband*, 21 J. LEGAL HIST. 119, 120 (2000).

72. Laurie Edelstein, *An Accusation Easily to be Made? Rape and Malicious Prosecution in Eighteenth-Century England*, 42 AM J. LEGAL HIST. 351, 364-66 (1998).

73. See Daniel Klerman, *Was the Jury Ever Self-Informing?*, in THE TRIAL IN HISTORY (Maureen Mulholland & Brian Pullan eds., forthcoming) (noting debate about the nature of thirteenth-century jury trial, but concluding that the jury was self-informing).

74. Vigorous cross-examination did not become routine in criminal cases until the eighteenth-century. See John Langbein, *Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 282-83, 312 (1978). Even those who doubt that the jury was self-informing do not believe that medieval witnesses were rigorously cross-examined.

the dialogue from the *Placita Corone* quoted above indicates,⁷⁵ the judge might question the appellor, but this questioning did not dwell on the potentially shameful and embarrassing details of the rape. On the other hand, although the sources are silent on the matter, the accusation itself and the jury's out-of-court investigation undoubtedly brought some shame on the victim/prosecutor. Nevertheless, since the jury's investigation was less public, the negative consequences for the prosecutor may have been less severe. In fact, Barbara Hanawalt suggests that even when a rape prosecution resulted in acquittal, the "satisfaction [of] tell[ing] the tale and nam[ing] the culprit" may have outweighed the danger to the woman's own reputation.⁷⁶

5) Finally, appeals by a woman for her husband's injuries and for crimes against her husband's property may also reflect a woman's role as her husband's agent in household and legal affairs when the husband was engaged in other business, such as war or harvest.⁷⁷

C. The Ineffectiveness of Restrictions on Women's Appeals

The large fraction of appeals women brought is especially surprising in light of customary rules restricting women's ability to bring criminal prosecutions. A woman could bring an appeal only for rape, for the death of her husband, and perhaps for assaults to her own person.⁷⁸ These customary rules were set out in the earliest treatises on law in the royal courts—the late-twelfth-century treatise attributed to Glanvill and the early-thirteenth-century treatise attributed to Bracton—and enforced whenever invoked by the defendant.⁷⁹ The only ambiguity relates to appeals of assault. Most formulations of the rule restricting women's appeals stated that women could appeal only for "injury to her body" (*iniuria corpori suo inflictia*) or for her

75. See *supra* p. 289.

76. HANAWALT, *supra* note 9, at 133.

77. Archer, *supra* note 2, at 149. See also 1 POLLOCK & MAITLAND, *supra* note 8, at 482 (noting that "a woman will sometimes appear as her husband's attorney").

78. Some sources also suggest that a woman could bring an appeal for the death of her unborn child and for theft or robbery, at least where the thief was arrested with the stolen goods. ROYAL JUSTICE AND THE MEDIEVAL ENGLISH COUNTRYSIDE: THE HUNTINGDONSHIRE EYRE OF 1286, THE RAMSEY ABBEY BANLIEU COURT OF 1287, AND THE ASSIZES OF 1287-88, pl. 370 (A.R. & E.B. DeWindt eds., 1981); G.O. Sayles, *Introduction to 3 SELECT CASES IN THE COURT OF KING'S BENCH UNDER EDWARD I*, at lxxii-lxxiii (G.O. Sayles ed., 58 Selden Society 1939); British Library MS Egerton 2811 fols. 81r, 100r; British Library MS Stowe 386 fol. 154r; Cambridge University Library MS Ee.6.18 fol. 7v-8r (allowing women to appeal robbery generally, but not death of unborn child). *But see* BRITTON, *supra* note 36, at 114 (denying women's ability to appeal for the death of an unborn child).

79. GLANVILL, *supra* note 40, at 174, 176; 2 BRACTON, *supra* note 36, at 419. For enforcement, see cases cited in the next four footnotes. For a good discussion of these restrictions, see G.O. Sayles, *supra* note 78, at lxxii-lxxiv.

husband's death.⁸⁰ Although the phrase "injury to her body" could simply be a euphemism for rape, the literal meaning would suggest that a woman was permitted to appeal assaults when she was the victim.⁸¹ On the other hand, the rule was sometimes formulated as allowing appeals only for rape and her husband's death.⁸² One consequence of either interpretation of the rule was that a widow was not supposed to bring an appeal for theft or burglary of her own property, which meant that no one was permitted to appeal such crimes. Although I have found only one case raising the legality of such appeals, it ruled against the widow.⁸³ Although no one could appeal such cases, they could still be prosecuted by presentment.⁸⁴

Magna Carta (1215) also had a provision restricting women's appeals:

No one shall be taken or imprisoned upon the appeal of a woman for the death of anyone except her husband.⁸⁵

Most modern commentators interpret this provision as affirming the part of the customary rule that restricted women's homicide appeals to instances where the deceased was her husband.⁸⁶ Some thirteenth century cases also interpreted the provision in this way.⁸⁷ Nevertheless, the more plausible explanation is that *Magna Carta* sought to clarify the pretrial implications of the customary rule. The customary rule simply said that women could not appeal except in narrow circumstances, but it left open what the accused's remedy would be. There were two possibilities. The customary rule could mean only that the defendant had a valid defense at trial but that pretrial

80. GLANVILL, *supra* note 40, at 174, 176; 2 BRACTON, *supra* note 36, at 353, 419; JUST 1/361 m. 42 (Kent 1255).

81. This implication is clear from *Glanvill*, which states that women can make rape appeals "just as in every case of injury done to her body." GLANVILL, *supra* note 40, at 176.

82. JUST 1/55 m. 21d (Buckinghamshire 1241).

83. THE ROLL OF THE SHROPSHIRE EYRE OF 1256, pl. 566 (Alan Harding ed., 96 Selden Society 1981).

84. See *supra* pp. 285, 297. Note, however, that if the customary rule was interpreted to bar women's appeal of assault, not only could no one appeal assaults to a woman (except perhaps her husband), but such offenses could not be prosecuted by presentment either, because there was no presentment for assault (at least not in royal court). It is possible, however, that such cases could be prosecuted in local courts. Also, from the mid-thirteenth century, the woman could bring a civil trespass action. See Klerman, *supra* note 7, at 44.

85. J.C. HOLT, *MAGNA CARTA* 466-67 (2nd ed. 1992) (*Magna Carta*, c. 54).

86. J.C. HOLT, *Magna Carta and the Origins of Statute Law*, in *POSTSCRIPTA: ESSAYS ON MEDIEVAL LAW AND THE EMERGENCE OF THE EUROPEAN STATE IN HONOR OF GAINES POST*, 15 *STUDIA GRATIANA* 489, 497 n.23 (1972). *But see* Meekings, *supra* note 4, at 124.

87. 1 *SELECT CASES IN THE COURT OF KING'S BENCH UNDER EDWARD I* 90 (G.O. Sayles ed., 55 Selden Society 1936); 2 *SELECT CASES IN THE COURT OF KING'S BENCH UNDER EDWARD I* 25 (G.O. Sayles ed., 57 Selden Society 1938); JUST 1/13 m. 22 (Bedfordshire 1287).

process (arrest, imprisonment, etc.) would be unaffected by the rule. Alternatively, the customary rule could mean that sheriffs, who were primarily responsible for pretrial process, should refuse even to arrest and imprison those accused by improper appeals. *Magna Carta* may have clarified this ambiguity by instructing the sheriff not to arrest (“take”) or imprison when the appeal violated the customary rule.⁸⁸ This interpretation also explains why *Magna Carta* refers only to the homicide part of the customary rule restricting women’s appeals. Homicide was the only crime for which defendants were routinely arrested and imprisoned. For other crimes, the defendant was merely attached, that is, was left at liberty if he could find sureties. Since the pretrial consequences of other forbidden appeals were so slight, *Magna Carta* addressed only homicide.

The reason for these restrictions on women’s appeals has never been satisfactorily elucidated. Most commentators suggest that they reflect the advantage that female appellors derived from their exemption from trial by battle. Whereas men might be deterred from bringing appeals by fear of battle, women could bring appeals with impunity, confident that at worst they would be fined for false prosecution. The restriction on women’s appeals could be seen as a way, albeit a rather crude one, to reduce abusive appeals.⁸⁹ R.H. Helmholz has suggested that these restrictions were unrelated to women’s

88. A 1275 Bedfordshire coroner’s roll affords a rare glimpse of the effect of *Magna Carta* on pre-trial process. A man accused of homicide was about to be outlawed by a woman who was appealing the death of her brother. The sheriff, however, received a royal writ (procured by the appellee?) ordering “that all the enactments of the Great Charter be observed.” As a result, the county court did not proclaim the appellee’s outlawry. SELECT CASES FROM THE CORONERS’ ROLLS 35 (Charles Gross ed., 9 Selden Society 1895). Note, however, that *Magna Carta* does not explicitly address the propriety of outlawry in this situation and that *Bracton* and the *Placita Corone* suggest that outlawry would be appropriate, even though the woman’s appeal was forbidden. 2 BRACTON, *supra* note 36, at 353 (“a suit is valid no matter by whom brought, and for an indefinite time, when there is no one to except against him who sues”); PLACITA CORONE, *supra* note 36, at 9 (woman’s appeal forbidden by *Magna Carta* sufficient for outlawry, because “his recalcitrance indicates that he is guilty of the deed for which she appeals him.”); *id.* at 29. A 1286 Huntingdonshire case provides another glimpse of the effect of *Magna Carta* on pre-trial process. The county was amerced, “because it admitted this appeal by a mother for the death of her son contrary to the form and tenor of our lord king’s *Magna Carta*.” ROYAL JUSTICE AND THE MEDIEVAL ENGLISH COUNTRYSIDE: THE HUNTINGDONSHIRE EYRE OF 1286, THE RAMSEY ABBEY BANLIEU COURT OF 1287, AND THE ASSIZES OF 1287-88, *supra* note 78, pl. 370. Unfortunately, it isn’t clear whether the county court arrested or imprisoned the appellee, or whether it simply allowed the woman to plead.

89. MCKETCHNIE, *supra* note 62, at 451 (but note that McKetchnie erroneously assumes that women could hire champions to fight for them); Meekings, *supra* note 4, at 123-24; British Library Egerton MS 2811 f. 100r (“And the reason that a woman’s appeal ought not be maintained in such a case is . . . that a man will not have the same advantage of defending by his body [i.e. by battle] in an appeal against a woman as he would have against a man.”). The same manuscript also mentions that women’s appeals were restricted because women are of changeable disposition (“femes sont chaungables de corage”). *Id.*

immunity from battle, but instead mimicked similar provisions in Roman and canon law.⁹⁰

Although it is difficult to understand why the law restricted women's appeals, it is clear that the restrictions were ineffective.⁹¹ Table 2 classifies appeals by crime and the relationship between the appellor and crime victim. Appeals forbidden by the customary rules are shaded. Although assault appeals in which the female appellor was the victim may have been forbidden, because of the ambiguity regarding the legality of this category, the relevant cell was not shaded.

Table 2. Women's appeals by offense and appellor's relation to victim, 1194-1294

	Assault	Homicide	Theft	Rape	Other crimes ^a	All crimes
Woman appeals injury to self	9%	0%	20%	100%	14%	17%
Woman appeals injury to husband	2%	51%	0%	0%	2%	15%
Woman appeals injury to other relative	0%	14%	0%	0%	0%	4%
All appeals by women	11%	65%	20%	100%	16%	36%

a. This column excludes cases in which the crime was not specified and so differs somewhat from the column labeled "Other crimes" in Table 1.

While the two principal categories of women's appeals—rape and death of husband—did not run afoul of the customary prohibitions, many women's appeals did. As Table 2 shows, 14% of all homicide appeals were brought by women prosecuting those whom they thought killed someone other than their husband. Similarly, 20% of theft appeals were brought by women, although such appeals were not within the permitted categories. Eleven percent of assault appeals were brought by women, of which most (appeals by women for injuries to themselves) were of ambiguous legality, and some (appeals for injuries to husbands) were clearly forbidden. The miscellaneous other appeals, including prosecutions for crimes such as arson and false imprisonment, were also forbidden to women, who nevertheless brought 16% of them. In all, forbidden appeals constituted 22% or 31% of all appeals brought by women, depending on whether one classifies cases in which a woman appealed an assault against herself as legal or illegal.

90. R.H. Helmholz, *Magna Carta and the ius commune*, 68 U. CHI. L. REV. 297, 350-52 (1999).

91. See Meekings, *supra* note 4, at 125; Orr, *supra* note 4, at 141.

Why were the restrictions so ineffective? The most important reason was probably that appellees were not ordinarily represented by counsel. Like modern criminal suspects, medieval appellees were generally unfamiliar with their rights and so failed to raise valid defenses. Nor were the judges inclined to inform them of their rights. As *Bracton* notes, "it is not for the king's court to show him [the appellee] how he ought to make his defence."⁹² Thus, even when an appeal clearly violated the rules regarding women's appeals, judges sent it to jury trial unless the defendant objected. In theory, early modern judges provided legal counsel to defendants, but this was clearly not the case in the thirteenth century. As a result, in most cases, the legal restrictions on women's appeals were ineffective on account of the ignorance of defendants and the indifference of judges.⁹³

Another reason was judicial treatment of quashed appeals. Appellees did occasionally raise the customary restrictions as defenses. In such cases, the judges nearly always accepted the defense and declared the appeal "null."⁹⁴ Before 1215, when ordeals were the principal method of proof, the defendant in a quashed appeal was ordinarily acquitted. As a result of the Fourth Lateran Council in 1215, however, the criminal justice system was forced to abandon ordeals, and jury trial swiftly became the norm. Soon thereafter, judges took advantage of the presence of a jury ready to decide the case and put defendants to trial even when the appeal had been declared "null." That is, starting in the 1220s, a quashed appeal no longer acquitted the appellee. The judges, "in order to preserve the king's peace," put the question of the defendant's innocence to the jury, just as they would have done if the appeal had not been quashed.⁹⁵ Thus, although women technically lacked the legal power to bring certain appeals, their quashed appeals were sufficient to force the appellees to jury trial. The following case, from Shropshire in 1256, shows how the procedure worked:

Agnes, who was the wife of Warin of Tedstill appealed Thomas Hord, William of Pimley, clerk, Walter Walhop, Philip Hord, Philip Caloch, Stephen of Stocks, Richard of Brugeshull and

92. 2 BRACTON, *supra* note 36, at 390; *see also supra* note 88 (discussing outlawry based on forbidden appeals).

93. Historians of later periods have also noted that lack of representation usually led to under-enforcement of rights. *See, e.g.*, J.S. Cockburn, *Trial by the Book? Fact and Theory in the Criminal Process: 1558-1625*, in *LEGAL RECORDS AND THE HISTORIAN*, *supra* note 51, at 60.

94. *See cases cited supra* notes 80, 82, 83.

95. PLACITA CORONE, *supra* note 36, at 26; *see Orr, supra* note 4, at 141, 153.

Ralph of Roughton in the shire-court [alleging] that when she was in the peace of the Lord king in her house at Tedstill on the Wednesday of Easter week in the 37th year [of King Henry III], Thomas and the others came about the middle of the night and tried to break into her house against the peace etc. This she offers etc. Walter Walhop, Philip Caloch, Stephen of Stocks and Richard of Brugesnull have not come. [Their sureties are fined.] Thomas Hord, Philip Hord and Ralph of Roughton come and deny the breaking-in and everything, and they ask it to be award to them that Agnes is a woman and has an appeal in two situations only. So it is decided that the appeal is null. William of Pimley comes and says that he is a clerk and ought not to answer here. On this the dean of the bishop of Coventry and Lichfield comes and claims him as a clerk and William is delivered to him. But that it may be known in what condition he is handed over, let the truth be inquired of the country. Verdict: Thomas and the others came by night to the house of said Agnes and broke into it, but not feloniously or to commit any robbery, but to take seisin. But since they did it at night and against the statutes of the Realm, they are to be committed to gaol. Afterwards, Thomas Hord, Philip Hord and Ralph of Roughton made fine at 40 shillings. . . .⁹⁶

Because the case involved eight defendants, it is somewhat more complicated than usual. Four did not show up for trial, and their sureties were fined. A fifth was a cleric and successfully claimed “benefit of clergy.” That is, as a cleric, he was immune from secular justice. The remaining three—Thomas Hord, Philip Hord, and Ralph of Roughton—are the defendants of principal interest for this Article. They came to the eyre and defended themselves both by denying the crime (burglary or, perhaps, attempted burglary) and by arguing that Agnes’s appeal violated the customary rules restricting women’s appeals. They asserted that “Agnes is a woman and has an appeal in two situations only,” that is, only for rape (or perhaps injuries to her body generally) and the death of her husband. The court accepted this defense and declared the appeal to be null, but did not acquit the defendants. Rather, the judges “let the truth be inquired of the country.” That is, they sent the case to trial by jury, “at the king’s suit.” The reason recorded for sending the case to trial—“that it be known in what condition he is handed over”—pertained only to William of Pimley, the clerical defendant. Never-

96. THE ROLL OF THE SHROPSHIRE EYRE OF 1256, *supra* note 83, pl. 566 (All material in square brackets was placed there by Harding, except “Their sureties are fined.”).

theless, it is clear that the jury was asked to render a verdict on all defendants. Other cases make clear that the reason for this practice was to “preserve the king’s peace.”⁹⁷ The jury’s verdict partially incriminated and partially exonerated the defendants. They had violated the law by breaking into Agnes’s home at night, but their actions were not a felony, because their intent was “to take seisin,” not to steal. Presumably they were acting in accordance with a prior court judgment depriving Agnes of possession and/or ownership of the house. Because the defendants’ actions were unlawful they were ordered committed to jail. As was normal in such situations, however, the defendants avoided imprisonment by paying a fine. Thus, even though Agnes’s appeal was quashed, the defendants were tried and punished.

By prosecuting defendants “at the king’s suit” when women had brought appeals prohibited by custom, judges effectively nullified those restrictions in the interest of public order. This policy was part of a larger judicial practice of ensuring that all defendants appealed of crime went to trial, even if the appeal was quashed or the appellor failed to prosecute. The explicit reason for this policy was to “preserve the king’s peace,” that is to punish and deter malefactors.

These two practices—ignoring defenses if not raised by the defendant and putting defendants to trial at the king’s suit when defenses were successfully raised—suggest that late thirteenth-century judges took a remarkably “deserts-oriented” approach to their criminal docket. They seem to have been impatient with technical rules and used their power to ensure that outcomes reflected jury verdicts on guilt or innocence, rather than legal niceties. To the extent that women’s appeals were especially encumbered with legal restrictions, these judicial practices enhanced women’s ability to prosecute.

III. THE OUTCOMES OF WOMEN’S APPEALS

Women prosecutors were reasonably successful in settling their cases and in the judgments they obtained in court. They settled more of their cases than men and obtained favorable jury verdicts about as often.

Determining the exact percentage of cases settled is difficult because it is often impossible to ascertain whether there was settlement. Settlements were most likely in non-prosecuted cases, but appellors may have stopped prosecuting for many reasons other than settlement, including recognition that they were likely to lose the

97. *Id.*, pls. 567, 613, 621, 747, 811, 890.

case or extra-legal pressure to drop it. Nevertheless, in many non-prosecuted cases the records indicate whether there was settlement. In addition, it is reasonable to assume that cases prosecuted to trial or resulting in outlawry were not settled. Using these cases, it is possible to calculate the approximate settlement rate. Because of the missing data, these figures probably underestimate the fraction of cases that settled and should be regarded with caution. Table 3, below, breaks down settlement rates by offense and by the sex of the prosecutor.

Table 3. Settlement by sex of prosecutor and offense, 1194-1294

	Assault	Homicide	Theft	Rape	Other crimes ^a	All crimes
Male prosecutor, settled	101	3	15	0	19	138
Male prosecutor, not settled	186	81	37	0	35	339
Female prosecutor, settled	14	9	4	35	4	66
Female prosecutor, not settled	17	119	8	27	7	178
Male prosecutor, % settled	35%	4%	29%		35%	29%
Female prosecutor, % settled	45%	7%	33%	56%	36%	27%

a. This column includes cases where the case record does not identify the crime.

If one looked merely at the overall percentages, it would seem that settlement rates were nearly identical. The percentages in the lower right-hand corner are nearly identical: 29% of male prosecutors settled versus 27% of women. Nevertheless, when one looks at each offense separately, women settled more often. Female prosecutors settled 45% of all assault appeals, while male prosecutors settled only 35%. For other offenses, the differences are not as large, but women still settled more. That women settled a greater percentage of appeals of each offense, but slightly less overall is somewhat paradoxical. The apparent contradiction, however, is explicable by the fact that women brought proportionately more homicide appeals. Even though female prosecutors settled more of those cases than men, their settlement rate was still under ten percent. This predominance of homicide appeals reduces the overall percentage of cases settled by female appellors.

Unfortunately, the terms of settlements are not generally known, and without that knowledge, it is hard to interpret the differences between male and female settlement rates. The greater settlement rate might reflect the fact that women were in a weaker bargaining position and settled more often and on less favorable terms. Or, the larger settlement rate might reflect greater bargaining power, perhaps because women prosecutors did not face the possibility of trial by battle.

In a number of rape cases, however, the terms of the settlement were recorded: marriage between the appellor and the accused.⁹⁸ Settling rape cases through marriage was controversial. *Glanvill*, a late-twelfth-century treatise, abhorred such settlements, because they allowed men of humble birth to secure the marriage of women from good families and because they allowed women of humble birth to coerce men of noble status into marriage. Nevertheless, the treatise declared such settlements permissible if both the king and the families consented.⁹⁹ Such marriages were also controversial in the canon law (the law of the Church), although by the thirteenth century the weight of opinion was in favor of the legitimacy of such marriages.¹⁰⁰ That women consented to such settlements probably reflected the grim economic prospects of single women in the absence of a substantial inheritance and the difficulty a non-virgin would have had in marrying given widespread male insistence upon virgin brides. Marriage to the rapist might have been the prosecutor's best alternative, albeit a rather unfortunate one. On the other hand, when the rapist was of higher social status, as seems to have been common, marriage might have been viewed as a favorable settlement.¹⁰¹ Two other explanations for marriage as settlement deserve mention, although they seem rather implausible. Some historians suggest that, when a family disapproved of a woman's choice of spouse, the woman might appeal her lover of rape. By doing so, she might hope to coerce her family into approval of the match by dashing their

98. Six of the thirty-five settled rape cases in the data set (17%) mention marriage. CROWN PLEAS OF THE WILTSHIRE EYRE, 1249, at pls. 461, 517 (C.A.F. Meekings ed., 16 Wiltshire Archaeological and Natural History Society, Records Branch 1961); ROLLS OF THE JUSTICES IN EYRE BEING ROLLS OF PLEAS AND ASSIZES FOR YORKSHIRE IN 3 HENRY III 1218-19, pl. 959 (Doris Mary Stenton ed., 56 Selden Society 1937); JUST 1/4 m. 30 (Bedfordshire 1247); JUST 1/358 m. 27 (Kent 1227); JUST 1/1109 m. 18d (Yorkshire 1257). Since the records only infrequently mention the terms of settlement, marriage was probably an even more common part of rape settlements than these numbers suggest.

99. GLANVILL, *supra* note 40, at 176; *see also* 2 BRACTON, *supra* note 36, at 417.

100. BRUNDAGE, *supra* note 12, at 209-10, 250, 312, 397 (1987); KATHRYN GRAVDAL, RAVISHING MAIDENS: WRITING RAPE IN MEDIEVAL FRENCH LITERATURE AND LAW 8-9 (1991).

101. Groot, *supra* note 57, at 328-29; Post, *supra* note 57, at 152.

hopes of her marriage to anyone else.¹⁰² Another potential explanation is that the prosecutor had consensual sex with the defendant with the understanding that they were to wed. When it became clear that he would not marry her, she brought an appeal of rape.¹⁰³ In such a context, termination of the case in exchange for marriage might have been the desired outcome. On the other hand, appeals of rape in such circumstances would have been quite risky. If the jury knew that the sex was consensual, it would acquit the defendant and fine the prosecutor. In addition, to the extent that the defendant could anticipate an acquittal, he had little incentive to offer marriage as settlement.

Table 4 shows how women prosecutors fared before juries.

Table 4. Jury verdicts by sex of prosecutor and offense, 1194-1294

	Assault	Homicide	Theft	Rape	Other crimes ^a	All crimes
Male prosecutor, appellee guilty	155	10	22	0	16	203
Male prosecutor, appellee not guilty	94	24	34	0	14	166
Female prosecutor, appellee guilty	17	35	5	19	8	84
Female prosecutor, appellee not guilty	11	71	8	31	3	124
Male prosecutor, % of appellees guilty	62%	29%	39%		53%	55%
Female prosecutor, % of appellees guilty	61%	33%	38%	38%	73%	40%

a. This column includes cases where the case record does not identify the crime.

At first glance, it appears that juries were much more likely to render guilty verdicts when the prosecutor was a male. Thus, as indicated in the lower right-hand corner of the table, male prosecutors obtained guilty verdicts in 55% of the cases they prosecuted to trial and verdict, while women obtained guilty verdicts in only forty percent. Nevertheless, this difference disappears when each crime is an-

102. BARBARA A. HANAWALT, *CRIME AND CONFLICT IN ENGLISH COMMUNITIES, 1300-1348*, at 106-07 (1979); Post, *supra* note 57, at 153. But see HANAWALT, *supra* note 9, at 132-33 (accusing historians who suggest this explanation of attempting "to shield themselves from the brutality of rape" and noting the absence of evidentiary support for "this romantic explanation for rape appeals").

103. See *ROLLS OF THE JUSTICES*, *supra* note 98, pl. 669 (The jurors say that "he had her with her good will for a year and that he took another to wife and for this reason she has appealed him.").

alyzed separately. Men and women obtained convictions in assault, homicide, and theft cases at almost identical rates, while women obtained more convictions in appeals of other and unspecified crimes.¹⁰⁴ The lower overall conviction rate for women prosecutors stems from the fact that women brought fewer assault appeals, which resulted in abnormally high conviction rates regardless of the prosecutor's gender. In addition, women brought more homicide appeals, and these appeals resulted in abnormally low conviction rates, whether the appeal was brought by a man or a woman. Thus, when one controls for the types of crimes brought, juries seem to have been remarkably even-handed toward female prosecutors.

Of course, it is possible that juries merely appeared to be even-handed, but were in fact reluctant to convict based on a woman's accusation. Perhaps women, anticipating juror distrust of their accusations, simply failed to bring appeals which they thought they would lose (but which, if brought by men, would have resulted in conviction).¹⁰⁵ This selection-bias critique, based on Priest and Klein's famous article, has some plausibility.¹⁰⁶ Were this selection-bias present, however, the number of appeals brought by women would have been significantly lower, reflecting women's anticipation of juror distrust. The fact that women brought more than a third of all appeals suggests that they were not deterred from bringing prosecutions. In addition, the possibility discussed below in Part IV.B that women's appeals of homicide were part of a familial strategy, suggests that families thought that female prosecutors would get a fair hearing.

IV. THE SOCIAL SIGNIFICANCE OF WOMEN'S APPEALS

A. Appeals, Women, and the Public Sphere

The concept of "separate spheres" has been one of the central organizing principles of women's history for the last thirty years.¹⁰⁷

104. None of these differences is statistically significant. All p-values are well above 10%.

105. One might also argue that the similar conviction rates reflect the fact that women settled more of their cases, perhaps anticipating that jurors would treat them unfairly. This argument, however, would be incorrect because the table includes jury verdicts even in cases that settled. See *supra* pp. 300-01; Klerman, *supra* note 7, at 37-38, 50-53; Daniel Klerman, *The Selection of Thirteenth-Century Criminal Disputes for Litigation* (unpublished manuscript, on file with author).

106. George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

107. LINDA K. KERBER, *TOWARDS AN INTELLECTUAL HISTORY OF WOMEN* 159-99 (1997).

According to this idea, men and women had different realms of activity, and this difference helps to explain women's subordination. Men dominated the public sphere of politics and work outside the home, while women were relegated to private, domestic activities such as housework and raising children. Because the public sphere was more valued and gave men access to the power of the state, relegation of women to the home guaranteed their inferior position. According to some historians, the separation of men's and women's spheres was a product of the industrial revolution and the democratization of society that began in the late eighteenth century.¹⁰⁸ Whereas previously both men and women had worked in and around the home without much opportunity to participate in politics, the turn of the nineteenth century created an economy based on larger scale non-familial organizations and a politics based on broader participation. Only men were generally allowed to take advantage of these new opportunities, and an ideology of domesticity and separate spheres developed to justify women's exclusion.

While the idea of separate spheres remains influential, two powerful critiques have emerged. One, championed by Michelle Rosaldo and Linda Kerber, argues that separate spheres may accurately describe most human societies but that they fail to explain women's subordination.¹⁰⁹ By suggesting that men and women inhabit largely different social worlds, the idea of separate spheres obscures the way that men and women, by interacting with each other, create and maintain the system of gender relations. The other critique, voiced most forcefully by Amanda Vickery and Robert Shoemaker, criticizes the idea that separate spheres were a creation of the late eighteenth century.¹¹⁰ They argue that both the reality and ideology of gendered responsibilities and spaces predate the industrial revolution, and that, in fact, the history of gender relations shows remarkable continuity going back at least to the seventeenth century, and perhaps much earlier.¹¹¹

108. LEONORE DAVIDOFF & CATHERINE HALL, *FAMILY FORTUNES: MEN AND WOMEN OF THE ENGLISH MIDDLE CLASS, 1780-1800* (1987); MARY RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865* (1981).

109. KERBER, *supra* note 107, at 159-99; M.Z. Rosaldo, *The Use and Abuse of Anthropology: Reflections on Feminism and Cross-Cultural Understanding*, 5 *SIGNS: J. WOMEN & CULTURE* 389 (1980).

110. ROBERT B. SHOEMAKER, *GENDER IN ENGLISH SOCIETY, 1650-1850: THE EMERGENCE OF SEPARATE SPHERES?* (1998); Amanda Vickery, *Golden Age to Separate Spheres? A Review of the Categories and Chronology of English Women's History*, 36 *HIST. J.* 383 (1993).

111. See Judith Bennett, *Medieval Women, Modern Women: Across the Great Divide, in CULTURE AND HISTORY, 1350-1600: ESSAYS ON ENGLISH COMMUNITIES, IDENTITIES AND WRITING* 147 (David Aers ed., 1992) (extending the argument for continuity back to the mid-

In spite of these critiques, the idea of separate spheres remains an important tool for the historical analysis of women and gender. Both critiques acknowledge that the concept of separate spheres remains an accurate description of social life.¹¹² In fact, the Vickery-Shoemaker critique opens up application of the idea of separate spheres to the medieval period.¹¹³ In that vein, recent work by Barbara Hanawalt, a leading medievalist, emphasizes a strand in the separate-spheres literature that focuses on the gendered nature of space,¹¹⁴ arguing that a key to understanding medieval women is mapping the places a respectable woman could occupy or traverse and those that excluded her or that would compromise her reputation. In addition, Hanawalt emphasizes that, when they ventured into public spaces, women were advised to keep their heads down and be silent.

While there is little literature applying the idea of separate spheres to women's litigation, the implications are relatively clear. Court was male space.¹¹⁵ Judges, lawyers, and jurors were exclusively male. Court was also clearly public, in that it was an arena for the formal exercise of governmental power. Respectable women were admonished to stay away. For example, *Bracton*, a thirteenth-century treatise, explained that a male heir ought to control litigation relating to a widow's dower, because a widow "ought to attend to nothing save the care of her house and the rearing and education of her children . . ."¹¹⁶ *Bracton's* argument is hardly persuasive—just one sentence later the treatise notes that the widow ought to have her own court for pleas pertaining to her as lord—but its very weakness may testify to the broad acceptance of its premise that litigation was inappropriate for women. The richer sources of the early modern period make clear that, in addition to formal legal barriers, "women were also discouraged from litigating by the idea that a modest woman speaks little, that a chaste woman does not appear in public, and that a good woman is ignorant of her rights."¹¹⁷ Nevertheless, historians have shown that, under certain conditions, courts could be especially accessible to women. Tim Meldrum demonstrated that, in

dle ages).

112. See Rosaldo, *supra* note 109, at 396.

113. See also KERBER, *supra* note 107, at 171 (discussing application of the idea of separate spheres "to the entire chronology of human experience").

114. HANAWALT, *supra* note 9, at 70-87; See KERBER, *supra* note 107, at 188 (describing "attention to the physical spaces to which women were assigned" as a "third major characteristic of recent work, one whose potential is at last being vigorously tapped").

115. HANAWALT, *supra* note 9, at 135.

116. 2 BRACTON, *supra* note 36, at 281.

117. Daniel Klerman, *Women Waging Law in Elizabethan England*, in 27 IUS COMMUNE 502, 502-03 (2000) (book review).

the early eighteenth century, female litigants dominated the ecclesiastical courts with suits alleging defamation, principally of a sexual nature.¹¹⁸ Across the Atlantic, Cornelia Dayton has shown that the Puritan exclusion of lawyers and rejection of the double standard for sexual misconduct made it possible for substantial numbers of women to litigate in colonial New Haven.¹¹⁹

The research presented here suggests that similar conditions led to the substantial representation of women among medieval English private prosecutors. Lawyers were rare in thirteenth-century appeals, which reduced the financial barriers to women prosecutors. While the lower cost of appeals would have made them attractive to both men and women, since women generally had less access to wealth than men, this aspect of appeals had a particularly large impact on women. In addition, as discussed above in Part II.C, judges had a rather deserts-oriented attitude towards appeals. While there were many technical, procedural rules that might have severely restricted women's ability to prosecute successfully, judges did not rigorously enforce them. Rather, their overriding concern to see the guilty punished caused them to treat women litigants with fairness, if not indulgence.

The fact that lawyers were rare meant that a female prosecutor had to appear publicly and make her case.¹²⁰ She had to come to county court to make her accusation and then, since the appellee seldom showed up until absolutely necessary, return to county court several times until he appeared or was outlawed. If she pursued the case to outlawry, as more than a quarter of women prosecutors did, she would have to appear five times at county court. If the accused appeared and remained steadfast in her determination to prosecute, as happened in about 15% of all cases, she would have to continue her prosecution in the general eyre, the most awesome manifestation of royal judicial power outside of Westminster Hall.¹²¹ All of these court appearances would require extensive public speaking, contrary to the norm counseling women's silence in public places.

Although appeals gave women a public role, this role was not indicative of public honor or selection as a representative by king or local community. In fact, especially when prosecuting rape, it is much more probable that prosecution led to shame and humiliation rather

118. Tim Meldrum, *A Women's Court in London: Defamation at the Bishop of London's Consistory Court, 1700-1745*, 19 LONDON J. 1 (1994).

119. CORNELIA HUGHES DAYTON, *WOMEN BEFORE THE BAR: GENDER, LAW, & SOCIETY IN CONNECTICUT, 1639-1789* (1995).

120. See Part I.B.

121. BAKER, *supra* note 8, at 18-19.

than honor. Women's participation in public life as prosecutors does not, therefore, detract from their overall exclusion from the honor of public offices.

In addition, although an appeal would have required the female prosecutor to appear in court and make her case, prosecution of an appeal in the thirteenth century required substantially less forensic skill than a modern criminal case. Prosecuting an appeal consisted principally of pleading, including recitation of the appropriate legal formulae and responding to judicial questioning. Since this was the era of the self-informing jury, the appellor would not ordinarily have made speeches to the jury or questioned—much less cross-examined—witnesses.¹²² Instead, the jury was expected either to investigate the case before trial or to decide the case based on gossip and reputation. Nevertheless, the task of prosecution should not be minimized. An effective prosecution probably required out-of-court lobbying of jurors. Since mistakes in recitation of the legal formulae could result in quashing of the appeal, accurate pleading would have required a good memory. Responding to judicial questions would have required an ability to think on one's feet. In addition, since the courts were run by powerful and imposing men (sheriffs and royal justices), the atmosphere of the courts would likely have been quite intimidating. Prosecution would, thus, have required considerable courage and ability to perform publicly under pressure.

There is some irony in the idea that *private* prosecution gave women a role in the *public* sphere. This irony results in part from anachronistic use of the terms public and private. Thirteenth-century English men and women did not think of the appeal as private prosecution or presentment as "public." These are modern terms. Even as modern terms, they are problematic, as the privateness of the appeal is only relative. Compared to presentment or modern public prosecution, appeals are more "private," because they vested power in ordinary individuals (the victim or a relative of the victim) rather than in representatives of the public (presenting jurors or salaried state prosecutors). Nevertheless, like any legal procedure, appeals required the participation of state actors (such as judges and sheriffs) and ultimately relied on governmental coercion for enforcement. In addition, appeals were becoming more "public" during the thirteenth century. As discussed above in Part II.C, in the 1220s and especially after 1250, appellors lost the power to effectively settle or terminate a prosecution. Even if an appellor withdrew or if the appeal was quashed for technical reasons, the defendant would still be

122. Klerman, *supra* note 73. For more on the self-informing jury, see *supra* p. 301-02.

put to trial “at the king’s suit,” and the case would proceed under the legal fiction that the king was prosecuting.

B. Women, Appeals, and Power

While the previous section deployed an analysis based on the idea of separate spheres, Rosaldo and Kerber’s critique suggests that it is important to go beyond that approach. Instead of emphasizing the separateness of men’s and women’s lives, they suggest that historians focus on trying to understand how men and women interacted.¹²³ This section takes up that challenge by analyzing the ways in which appeals gave women the power to affect others, most often men who injured them, their relatives, or their property.

The ways in which medieval women exercised power have been an important topic of historical inquiry. In fact, two recent essay collections—*Power of the Weak: Studies on Medieval Women* and *Women and Power in the Middle Ages*—take this subject as their theme.¹²⁴ Since women were generally excluded from formal, governmental office, historians have tended to see women’s power as flowing through more informal channels, such as persuasion, sainthood, land ownership, and family position. As Mary Erler and Maryanne Kowaleski put it, historians have moved “away from a limited and traditional view of power as public authority to a wider view of power which encompasses the ability to act effectively, to influence people or decisions, and to achieve goals.”¹²⁵

Surprisingly, medieval women’s legal power has received little attention. For example, in the two books mentioned above, only one essay, by Judith Bennett, takes much note of women’s legal activity. She emphasizes that women’s access to court and power “waxed, waned, and waxed again over the course of the female life cycle” as women achieved some independence between adolescence and marriage, then lost it upon marriage, and regained it upon widowhood.¹²⁶

Erler and Kowaleski’s definition of power—“the ability to act effectively, to influence people or decisions, and to achieve goals”¹²⁷—is quite helpful for the analysis of appeals. Under this broad definition, the ability to sue others successfully is surely a kind of power. In particular, appeals allowed women to “influence people or

123. KERBER, *supra* note 107, at 196-97; Rosaldo, *supra* note 109, at 409.

124. POWER OF THE WEAK, *supra* note 5; WOMEN AND POWER IN THE MIDDLE AGES, *supra* note 5.

125. Mary Erler & Maryanne Kowaleski, *Introduction* to WOMEN AND POWER IN THE MIDDLE AGES, *supra* note 5, at 1, 2.

126. Bennett, *supra* note 5, at 21.

127. Erler & Kowaleski, *supra* note 125, at 2.

decisions” in that it conferred on them the ability to influence jurors and judges to render legal decisions in their favor. It allowed them to “achieve goals,” such as punishment of the defendant or settlement.¹²⁸ And it allowed them to “act effectively,” or at least as effectively as men, in that women achieved settlement and conviction rates comparable to or better than those of men.¹²⁹

Although appeals gave women a form of power, that power should not be overstated. As discussed above in Part II.B, one of the reasons women brought appeals was that they had been victimized—assaulted, raped, or robbed. The potential power that appeals gave women had, at least in these situations, not been sufficient to deter the crime. Another reason women brought so many appeals, especially homicide appeals, was that they were immune from trial by battle and thus could prosecute crimes of interest to their families without the danger male members of the family might encounter. In these situations, women may have been pressured into prosecuting. Nevertheless, even when prosecution was the result of victimization or family pressure, it was still a form of power. A crime victim who can prosecute is more powerful than one who, like a slave, has no power to prosecute or who, like a child, must depend on others to prosecute on her behalf. Similarly, although a woman’s prosecution may have been in her family’s interest, to the extent that a woman’s interests were aligned with those of her family, prosecution in the family interest may have benefited her as well.

The power of women’s appeals may also have been limited by the possibility that women’s appeals, even if successful, may have provoked social disapproval or even physical vengeance. To the extent that women prosecutors were violating social norms about women’s proper role, the possibility of such disapproval or vengeance cannot be excluded. Unfortunately, the legal records shed little light on these possibilities, although violent retaliation could itself have resulted in a subsequent appeal or presentment.

The case below, which was heard in the 1249 Wiltshire eyre, illustrates the power that appeals gave women.

Alice, who was the wife of Henry of Wyly, appealed Robert Pycot, Robert Sterre and Gilbert Chynne in that against the King’s peace wickedly and in felony they ejected her by force

128. For a related argument about prosecution and power in a subsequent period, see Douglas Hay, *Prosecution and Power: Malicious Prosecution in English Courts, 1750-1850*, in *POLICING AND PROSECUTION IN BRITAIN 1750-1850*, at 343 (Douglas Hay & Francis Snyder eds., 1989).

129. See *supra* Tables 3 & 4.

from a house in Salisbury. That they did this etc. she offers [to prove] etc.

Robert Pycot is dead. Robert Sterre and Gilbert come and deny the force and whatsoever is against the king's peace. They fully admit that they ejected Alice from the house but not in robbery, rather by judgment of the Court of Salisbury and by the command of Robert Pycot then mayor of Salisbury. On this they put themselves on a jury and call the aforesaid Court to warranty. Upon this the aforesaid Court comes and says that Henry of Wyly, sometime Alice's husband, held the house and after Henry's death Alice was in seisin of the house for half a year. Then Avice, Henry's sister, sought the house in the Court of Salisbury saying that Alice was never married to Henry. And, because it did not appear to the Court whether Alice was married to Henry or not, the Court presented the seisin of the house to Avice. But they did not warrant that Alice should be ejected from the house by force. And because the aforesaid Court held this plea without writ and warrant it is held that the aforesaid Court be in mercy and let Robert Sterre and Gilbert, because they dispossessed [Alice of her house,] be taken into custody for the offence etc.

Later it is testified that Alice received seisin of the house because she proved that she was married to Henry and that Henry in his will left her the house.¹³⁰

Alice, a widow living in a house given to her by her husband, was evicted from that house after losing a suit in the Court of Salisbury. Although Alice had civil remedies to recover her house, she chose to bring an appeal against the mayor of Salisbury, who ordered her eviction, and against the men who carried out that eviction. Although her appeal did not fall within the two categories permitted to women (rape or injury to her body), the defendants did not object, and her appeal was successful. The justices in eyre found that the Court of Salisbury had acted improperly in depriving her of her house without a royal writ. As a result, the living defendants were ordered jailed, probably as a prelude to stiff fines. In addition, although the timing and circumstances are not clear, it appears that the justices in eyre allowed her to prove the substance of her claim to the house—that she was married to Henry and that Henry left her the house in his will. The power Alice wielded through this appeal is

130. CROWN PLEAS OF THE WILTSHIRE EYRE, 1249, *supra* note 98, pl. 553.

rather impressive. She successfully sued the mayor of Salisbury and two men who were carrying out his orders, secured an order for their imprisonment, and recovered both possession and title to her house.

More generally, the legal power of an appellor was substantial. Appeals could lead to the imposition of serious penalties. If the defendant did not appear in court to respond to charges, he was outlawed. As mentioned above, an outlaw was a person without legal rights.¹³¹ He forfeited all his property, and it was a crime to feed, shelter, or communicate with him. If he resisted arrest, he could be killed without further legal process.¹³² Women successfully outlawed defendants in about a quarter of all appeals they initiated. If, on the other hand, the defendant appeared for trial and was convicted, he could be executed or fined. Such outcomes were not as common as outlawry, but hardly rare. Thus, the appeal allowed women to impose substantial penalties on those who harmed them. Perhaps more importantly, although it cannot be proved directly, the fact that women had the power to initiate criminal prosecutions probably deterred some potential malefactors.

A crime victim could also use the threat of prosecution to induce settlements, which might consist of cash, land, or resolution of other disputes.¹³³ In addition, as discussed above, rape cases were sometimes settled by marriage between the appellor and the man she had previously accused of rape. Although marriage to the man who raped her was undoubtedly a rather unfavorable settlement, it does not negate the idea that the appeal gave the prosecutor a modicum of power. To the extent that rape reduced a woman's marriageability, the fact that the appeal allowed the victim to pressure the defendant into marrying her conferred a benefit on the prosecutor. That such a marriage seems odious should not detract from the fact that it might have been preferable to the alternatives: impoverish-

131. Women accused of crime could not technically be outlawed. Instead, a woman who failed to appear at county court was "waived," that is, declared a "waif." Nevertheless, the procedure and consequences of waiver and outlawry were the same, so this difference is of no importance. 1 POLLOCK & MAITLAND, *supra* note 8, at 482. Although outlawry was relatively severe, outlaws could secure pardons from the king. See 2 POLLOCK & MAITLAND, *supra*, at 581-82.

132. 2 BRACTON, *supra* note 36, at 361-62, 378.

133. It is interesting in this regard to contrast the thirteenth and eighteenth centuries. Laurie Edelstein has recently argued that eighteenth-century rape prosecutions were *not* brought to induce negotiation, settlement, and/or marriage. Edelstein, *supra* note 72, at 376-89 (1998). She adduces a number of factors, including the humiliation and cost of rape trials, to explain why such a motivation was implausible. The data presented above in Table 3 suggest that over half of thirteenth-century rape appeals resulted in settlement. In part, the greater frequency of settlement may reflect differences between thirteenth- and eighteenth-century procedure, such as the low cost of appeals and the absence of cross-examination at trial.

ment as a single woman or an even less favorable marriage. Thus, the prosecutor's power could not right the wrong done to her but could improve her post-crime position, even if only slightly.

Although historians generally emphasize women's loss of independent power upon marriage, appeals provide an interesting, although limited, counter-example. As discussed in the next section, at least 5% of female appellors were married women suing alone. Although this percentage is certainly lower than the percentage of married women in the population, it is noteworthy that married women were bringing suits at all.

Another way to appreciate the power that appeals provided is to contrast appeals of rape with trespass actions for ravishment. Whereas rape appeals were brought only by the aggrieved woman herself, ravishment actions were brought by husbands, fathers, and lords. Ravishment was the tort of abducting and/or raping a woman, and such claims became common around the turn of the fourteenth century. Such suits sometimes arose out of a woman's marriage contrary to the will of her father or her desertion of her husband in order to abscond with a lover.¹³⁴ In such situations, vesting the right to bring ravishment actions in fathers and husbands gave men additional power over women. In contrast, the requirement that the female victim bring a rape appeal made it nearly impossible for an appeal to be used to thwart her choice of husband or lover.

As discussed above in Part II.A, women brought approximately eight thousand appeals during the thirteenth century. Although this may seem like a large number, it pales in comparison to the number of women who lived in England during this period, which probably approached ten million.¹³⁵ Thus, probably only about one in every thousand thirteenth-century English women ever brought an appeal during her lifetime. The proportion of women who actually exercised the power of an appeal was therefore relatively small. On the other hand, to the extent that women's ability to bring appeals had a deterrent effect, appeals may have had a broader impact.

134. Brand, *supra* note 16, at 65-66; Post, *supra* note 57, at 157-60.

135. Estimating the number of women who lived during the thirteenth century is very difficult. Most probably there were between one and two million women in 1200 and almost double that number in 1300. J.L. BOLTON, *THE MEDIEVAL ENGLISH ECONOMY, 1150-1500*, at 65 (1980). Average life expectancy was thirty to forty years. *Id.* at 48. Together, these figures imply that between five and ten million women lived in England in the thirteenth century.

C. *Social Status of Female Prosecutors*

Many studies of women and power in the middle ages focus on upper class women.¹³⁶ One advantage of legal records is that they often shine light on less prominent people. Records from manorial courts have been especially fruitful for the investigation of ordinary people.¹³⁷ Royal courts, in contrast, tended to hear disputes only by those who held "freehold" property, that is, property unencumbered by the obligations a peasant ordinarily owed his lord. Appeals, although heard in royal court, seem to have been brought by a broad spectrum of society and thus can help shed light on the lives of ordinary women.

Although the records of appeals seldom indicate people's status, it is possible to ascertain the status of some female appellors by looking at other legal and administrative records. For most of England, this would be a very difficult task, because those other records are generally unpublished and unindexed. For late thirteenth-century Huntingdonshire, however, scholars have compiled a Regional Data Bank, which facilitates identification of people from that county.¹³⁸ By tracking female appellors mentioned in the 1286 Huntingdonshire eyre, one can see that ordinary villagers dominated the ranks of female appellors. There were sixteen female prosecutors mentioned in the 1286 Huntingdonshire eyre.¹³⁹ The social status of nine of them can be identified. Seven (78%) were villagers¹⁴⁰ and two (22%) were "regional landowners,"¹⁴¹ a class intermediate between villagers and knights.¹⁴² Although it is hazardous to speculate about the six whose status is not identified in contemporary records, it is quite likely that they were also ordinary villagers, as it is unlikely that knights or regional landowners would have left no imprint in surviving records. If this speculation is correct, then 88% of female appellors would have been villagers.

Sometimes the eyre records themselves make it clear that the appellor came from modest circumstances. For example, in 5% of all

136. *See supra* note 5.

137. *See Bennett, supra* note 5.

138. *See*, 1 ROYAL JUSTICE AND THE MEDIEVAL COUNTRYSIDE: THE HUNTINGDONSHIRE EYRE OF 1286, THE RAMSEY ABBEY BANLIEU COURT OF 1287, AND THE ASSIZES OF 1287-88, *supra* note 78, at xi.

139. *See id.* cases 370, 391, 394, 397, 404, 407, 444, 447, 464, 549, 513, 526, 558, 634, 789 & 805. For this purpose, I have included the two appeals (cases 789 and 805) brought by women mentioned in the 1287 Ramsey Abbey Banlieu Court.

140. *See id.* cases 391, 394, 397, 444, 549, 558 & 789.

141. *See id.* cases 513, 536.

142. *See id.* at 68.

cases, fines female appellors incurred were pardoned “on account of poverty,” as in Gunora’s case.¹⁴³ Since fines were not imposed in every case, the number of poor women prosecutors undoubtedly exceeded five percent. How poor a woman had to be to qualify for a remission of fines on account of poverty is unclear. The ordinary fine imposed in the eyre was half a mark, or 6s. 8d. That would have been a trivial sum for any significant landholder, but almost certainly more than the average peasant could pay.¹⁴⁴ On the other hand, it is apparent that such pardons were sometimes given even to those who were not poor. For example, in Gunora’s case, Gunora’s fine was pardoned even though, having just received four acres in settlement, she would hardly still qualify as poor.¹⁴⁵

The records sometimes mention an appellor’s occupation. So, for example, one female prosecutor is described as a washerwoman (*lotrix*).¹⁴⁶ She was undoubtedly of humble status.

It is also likely that an additional 10% of female appellors were poor. In addition to the 5% whose fines were pardoned on account of poverty, 10% of female appellors are recorded not to have found sureties to prosecute and instead merely swore that they would prosecute. Swearing rather than finding sureties is probably indicative of poverty. Occasionally, the link between swearing and poverty is explicit in the records,¹⁴⁷ but it is a plausible inference even in cases where the connection is not patent.¹⁴⁸ Appellors ordinarily initiated their suits at county court and were required at that time to nominate sureties. If the appellor later failed to show up for trial or withdrew her suit, or if the appellee was acquitted, the appellor was fined. If the appellor could not or would not pay, the sureties were liable for the fine. Sureties naturally wanted some assurance that the appellor could pay her own fines or would indemnify them for any fines they paid. Poor litigants would be the group most likely to be unable to provide such assurance, so it is likely that those who failed

143. *Supra* text accompanying note 30.

144. See CHRISTOPHER DYER, STANDARDS OF LIVING IN THE LATER MIDDLE AGES 70, 117 (1989).

145. *Id.*

146. 2 PLEAS BEFORE THE KING OR HIS JUSTICES, 1198-1202, pl. 15 (Doris Mary Stenton ed., 68 Selden Society 1952) (Norfolk 1198).

147. CROWN PLEAS OF THE WILTSHIRE EYRE, 1249, *supra* note 98, at pls. 130, 517, 562; JUST 1/614B m. 41d (Northamptonshire 1247) (“non habuit plegios nisi fidem quia pauper”); JUST 1/615 m. 3 (Northamptonshire 1253) (“non invenit plegios quia pauper”); *id.* at m. 5d; JUST 1/361 m. 50 (Kent 1255) (“nec invenit plegios nisi fidem quia pauper”); *id.* at m. 53d (Kent 1255) (“non invenit plegios nisi fidem pro paupertate”).

148. See Groot, *supra* note 57, at 328; Ralph Pugh, *Introduction to WILTSHIRE GAOL DELIVERY AND TRAILBASTON TRIALS, 1275-1306*, at 1, 11 (Ralph Pugh ed., 33 Wiltshire Record Society 1977).

to find sureties were most often poor. Nevertheless, the correlation is not iron-clad. In some cases, although the appellor did not find sureties to prosecute, her fine for non-prosecution was not pardoned on account of poverty.¹⁴⁹ The lack of a perfect correlation between failure to find sureties and poverty might suggest that the fact that 10% of female appellors are recorded as not having found sureties would mean that less than 10% were poor. Nevertheless, one must also take into account that whether an appellor found sureties is recorded in less than half of the cases. So, the 10% figure may substantially under-count the number of poor female appellors.

The substantial uncertainty that surrounds who was classified as “poor” for the purposes of pardoning fines and who would be unable to find sureties makes it impossible to give a precise figure for the percentage of female appellors who were poor. Any figure from about 5% to over 30% would be plausible. Nevertheless, it seems safe to conclude that a significant number of female appellors were from modest circumstances.

Examination of the marital status of female appellors also reveals considerable diversity. Naming provides the principal clue to marital status. Those called “A who used to be B’s wife” (*A que fuit uxor B*) can safely be categorized as widows. Similarly, those called “A wife of B” (*A uxor B*) can be safely categorized as married. Names such as “A from place X” (*A de X*) or “A daughter of B” (*A filia B*) give no information on marital status. Although such women might have been married or widowed, I will generally assume they were never married unless there is other evidence of their marital status.

The overwhelming majority of female appellors were either widowed or never married. Most homicides were prosecuted by widows.¹⁵⁰ In addition, 6% (14/229) of women who appealed crimes other than homicide were widows. Nearly all rapes were prosecuted by never-married women.¹⁵¹ A small, but appreciable fraction (5% or

149. See, e.g., COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE 41 (William Wrottesley ed., 3 William Salt Archaeological Society 1882) (Staffordshire 1199).

150. See *infra* Table 2.

151. A few rape appeals were prosecuted by married women and widows. See JUST 1/358 m. 27d (Kent 1227) (rape appeal by widow); CROWN PLEAS OF THE WILTSHIRE EYRE, 1249, *supra* note 98, pl. 296 (rape appeal by widow); *Id.* pl. 207 (rape appeal by married woman). The legality of such appeals is unclear. Although the married women and widows who brought these appeals were presumably not virgins, there is a case from 1244 which held that only those who were virgins before the rape could bring appeals. See Post, *supra* note 57, at 153. Nevertheless, there are cases (although not many) both before and after 1244 that seem inconsistent with a rule against rape prosecutions by non-virgins. See Groot, *supra* note 57, at 325; JUST 1/359 m. 30d (Kent 1241); see also cases cited *supra*. In addition, the treatises attributed to Bracton and Britton assume that there was no such rule. See 2 BRACTON, *supra* note 36, at 415, 418 (discussing rape of married women, widows, and prostitutes); 1 BRITTON, *supra* note

23/452) of all female appellors were married women. This figure is interesting, because it is usually thought that a married woman's legal personality merged into her husband's through coverture.¹⁵² In some cases, a married woman's right to appeal was challenged,¹⁵³ but in most cases it was not. Because of the reliance on naming, these figures almost certainly understate the number of appeals brought by widowed and married women.

V. CONCLUSION

The number of appeals declined markedly in the late thirteenth century.¹⁵⁴ Presentment became the nearly exclusive means of prosecuting crime. Since the presenting jury was entirely male, the decline of the appeal meant a reduction in the role of women.¹⁵⁵ One might see this decline in the status of women as part of a general, Europe-wide "tendency, as the Middle Ages progressed . . . towards a lessening of the public activity of women."¹⁵⁶ Susan Mosher Stuard has explained this trend as reflecting "the failure of early medieval society to define rigidly a public and a private sphere and to relegate women to the latter."¹⁵⁷ As the quote from *Bracton* in Part IV.A reveals, by the thirteenth century, such a distinction had been clearly made. The prominence of the appeal until at least the late twelfth century may reflect the earlier lack of separation between public and private. Al-

36, at 114 ("With regard to an appeal of rape, our pleasure is, that every woman, whether virgin or no, shall have a right to sue vengeance for the felony by appeal. . ."). *But see* 2 BRACTON, *supra* note 36, at 344, 414, 416-17 (assuming that rape appeal will be brought by one who was a virgin before being raped).

152. See *supra* pp. 283-84, 296.

153. COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE, *supra* note 149, at 92 (man fined because he permitted his wife to appeal, but did not want to prosecute with her); THE EARLIEST NORTHAMPTONSHIRE ASSIZE ROLLS, A.D. 1202 AND 1203, *supra* note 67, pl. 70 (appeal quashed, because married woman did not prosecute with her husband); JUST 1/358 m. 21d (Kent 1227) (appellees not attached, because female appellor did not prosecute when her husband, although present, did not prosecute with her); JUST 1/4 m. 29d (Bedfordshire 1247) (appellee asked the court to note that the woman who appealed him of robbery and wounds could have no property because she was married, but appellee submitted to jury trial anyway).

154. See Klerman, *supra* note 7, at 22-31.

155. Of course, since almost two-thirds of appellors were men, there was also a decline in the prosecutorial role of many men as well. Nevertheless, since men could be on presenting juries while women could not, the move to presentment had the effect of removing all women from prosecution, while merely shifting the male prosecutorial role from one group (crime victims and their relatives) to another (the presenting jury). Nevertheless, to the extent that presenting juries (and later grand juries) were composed primarily of higher status men, the shift to presentment may have resulted in the exclusion of lower status men from prosecution.

156. Susan Mosher Stuard, *Introduction* to WOMEN IN MEDIEVAL SOCIETY, *supra* note 3, at 1, 3.

157. *Id.* at 4; see also Jane Tibbetts Schulenburg, *Female Sanctity: Public and Private Roles, ca. 500-1100*, in WOMEN AND POWER IN THE MIDDLE AGES, *supra* note 5, at 102, 105.

though I have sometimes referred to the appeal as "private prosecution," it was neither entirely private nor entirely public. Although the individuals brought appeals, they lay only when the king's peace had been violated and thus when more than the victim's own interest was affected. The introduction of presentment in the twelfth century and its ascendance in the thirteenth can be seen as reflecting the separation of private and public, putting prosecution of breaches of the king's peace in the hands of representatives of the community (the presenting jury) rather than in those of the victim.¹⁵⁸ In this way, the marginalization of women through the ascendance of presentment fits Stuard's theory that the separation of public and private harmed women.

A different but complementary interpretation would note that the increasing power of the state in the thirteenth century often imposed and enforced dichotomies—male/female, orthodox/heterodox, Christian/Jew, heterosexual/homosexual—which disadvantaged the smaller or less powerful group.¹⁵⁹ Early medieval society had been less effectively governed, and thus enforced rigid distinctions less often. Gays and Jews, although occasionally persecuted, were usually left in peace and often rose to prominence. Heretics were not subjected to the rigors of the inquisition. Women could govern both monks and nuns in double monasteries. They could prosecute.

This is not to imply equality. Early medieval women could be powerful abbesses, but they could not be priests or bishops. Women could bring appeals, but the crimes for which they could do so were circumscribed. But it does seem that the rise of presentment, an institution which explicitly excluded women, was part of a more general phenomenon in which the newly emergent European states used their control of the legal system to exclude certain groups from power and public life.

While the previous two paragraphs attempt to provide a broader historical context for thinking about the decline of women's role as prosecutor, they must be regarded as tentative. The kind of historical generalizations upon which they rely have been criticized as part of a romantic search for a "golden age."¹⁶⁰ Although the specific general-

158. The introduction of trespass writs in the mid-thirteenth century, however, again muddled the distinctions between public and private, and between civil and criminal. Klerman, *supra* note 7, at 44.

159. JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* 270-71 (1980); R.I. MOORE, *THE FORMATION OF A PERSECUTING SOCIETY* 1 (1987).

160. Judith M. Bennett, "History that Stands Still": *Women's Work in the European Past*, 14 *FEMINIST STUD.* 269 (1988); Pauline Stafford, *Women and the Norman Conquest*, 4 *TRANSACTIONS ROYAL HIST. SOC'Y.* (6th Ser.) 221 (1994); Vickery, *supra* note 110, at 383-414.

izations—that the distinction between public and private became more rigid during the middle ages and that governments in the twelfth and thirteenth centuries enforced a greater number of disadvantageous distinctions—remain substantially unchallenged,¹⁶¹ it is not unthinkable that historians in the future will refute them. While the evidence presented in this Article supports these more general hypotheses, the verdict awaits additional research. As Janet Loengard suggested, an Article such as this one is best seen as “a piece in the mosaic that must be constructed, the jigsaw that must be put together.”¹⁶²

Although this Article has focused on thirteenth-century England, there is reason to believe that women played a significant role in prosecuting crime in other pre-modern societies, especially those that relied on private prosecution.¹⁶³ The legal systems in nearly all of medieval Europe allowed private prosecution, yet the role of female prosecutors remains largely unexplored. In England, private prosecution remained an important aspect of criminal procedure until the mid-nineteenth century. What roles did women play in these prosecutions? If women brought prosecutions, did they actually control them, or was prosecution effectively in the hands of husbands and relatives? Did women speak in court, or did lawyers or relatives speak for them? Did prosecution contribute to women’s power? These questions are likely to have different answers in different places and at different times. Nevertheless, answering them will enrich our understanding of the history of gender and of law.

161. See Bennett, *supra* note 160, at 282 n.8.

162. Janet Senderowitz Loengard, “*Legal History and the Medieval Englishwoman*” *Revisited: Some New Directions*, in *MEDIEVAL WOMEN AND THE SOURCES OF MEDIEVAL HISTORY* 219 (Joel T. Rosenthal ed., 1990).

163. See, e.g., COHN, *supra* note 50, at 27, 33 (documenting significant numbers of female plaintiffs in private criminal prosecution in fourteenth-century Florence).

