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978-0-521-78199-2 - Crime and Law in England, 1750-1840: Remaking Justice from the Margins

Peter King

Excerpt

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## *1. Shaping and remaking justice from the margins. The courts, the law and patterns of lawbreaking 1750–1840*

The late eighteenth and early nineteenth centuries witnessed many high profile changes in the criminal justice system of England and Wales. The capital code, which had threatened so many property offenders with the long shadow of the gallows, was repealed. Formal, centrally initiated policing and prison reforms increased in importance and moved from an initial reliance on permissive and enabling legislation towards a greater emphasis on compulsion and centrally organised inspection. The causes of these changes, their impact and the degree to which local reforms had already achieved major changes before formal legislation was introduced have all produced extensive debates among historians of crime. However, in the process other important dimensions of criminal justice history were often marginalised in the early stages of the development of the field. Four of the most obvious of these – gender, youth, attitudes to non-lethal violence and the criminalisation of customary rights – are focused on here. None of these areas attracted major attention from parliament or from central government for most of the period from 1750 to 1840, yet in each the courts systematically pursued policies which often had a major role in shaping how justice was actually experienced on the ground. By studying the courts' policies in relation to these issues – and in the case of youth and gender by analysing related changes in patterns of formal prosecution – this volume forms part of a broader recent movement among historians which aims to provide a more holistic picture of the ways the criminal justice system was shaped and remade in this period. In the process it highlights both important changes and substantial, yet often neglected, elements of continuity in attitudes to crime, in prosecution patterns and in court policies towards offenders. The chapters on juvenile delinquency (Part I), for example, highlight a major transformation in attitudes and prosecution patterns, as well as substantial, if more gradual changes in punishment policies towards the young. The chapters on gender (Part II), by contrast, foreground two major continuities: first, in women's levels of involvement in recorded crime which did not decline in the ways recently implied by work on the vanishing female offender; and second, in the ways the courts tended to offer

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more lenient treatment to female offenders throughout the period. Part III then highlights another major, but neglected discontinuity – the quiet but successful criminalisation of non-lethal violence – while Part IV analyses a somewhat surprising continuity – the failure of a carefully orchestrated set of central-court judgements to criminalise one of the poor's most substantial customary rights.

In focusing on these four dimensions of criminal-justice history, this volume therefore contributes to a number of specific debates. However, it also aims to raise some important and more general issues about the ways justice was sometimes shaped and remade from the margins in this period. In particular, this long initial chapter is designed to open up a new set of agendas by focusing on one highly significant and neglected set of themes that emerge from the studies presented here – the local, decentralised nature of many of the means by which justice was shaped and remade in the period between 1750 and 1840. This initial chapter therefore involves, amongst other things, a re-evaluation of the role of parliamentary legislation, central-government initiatives and the Westminster courts, and the development of alternative perspectives which foreground the roles of various courts, of magistrates and of other local actors in shaping, and sometimes in remaking, key areas of the criminal-justice system. The complex interactions between the centre and the localities that molded eighteenth-century criminal judicial practice provide many challenges to the historian. At the centre, for example, the processes through which legislation was produced have proved very hard to unravel. While the wording of the statutes themselves is easily accessible, it is often very difficult to understand the balance of forces that resulted in their being passed or the intentions of those who initiated them. Each act of parliament has its own history and its own complicated relationship to practice on the ground. However, by focusing a lot of their attention on the major courts, and by sometimes giving legislative activity rather too central a role in their accounts of reform, historians may have underestimated the importance of local rather than central initiatives within the balance of interactions which determined the nature of justice in this period. In the long eighteenth century, it will be argued here, the justice delivered by the courts was shaped and remade as much from below, from within and from the margins as it was from the centre.

This argument will be developed, first by analysing various changes in criminal-justice practice that are highlighted in the studies in this volume (section 1), and secondly by briefly scrutinising existing work on the major courts to extract relevant themes (section 2). Sections 3 to 5 of this introduction will then use a variety of sources to present a more detailed picture of the ways that the practices of the relatively neglected summary courts shaped important aspects of the nature of justice during the eighteenth and early nineteenth centuries. The interconnections of the local and the central, and the institutional and personal overlaps between the two will then be discussed (section 6). Having

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thus explored the two-way relationship between court practice on the ground and statutory or other initiatives at the centre, it will be argued that a greater emphasis needs to be given to the former if we are to develop a full and balanced model of the reform process (Section 7). The perspectives that can be opened up by a more general exploration of the relationship between the central and the marginal will then be used to address two further questions raised by the essays in this volume (Section 8). First, the relative neglect of gender and age dimensions in formal, statutory law will be contrasted with their decisive influence on the way the courts actually disposed of those accused before them at the local level. Secondly, the extensive regional differences in both criminal justice traditions and in patterns of recorded lawbreaking observed in case studies of particular regions (Chapters 7 and 8) and in the national data available for all counties (Chapter 6), will form the basis for a discussion of the relationship between centre and periphery within the eighteenth- and early nineteenth-century state.

## I

When historians have analysed the complex interactions between the centre and the localities which shaped how the criminal law and its administration were reformed in the eighteenth and the first half of the nineteenth centuries, statutes and legislative activity have often played a central role. Much of the very extensive research now available on the history of policing, for example, focuses around the role of key policing acts such as those of 1829, 1839 and 1856, although recent work has also indicated that many important locally initiated changes had already occurred by the 1820s. Equally, the growth of the 'bloody code' and the processes that led to the repeal of the vast majority of it in the 1830s and 1840s has inevitably attracted a large amount of research.<sup>1</sup> This use of statutory change as a foundation for structuring our understanding of (and establishing a clear chronological framework for) criminal justice reform is highly understandable. There were many reforms in the period from the late seventeenth century to the middle of the nineteenth in which parliament played a central role. An extensive rewards system to encourage the apprehension of

<sup>1</sup> For textbooks that foreground legislative turning points – D. Taylor, *Crime, Policing and Punishment in England 1750–1914* (London, 1998); P. Rawlings, *Crime and Power: A History of Criminal Justice 1688–1998* (Harlow, 1999), 66–100; a considerable amount of work has recently highlighted changes happening in London before 1829 – A. Harris, *Policing the City. Crime and Legal Authority in London 1780–1840* (Ohio, 2004); E. Reynolds, *Before the Bobbies. The Night Watch and Police Reform in Metropolitan London 1720–1830* (Stanford, 1998); R. Paley, 'An Imperfect, Inadequate and Wretched System? Policing London before Peel', *Criminal Justice History*, 10 (1989), 95–123. L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750, The Movement for Reform*, 5 volumes – fifth with R. Hood (London, 1948–68), i.

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major felons was first developed and then dismantled by parliament, for example, and amongst its many other initiatives it also transferred responsibility for a growing list of offences to the summary courts during this period.<sup>2</sup> However, the detailed studies of local judicial decision-making (and of how various specific kinds of offenders were dealt with) which are included in this volume suggest that in parallel with continued research on the role of parliament and of central government we need to give serious attention to the ways the courts themselves shaped the nature of justice as it was actually delivered on the ground. In the eighteenth and early nineteenth centuries a series of important changes in judicial practice took place within dimensions of the criminal justice system that are not normally foregrounded in discussions about its reform, and in many of these cases legislative change seems to have played a less central role than the informal decisions made by the courts themselves. In looking at all the four dimensions investigated here, it becomes increasingly clear that some of the key changes in judicial policies (and sometimes the core assumptions which structured all judicial decisions) were not determined primarily by parliamentary legislation or by central government. Rather it was the informal practices, and not infrequently the decisive reforms, adopted by court judges, juries, local magistrates and other local decision-makers that played the most important role in the interactions which shaped these areas of criminal justice policy. In all these subject areas it is possible to identify significant changes in practice which their creators would have seen as changes from worse to better (i.e. as reforms) which were not overtly related to any specific legislative initiatives. These are dealt with in more detail in later chapters but six specific examples are worth brief discussion here in order to illustrate the more general argument.

One of the most interesting areas involves the fundamental changes that occurred in quarter-sessions policies towards non-lethal violence (chapters 7 and 8). The work presented here on the contrasting counties of Essex and Cornwall, along with research recently completed on London and earlier soundings in Surrey, has indicated clearly that assault was increasingly criminalised in the late-eighteenth century.<sup>3</sup> Indictment for assault was turned from what had been mainly a civil process, resolved by compensation and/or a fine, into a criminal trial which usually, although by no means always, ended in imprisonment. In the mid-eighteenth century most people indicted for assault pleaded guilty and were fined a nominal amount after making an agreement to compensate their victims. By 1820 very few pleaded guilty because most of those

<sup>2</sup> Radzinowicz, *A History*, 2, 57–111.

<sup>3</sup> G. Smith, 'The State and the Culture of Violence in London 1760–1840', PhD thesis University of Toronto 1999; N. Landau, 'Indictment for Fun and Profit: a Prosecutor's Reward at Eighteenth-Century Quarter Sessions', *Law and History Review*, 17 (1999), 507–36; J. Beattie, 'Violence and Society in Early Modern England', in A. Doob and E. Greenspan (eds.), *Perspectives in Criminal Law*, (Aurora Ontario, 1985), 49–50.

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convicted of assault were imprisoned. Those found guilty of assault were now subjected to very similar imprisonment terms to those imposed on petty thieves. Even though the assaults they committed were often minor in character, those accused of non-lethal violence at quarter sessions were subjected to quite severe sanctions by the 1820s – a policy that had been extremely rare in almost every part of England sixty or seventy years earlier.

Two further examples of major shifts in the direction of criminal justice practices that cannot be related directly to legislative changes emerge from the work presented here on juvenile delinquency. The first involves a gradual but important change in the technical legal immunities enjoyed by young offenders. The erosion of the principle of *doli incapax*, which had offered significant protection to offenders aged up to fourteen, and of the less formal notions that had offered some protection to older juveniles aged roughly between fifteen and seventeen, can be clearly traced in the major courts of the early nineteenth century. This important shift, which appears to have been totally unrelated to any formal central policy announcement or legislative change, affected both the pre-trial and public trial experience of juvenile felons. Both petty-sessions magistrates and the major courts seem overall to have moved from policies that favoured diversion (i.e. informal sanctions not involving indictment or imprisonment) to policies that prioritised strategies involving public discipline (Chapters 2 and 3). An increasing proportion of magistrates moved away from the informal resolution of such cases and subjected suspected juvenile felons either to summary imprisonment (primarily as vagrants or ‘reputed thieves’) or to commitment to gaol to await formal trial. Those that reached formal trial then found that jurors, who in the eighteenth century had brought in a much higher rate of acquittals in cases involving juveniles, had now reversed that policy and were less likely to find younger offenders not guilty.<sup>4</sup> The effect of these policies, and of victims’ growing tendency to take juvenile offenders before a magistrate, was a very rapid increase in the number of juvenile offenders being convicted by the courts.

These changes in turn can be linked to another significant informal shift in criminal justice policies. In the early nineteenth century the judges at the Old Bailey, and to a lesser extent elsewhere, were deeply ambivalent about every sentencing option available to them, and particularly about the imprisonment of juveniles (Chapter 3), but no formal legal channel existed whereby they could commit juvenile convicts to a reformatory institution. They did not, however, let this prevent them from doing just that. Mobilising the fiction of the ‘respited judgement’ and the formal recording of a nominal fine, the Old Bailey began

<sup>4</sup> H. Shore, *Artful Dodgers. Youth and Crime in Early Nineteenth-Century London* (1999), 117; M. Wiener, *Reconstructing the Criminal. Culture, Law and Policy in England 1830–1914* (Cambridge, 1990), 51–2.

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to send fairly large numbers of juvenile offenders to the London Refuge for the Destitute and to a lesser extent to the Philanthropic Society (Chapter 4). By the early 1820s the former was an important destination for convicted juvenile offenders and many were sent there direct from the courts. Although formal legal advice made it clear that the Refuge could not by law restrain the inmates from leaving, in practice they were only allowed out very occasionally and the average juvenile inmate was subjected to a two-year training programme by this formally enclosed institution. A reformatory sentencing option for juveniles had been invented and by the late 1810s the most easily serviceable philanthropic institution available at that time, the Refuge for the Destitute, was quietly being given a large annual grant by the government in order to ensure that that option remained available. The courts having initiated an informal, and strictly speaking illegal, new criminal justice policy, central government then, somewhat later, backed that initiative with cash (Chapter 4).

Detailed research on gender and justice (Chapters 5 and 7) reveals a fourth area in which a range of sentencing and punishment policies were also altered on the ground without either any legislative change taking place, or any evidence being created that central government had initiated, or even had any prior warning of, these changes. The later eighteenth century and the early decades of the nineteenth witnessed the almost complete abandonment of the public punishment of women but not of men. At both the assizes and the quarter sessions, the public whipping of women who had been convicted of theft was completely abandoned between 1750 and 1800, not only in London and the home counties, but also in some remoter regions such as Cornwall. This change, which affected the lives of large numbers of female offenders, occurred several decades before parliament formally changed the law and made the public whipping of women illegal in 1817.<sup>5</sup> A similar, if slightly more protracted process was occurring in relation to the hanging of women (Chapter 5). By the late eighteenth and early nineteenth centuries it was extremely rare for any female property offender to be hanged but relatively large numbers of males were still going to the gallows.<sup>6</sup> As the circuit judges changed the meaning of the capital code by drastically reducing the proportion of convicts whom they

<sup>5</sup> P. King, *Crime, Justice and Discretion in England 1740-1820* (Oxford, 2000), 286; G. Morgan and P. Rushton, *Rogues, Thieves and the Rule of Law. The Problem of Law Enforcement in North-east England 1718-1800* (London, 1998), 134-5 implies a slightly later survival of female public whipping. Parliament banned the whipping of female vagrants, but not of male ones - G. Smith, 'Civilised People Don't Want to See That Kind of Thing: The Decline of Public Physical Punishment in London 1760-1840' in C. Strange, *Qualities of Mercy: Justice, Punishment and Discretion* (Vancouver, 1996), 39.

<sup>6</sup> King, *Crime, Justice*, 281-2; *Parliamentary Papers* (henceforth *P.P.*), 1819, xvii, 228 - If murder is excluded 3 out of 54 females (5.5 per cent), and 139 out of 488 males (28.5 per cent) capitally convicted in Lancashire 1798-1818 were hanged. V. Gatrell, *The Hanging Tree. Execution and the English People 1770-1868* (Oxford, 1994), 7.

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left to hang – a process, which effectively repealed the capital parts of some of these statutes well before parliament actually changed the statutory law – female offenders were particularly advantaged. Here, as in the case of public whippings, an informal movement away from public, physical punishments tended to express itself most fully, in its early stages at least, in cases involving female convicts. Even when allowance is made for the differences in the types of offence that men and women tended to be indicted for, a deeply gendered policy about public physical punishments, which in part reflected the generally lighter sentences given to women, was developed by the courts in this period with only minimal input from the centre.<sup>7</sup>

The fifth example highlighted in this volume illustrates the problems experienced by those who tried to use the central courts to create new legal sanctions that would reform the behaviour of the poor. The complex legal initiatives and counter strategies that occurred in this period in relation to the poor's customary right to glean the corn left in the fields after harvest also indicate the power of the local in legal disputes at a number of levels. Chapters 9 and 10, which focus on the origins and impact of the attempts of an association of farmers and others to use judgements handed down in one of the central Westminster courts to take control of the gleaning fields, highlight the fragility of 'law' created at the centre. Apart from the structural problem that the force of local custom could take the place of the general common law as established by the central civil courts, those who wanted to control gleaning also faced several other difficulties. On the few occasions when cases reached the major courts jurors strongly resisted attempts to redefine gleaning as theft. More important, the magistracy in many localities simply refused to back the Court of Common Pleas 1788 decision to make gleaning illegal and sometimes supported the gleaners against farmers who had tried to use force to expel them from the fields. The farmers may have succeeded, at considerable expense and after two attempts, in getting a high-court judgement that made gleaning illegal, but making this stick in the local courts proved almost impossible (Chapter 10). Local decision-makers refused to enforce a ruling that went against their sense of justice, and thus remade the law at the local level in ways which thwarted the overt attempts of the farmers to use the Westminster courts to redefine gleaning as a crime.

The evidence cited briefly in chapter 2, which indicates that magistrates made increasing use of various informal powers to deal summarily with large numbers of juveniles whose actions could have been defined as felonies, also pinpoints

<sup>7</sup> D. Palk, 'Private Crime in Public Places. Pickpockets and Shoplifters in London 1780–1830' in T. Hitchcock and H. Shore (eds.), *The Streets of London from the Great Fire to the Great Stink* (London, 2003) rightly points out that in comparing the treatment given to male and female pickpockets, for example, we are not comparing like with like, since female pickpockets operated mainly in enclosed spaces at night whereas male ones operated mainly in open spaces and often in the daytime.

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a sixth arena in which ‘justice in practice’ often failed to coincide with the rulings to be found in the law books and the statutes. In performing their roles as committing magistrates in felony cases, JPs had long exercised considerable discretion, but the period under scrutiny here appears to have witnessed major informal changes in the ways these courts processed many property offenders. The summary courts increasingly, and without any statutory authorisation, took on the business of judging which property offenders should be sent on for trial and which cases should be dismissed, be resolved by the payment of compensation, or end in the summary imprisonment or impressment of the offender.<sup>8</sup> There is some evidence that these practices began well before the eighteenth century – especially in and around London where John Beattie has shown that those accused of grand as well as petty larceny were often summarily imprisoned ‘without legal warrant’ in the City Bridewell and in the Middlesex houses of correction. However, although research in this area is still at a fairly early stage and there are few sources that shed light on earlier periods, it seems likely that the practice of dealing with theft cases at the summary level without recourse to the jury courts was becoming much more widespread. In the City of London Beattie’s research suggests a very significant shift between the 1690s and the 1730s as the magistrates increasingly took on the business of enquiring into the nature and strength of the case presented by both sides. Moreover, there is considerable evidence that these procedures had become even more central by the final years of the century. In the 1730s around half of theft cases were being dealt with informally but Drew Gray’s recent work on the City’s magistrates’ courts in the 1780s and 1790s indicates that by then a very much smaller percentage of such cases were being sent on for jury trial. By the end of the century the norm was for these cases to be dealt with at the summary level so that effectively a felony trial might end at three points – before a magistrate, at the grand jury stage, or at a formal and public petty jury trial.<sup>9</sup> By the late eighteenth century, moreover, there is evidence that three trials was often an

<sup>8</sup> King, *Crime, Justice*, 87–94; G. Morgan and P. Rushton, ‘The Magistrate, the Community and the Maintenance of an Orderly Society in Eighteenth-Century England’, *Historical Research*, 76 (2003), 74.

<sup>9</sup> For a rare seventeenth-century justicing book – from an area of Essex near to London, which shows some use of informal resolutions in felony cases – J. Sharpe (ed.), ‘*William Holcroft his Booke*’ *Local Office Holding in Late Stuart Essex* (Chelmsford, 1986); J. Beattie, *Policing and Punishment in London 1660–1750* (Oxford, 2001), 24–30, 95–107; D. Gray, ‘Summary Proceedings and Social Relations in the City of London 1750–1800’ forthcoming thesis, University of Northampton; comparison of such figures is sometimes problematic, however, because it is sometimes very difficult to agree on a definition of what precisely constitutes an accusation of theft. ‘No thief in England’ the chairman of the Cornwall quarter sessions told the grand jury in 1796 during a revealing overview of the system, ‘can be punished till . . . he has had the advantage it may be said of three trials – First before the magistrate commits, Second before the grand jury and Thirdly before another jury.’ Cornish Record Office, AD604 Address to the Gentlemen of the Grand Jury Easter 1796.

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underestimate. Many thieves were being put through at least four adjudication procedures. As regular weekly petty-sessions meetings began to be established in more and more divisions, magistrates in many areas further increased their discretionary powers in felony cases by developing (on their own initiative) a system in which many felony accusations were first heard by a single magistrate, and then sent on if necessary to the next petty sessions – where further cases might be informally resolved or summarily dealt with before a residue was sent on for jury trial.<sup>10</sup> This system, which involved holding offenders ‘for further examination’ for considerable periods, was also based on extremely shaky legal foundations and resulted in considerable conflict – an issue that will be returned to later in this introduction.

The gap between the law as laid down in the justicing handbooks and practice on the ground widened in the early nineteenth century. The law books continued to insist that in felony cases preliminary hearings were not to be used as filters, but it was becoming increasingly clear that this was established practice in many areas. By the 1830s this was even being openly admitted by many commentators, although not yet by the justicing handbooks. In 1837, for example, the most widely read justices’ handbook was still insisting that ‘if there be an express charge of felony, on oath, against the prisoner, though his guilt appear doubtful, the justice cannot wholly discharge him but must bail or commit him.’ However, in the same year, a prominent metropolitan JP openly admitted to parliament that magistrates were ‘in the practice of applying their summary jurisdiction even beyond the spirit, certainly beyond the words, of the law . . . assuming to themselves the power of adjudicating in cases of actual felony.’ Equally the criminal law commission’s report on juvenile offenders, which was also published in 1837, was in no doubt that this was normal practice in this context. ‘The discretion of absolutely discharging a prisoner is already assumed by many magistrates, though without any direct authority by the law;’ they reported, ‘and it is now not an unfrequent practice to dismiss charges for trivial offences against children, not withstanding the evidence adduced may have clearly established the commission of a felony.’ The commissioners then went on to suggest that, since the informal practices that had been developed by the summary courts were widely felt to be very useful, they needed to be both legalised and standardised. ‘If the exercise of such a discretion is desirable, it should’, they concluded, ‘be expressly sanctioned by law, and defined, and limited, as far as possible, upon some rational and consistent principle.’ This recommendation finally began to bear fruit in 1847, when the first of a series of acts (targeted initially only at juvenile offenders) began the formal statutory transfer of minor larceny trials into the summary courts. After half a century or more parliament had finally

<sup>10</sup> For a critique of these developing procedures – G. Paul, *Address to His Majesty’s Justices of the Peace for the County of Gloucester* (Gloucester, 1809), 106.

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acknowledged changes in justicing practice that had long been visible on the ground.<sup>11</sup>

## II

The extensive research already completed on the prosecution, trial and punishment of felons in the major courts also makes it clear that in this period the interactions between legislative and non-legislative activity were often complex and were rarely unidirectional. Several different types of interaction between centrally directed initiatives and those that arose from changing practice on the ground can be identified in this work. While many statutes initiated or encouraged important changes in practice that were in sympathy with the intentions of the legislators, others, by contrast, stimulated a widespread counter-reaction on the ground. Equally ground-up initiatives were not infrequently ignored by the legislature (and by formal central government bodies) for such long periods that they effectively became ‘law’ as a result. Other local, court-based initiatives led fairly directly to legislative activity, which was designed either to legitimise them or to bring them under at least partial control (or both).

In analysing these different forms of interaction, however, historians have been hampered by the fact that the surviving evidence tends to foreground legislation and central government-based initiatives and to downgrade informal, local, court-based changes. For example, the first of the (admittedly oversimplified) scenarios briefly listed above – that in which statutes led to changes that were at least roughly in line with the intentions of those who created them – is the easiest to identify and discuss. Successful parliamentary legislation left by far the clearest records, often produced a printed debate, and usually resulted in the creation of documentation about its implementation because the courts formally recorded their responses to it. The major-court records make it clear, for example, that the legislation on the reimbursement of prosecutors costs introduced from 1752 onwards was broadly successful in its stated aims, although the records also indicate that the courts often went beyond the limitations imposed by statute, giving help to categories of prosecutor that the legislature had excluded.<sup>12</sup> Equally, although recent research has highlighted the similarities between the old police and the new, it is not difficult to establish that the acts of 1829, 1839 and 1856 did change the ways

<sup>11</sup> R. Burn, *The Justice of the Peace and Parish Officer* (London, 13th edn, 1776), iv, 318–19; King, *Crime, Justice*, 87–94; J and T. Chitty (eds.), *The Justice of the Peace and Parish Officer by Richard Burn*, 28th edn (London, 1837), ii, 121; B. Smith, ‘Did the Presumption of Innocence Exist in Summary Proceedings?’, *Law and History Review*, 23 (2005), 191–9; *P.P.*, 1837, xxxi, 8; C. Emsley, *Crime and Society in England 1750–1900* (2nd edn, London, 1996), 204.

<sup>12</sup> King, *Crime, Justice*, 49–52.