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The state of summary justice – BCHS September 2012 (Drew Gray)

Most histories of crime and punishment since the 1980s have placed their emphasis on the jury courts of Assize and quarter sessions, and with good reason. After all it was in those courts that most serious crime was dealt with and the most severe punishments handed down. However, historians are now aware that this concentration on the higher courts is perhaps disproportionate. In reality most people in the eighteenth and nineteenth centuries who encountered the criminal justice system would have done so at a level below the jury courts. Thus, for many people the most significant figure would have been the justice of the peace, or magistrate. And it was the plea, (by Joanna Innes and John Styles in their *Crime Wave* piece), for more understanding of the summary process, that got me started on this in the first place. The purpose of this paper is to take a look the progress that has been made, to offer a few observations on what we know and then to suggest some areas or questions that need more work. In the spirit of the conference I hope this will be as much about what everyone else thinks in discussion as what I think here. I am, I should say, for the most concentrating here on the 18<sup>th</sup> century, although I will say a little about the progress being made in studies of the summary process in the 19<sup>th</sup>.

So let's start with what we know and what research has been done so far.

Whilst there has certainly been a neglect of the topic a small but important body of work has emerged since the 1980s. Perhaps the most important starting point was Norma Landau's study of the Kent bench but this explored the nature of the justices themselves rather than the work that they undertook.<sup>1</sup> More recently Peter King and others have made significant inroads into the subject and have identified a number of key themes for further research. King's pioneering essay on the role of summary proceedings brought together a range of research into justice's notebooks including JPs from Bedfordshire, Essex, the north east of England and London.<sup>2</sup> Work by Douglas Hay has also looked at how masters and servants utilised the summary process. Most other research concerning the magistracy has consisted of case studies of either individual JPs or specific geographic locations. Thus Robert Shoemaker studied the Middlesex bench in the late seventeenth and early eighteenth centuries.<sup>3</sup> His concern was with how the summary process operated as a disciplinary mechanism

for controlling the urban poor. Importantly Shoemaker suggested that urban magistrates had a greater social and legal authority over their communities than their rural counterparts did. This has been developed and sustained by the work of John Beattie and myself, looking at the operation of the City of London's magistrates in the eighteenth century.<sup>4</sup> Beattie noted that the aldermen of the City had no qualms about ignoring the letter of the law in the period to 1750 and frequently sent petty property offenders to the Bridewell house of correction rather than, as statute law demanded, indicting them as petty larcenists and sending before a judge and jury. This practice was continued throughout the second half of the century and therefore preceded much of the nineteenth-century legislation that enshrined this practice in law.

The extent to which this situation prevailed in rural areas needs further research. However while David Lemmings maintains that justices' work (either when they sat in petty session or alone) was 'subject to review by Quarter Sessions, and ultimately by King's Bench' he accepts that in reality JPs had a large amount of discretion available to them and considerable power to act without supervision or consequence.<sup>5</sup> This reiterates the work of Peter King who has noted independence of the summary process and its ability to 'shape, and sometimes to remake, justice as it was practised on the ground'.<sup>6</sup> By the end of the 18<sup>th</sup> century, Lemmings argues that the 'proceedings of the justice of the peace appear to have been remote and oligarchic, and at the lower levels effectively autonomous'.<sup>7</sup> However, there is still much work to do in understanding how justice operated at a local level.

There have been a number of studies of individual justices based upon the notebooks that have survived. In many cases these are little more than transcriptions of the notebooks with a short introduction or commentary. A notable exception is Gwenda Morgan and Peter Rushton's analysis of the notebook of Edmund Tew.<sup>8</sup> Here they examine Tew's role as justice thematically looking at his work with the poor law, in dealing with violence and petty criminality. They argue that Tew was most concerned with maintaining good relations within his community and in acting against 'unneighbourly behaviour'.<sup>9</sup> Tew was first and foremost a negotiator or counsellor rather than someone attempting to act as an agent of social control. Tentative work on two of Northamptonshire's JPs in the period would also appear to echo this conclusion. Phillip Ward of Stoke Doyle in the north east of the county and Sir

William Ward (no relation) of Guilsborough in the south west both appear to have acted to maintain peaceful communities. Other work by Dietrich Oberwiltler has attempted to look at a small number of justices to understand their operations but has been fairly limited in its focus.<sup>10</sup>

So what do we know? I think we are closer to being able to give a brief typology of eighteenth-century JPs. This is not exhaustive and again, I'm quite interested to see how others would describe it but this is my attempt.

For most of the long eighteenth century rural and urban communities throughout England and Wales were served by justices of the peace who dispensed justice, settled disputes and dealt with a considerable workload of administrative business. Each county returned a list of JPs who held office without remuneration in a voluntary capacity. Justices were, in rural and provincial England at least, usually drawn from the patrician class (broadly defined). As members of the nobility and gentry they were ideally suited to a role as mediators within their communities. Men such as the 2<sup>nd</sup> Earl Spencer, who served as a JP in Northamptonshire in the 1790s, were well known and well respected local figures who were used to dealing with people from across the social scale, be they minor servants, trusted lieutenants, or members of the middling sorts. Operating as a JP was a part of the public life of men such as Spencer that might include an interest in politics, the church or the local hunt. Of course, not all JPs in rural England were members of the ruling elite; there were clergymen, such as Edmund Tew in the north east, who were equally used to attending to the needs of their communities and well positioned to act as authority figures.<sup>11</sup> There were also many members of the gentry much less illustrious than Earl Spencer: the quiet hamlet of Stoke Doyle was served by Sir Phillip Ward, a significant landholder and qualified barrister but not a member of the House of Lords, likewise the Surrey JP Richard Wyatt was a man of means – a patron of the arts – but not in Spencer's league.<sup>12</sup> So in provincial England rural communities and small towns were served by a mixture of aristocrats, minor gentry and clergymen JPs.

The picture is mixed again when we look at London. Here magistrates could be, like the lord mayor and aldermen of the City, members of a mercantile elite or semi-professional law men like the Fieldings at Bow Street, or indeed the much criticised

trading justices discussed by Norma Landau. Henry Norris, whose Hackney notebook has been transcribed by Ruth Paley, was described by her as someone who was rich but not quite assured of his social position; ‘he lived like a gentleman, but it was not quite clear that he actually was a gentleman’<sup>13</sup>. Not a criticism that could be levelled at Earl Spencer or indeed Sir Phillip Ward.

What this brief typology reveals is that there was no uniform system of summary justice operating across England and Wales in the 1700s. JPs were drawn from a range of backgrounds and were largely amateur and untrained. Some, Like Philip Ward in Northamptonshire or William Hunt of Devizes<sup>14</sup>, would have had some legal background (as indeed would many educated men in the period), while others, such as Edmund Tew in Boldon would have relied on legal handbooks such as that produced by Richard Burn from the middle of the eighteenth century. Part of the problem for historians of crime and legal history is that while justices were obliged to keep a record of their activities and judgements there was no set form that this record was supposed to take and no obligation to leave a copy of their adjudications behind. So unlike assize and quarter sessions records (which survive in large numbers across the eighteenth and nineteenth centuries, and in a fairly standardised form) the survival of summary records is at best partial and accidental. Much of what we do know therefore, has come from a growing body of justices’ notebooks and papers deposited in county record offices across England.

Let’s look at these problems a little more closely. For a start there are not huge numbers of notebooks. Nor do we yet know exactly how many sets of petty sessions minute books or other related source material is still extant. A comprehensive list of all sources for summary proceedings across the 18<sup>th</sup> century would be very useful (so if someone would like to undertake this task – please let me know). Within these records there is little uniformity. While quarter sessions minute books and rolls are very similar across the long eighteenth century, regardless of which county they cover, justicing notebooks are the product of individual authors. Thus, while they might contain similar information this information is not always presented in the same format and the level of detail recorded varies enormously.<sup>15</sup>

It is possible however, to construct a broad spectrum of justices' notebooks based on the copies that exist. There are those (such as William Hunt's notebook) that cryptically describe the hearing that take place before them. These often simply record names of complainants and those complained about, offence and outcome; there is little or no detail or any hint of the decision-making process. Then there are books (such as Samuel Whitebread's<sup>16</sup>) that perform a similar task but do so with a little more qualitative information (perhaps giving a more detailed account of what was said at the hearing). Finally there are examination books (such as the Deposition book of Richard Wyatt) which, while rich in detail about the cases, often fail to provide information about outcomes.

This categorisation is loose because there is considerable overlap between these different types of document. Not all contain the information about the outcome of the hearings and even if they do they hardly ever provide a rationale for the decisions the justice has arrived at. No wonder historians have preferred the relatively transparent world of the Old Bailey! Along with the issue of uniformity and lack of detailed information comes the important fact that very few of these sources provide runs of information that overlap, thereby making it difficult (if not nigh on impossible) to allow us to do the sort of comparative counting exercises so popular with the vanguard of historians of crime. I attempted this in London for the few years where the Guildhall and Mansion House minute books do cover the same period. So, all in all historians of the summary courts are beset with a multitude of source related difficulties.

But enough moaning from me, what about the questions we need to ask?

I think it is useful to go back to the questions Pete King posed in his 2004 Past and Present article<sup>17</sup>. First he asked **were these hearings the main judicial forums in which most social groups experienced the law?** The resounding answer to this has to be yes – the evidence from Essex, City of London, Wiltshire, Bath, and elsewhere all suggests that that massively more people had experience (directly or indirectly) of the summary process than ever came near to the jury courts of QS or assize.

**Next up he asked what were the main types of cases heard by magistrates?**

This we have certainly made progress with. Overwhelmingly magistrates dealt with Assault, everywhere it seems. There are some regional differences, some to do with proportionality but urban areas have higher levels of assault. Was this because town dwellers were more litigious (harking back again to differences between urban and rural areas, the question of anonymity etc) or was there more petty violence? This needs further work.

All justices dealt with the administration of the Poor law, with requests for relief, settlement examinations, vagrancy and bastard bearers. However there are some problems here partly caused by the ways in which hearings were recorded – notably in the City of London where the recording is cryptic and complicated and it may be that most PL business was heard elsewhere. Also almost every town had a workhouse to which paupers could be sent if they threatened to demand relief from a magistrate, the important issue here is the ability (or otherwise) of the poor to play off the parish against the justices, something Pete had identified as a strategy used by the labouring poor outside of the capital.

**Were plebeian groups as well represented as the propertied amongst those who brought these cases?**

In Essex the labouring poor were prosecuting in nearly half of all assault cases, they dominated in poor law matters.<sup>18</sup> In master and servant cases King and Hay have shown that in the 18<sup>th</sup> century it was more likely to be servants that went to complain before a JP than their employers. Theft remains the only area where the poor tend to be the accused rather than the complainants, which is to be expected. As Pete notes overall this represents ‘a massive plebeian presence amongst users of these courts’.<sup>19</sup> So now I think we need a detailed study across all types of hearing, beyond Pete’s 2004 article. I’d be interested to find out if that work is being done.

**Pete also asked whether the dominant mode of procedure in summary hearings was civil or criminal, arbitrational or judicial?**

The answer is that it is mixed. As King noted justices were the providers of solutions, ‘reflecting the broader common law traditions that still shaped much of the legal process’ in the eighteenth century.<sup>20</sup> There was a great deal of mediation and

arbitration that comes across very much in the minute books of the City of London and in the much more transparent notebook of Phillip Doyle. This can be seen in assault cases but also in other areas such as disputes relating to services, to tax and it is also evident in the taking of settlement examinations. Now I suggest we need to move forward with individual research projects on the types of hearings the justices conducted.

**Finally the big question - How useful were these courts and to whom? Where they the 'people's courts' or is that epithet too easily bestowed?**

Pete and Joanna Innes have shown that considerable numbers of the idle and disorderly were locked up in gaols and bridewells after a short summary hearing.<sup>21</sup> Thus it's true to say that the JPs were certainly part of the disciplinary armoury of the parish, employers and the elites. As PK notes it 'would be unwise to conclude that the summary courts of the 18<sup>th</sup> century were neutral arbitral tribunals'...but equally he notes that 'almost every social group could and did make strategic use of these judicial forums'.<sup>22</sup> The ability of the poor to use the summary courts of the metropolis in the late 18<sup>th</sup> century was to some extent hamstrung by the nature of the City justices. Here there was a relatively united mercantile elite, quite unlike the more individual and independent justices of the counties. Pete has argued that in the countryside the poor were able to 'triangulate, to use the relatively distanced justice offered by most rural magistrates against the very localized financial interests of middling vestrymen and employers'.<sup>23</sup> However, this may also have been undermined in areas where justices were few and far between or the geography much less kind than in the south east of England. I'd like to see more work that explores this issue and in particular work that looks at this in the context of specific hearings; so in this respect it needs to be tackled alongside the previous question about the nature of hearings.

So finally then having looked at Pete's questions what else do we need to know about summary proceedings?

We are getting better at understanding how these JPs operated, and there are some clear consistencies but much still needs to be done in understanding how they arrived



at their decisions. Did they rely on advice manuals such as Richard Burn's or the earlier works of Blackerby, Barlow or Shaw? Did they follow them? Did this vary between the centre and the peripheries? We would expect members of the educated patrician class to have some grounding in the law as it affected them but very few Justices were trained lawyers. Did they apply statute law? Could they even begin to understand it? After all Daines Barrington and William Blackstone both criticised the state of statute law in the period, as David Lieberman has shown<sup>24</sup>. Were they making law, or reshaping law, were they quite as independent as has been suggested?

To what extent could you choose which JP to see? Was this restricted in towns or in more isolated areas? This question I think goes to the heart of the issue of the use of the law at summary level. At the Guildhall justice room the magistrates sat in rotation so one's opportunity to pick and choose was restricted. However, what about the other justices of the capital? Would complainants visit the Fieldings for certain things or seek out Justice Wilmot instead?

We need to know more about how women used the summary process and also the extent to which the summary process impacted women's lives; was it in fact harsher than the jury system? I found that proportionally more women than men were being imprisoned after summary hearings in the City suggesting that for certain sorts of women, petty thieves and prostitutes, the experience of summary justice could be a chastening one. Throughout the sources women appear in not inconsiderable numbers to prosecute their men folk for assaults upon them. Does this suggest the courts were useful to them? Or merely that when they had exhausted all other avenues this was a last resort? Nell Darby is looking at the importance of gender within the summary process in rural England but we need similar studies that explore the importance of gender in the urban context.

In trying to answer these and other questions I think we need to use the sources that do exist – this is certainly an area of criminal justice history that requires us to go to where the sources are. It is not so easy to pick a town or region and try and analyse it given the reality paucity of surviving material.

Finally although this paper has addressed itself to the summary process in the 18<sup>th</sup> century, I should also point out that there is much less work on the development of police court magistrates in the Victorian period and at the gradual evolution of the modern magistrates court in the twentieth century. Jennifer Davis' work on the London Police courts is a notable exception here but her seminal essay of 1984 has surprisingly not led to detailed research in this area. Bruce Smith has looked at the London Police courts in the mid 18<sup>th</sup> and early 19<sup>th</sup> century and has argued that many defendants accused of simple larceny were dealt with summarily because it had become increasingly difficult to convict them before juries. He suggests, quite plausibly, that there was two-tiered system of justice in place; while defendants at old Bailey and elsewhere had begun to enjoy a reasonable level of protection in court this was notably absent when the juries were removed as they were in summary proceedings. This led in turn to what he describes as a 'smattering of attorneys' offering legal help to the accused in the police courts.<sup>25</sup> The involvement of lawyers in the summary process could do with more work.

There has been some work on the magistrates of the later 19<sup>th</sup> century: Barry Godfrey has looked at Crewe in the 19<sup>th</sup> and early 20<sup>th</sup> centuries; Jo Turner has discussed female offending in Stafford in the 1880s and Michelle Abraham has explored the use of the summary process by female victims of violence in Northampton and Nottingham in the 1880s and 1890s. Social and cultural historians have also used the police courts of London to shed light on other areas of interest but as far as I am aware there has not been a systematic study of the courts – again records are few and far between but the newspapers can help here. A detailed and extensive study of these courts would be of significant interest for historians of crime and those interested in social relations in the nineteenth century. In particular I would like to see more work on how the summary courts evolved in the 19<sup>th</sup> century, taking into consideration the impact of legislation and of local policy making.

Summary justice is not easy to research but it continues to be a very important area for us to understand – especially in the light of Peter King's recent counterfactual history of punishment (the so-called 'bloodless code'). The difficulties in researching may well explain the shortage of work in this area compared with the wonderful accessibility of more recent digital sources – but that should not stop us trying.

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- <sup>1</sup> Norma Landau, *The Justices of the Peace, 1679-1760*, (University of California, 1984)
- <sup>2</sup> Peter King, 'Summary Courts and Social Relations in Eighteenth-Century England', *Past and Present*, 183 (2004)
- <sup>3</sup> R. Shoemaker, *Prosecution and Punishment: Petty crime and the law in London and rural Middlesex, c.1660-1725* (Cambridge UP, 1991)
- <sup>4</sup> J. Beattie, *Policing and Punishment In London: The Limits of Terror* (Oxford UP, 2001); D. Gray, *Crime, Prosecution and Social Relations in the City of London, c1750-1800*
- <sup>5</sup> David Lemmings, *Law and Government in England during the Long Eighteenth Century: from consent to command*, (Basingstoke, 2011) 46
- <sup>6</sup> P. King, *Crime and Law in England, 1750-1840: Remaking Justice from the Margins*, (Cambridge, 2006), 22
- <sup>7</sup> Lemmings, *Law* 54
- <sup>8</sup> G. Morgan & P. Rushton, 'The Magistrate, the Community and the Maintenance of an Orderly Society in Eighteenth-Century England', *Historical Research*, 76:191 (2003)
- <sup>9</sup> Morgan & P. Rushton, 'The Magistrate', 30
- <sup>10</sup> Dietrich Oberwittler, 'Crime and Authority in Eighteenth-Century England: Law Enforcement on the Local Level. *Historical Social Research* (15/2 1990)
- <sup>11</sup> G. Morgan and P. Rushton (eds), *The Justicing Notebook (1750-64) of Edmund Tew, Rector of Boldon* (Woodbridge, 2000)
- <sup>12</sup> E. Silverthorne (ed), *Deposition book of Richard Wyatt, JP, 1767-1776* (Guildford, 1978)
- <sup>13</sup> R. Paley (ed) *Justice in Eighteenth-Century Hackney: the Justicing Notebook of Henry Norris and the Hackney Petty Sessions Book* (London, 1991), xiv
- <sup>14</sup> E. Crittal (ed), *The Justicing Notebook of William Hunt, 1744-1749* (Devizes, 1982)
- <sup>15</sup> This is even the case where records are quite extensive – such as the petty session minute books of the City of London's two justice rooms, Guildhall and Mansion House. These vary according considerably across the period 1750-1800 and this is in part examined by the diligence of the clerk of the court in writing down what took place before him. See Gray, *Crime*, 9-11
- <sup>16</sup> A.F. Cirket (ed), *Samuel Whitebread's Notebooks, 1810-1, 1813-14* (Ampthill, 1971)
- <sup>17</sup> King, 'Summary Courts'
- <sup>18</sup> P. King, 'The Rights of the Poor and the Role of the Law: The Impact of Pauper Appeals to the Summary Courts 1750-1834.' in S. King (ed.), *Poverty and Relief in England 1500-1880* (Forthcoming)
- <sup>19</sup> King, 'Summary courts', 145
- <sup>20</sup> King, *Crime and Law* 29
- <sup>21</sup> Joanna Innes, 'Statute law and summary justice in early modern England' (unpublished paper)
- <sup>22</sup> King, *Crime and Law* 161
- <sup>23</sup> Ibid 162
- <sup>24</sup> David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge UP, 1989)
- <sup>25</sup> Smith, Bruce P., 'The Presumption of Guilt and the English Law of Theft, 1750-1850'. *Law and History Review* 23.1 (2005); see also Norma Landau, 'Summary Conviction and the Development of the Penal Law'. *Law and History Review*, 23 (2005). For Bruce's reply see 'Did the Presumption of Innocence Exist in Summary Proceedings?'