

Conceptions of Justice, 1770-1870

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Abstract

This research project explores the normative content of justice within the courts of eighteenth- and nineteenth-century England. The project involves analysis of the discourse and practice of national and local courts of England to explore ways in which justice was used to reach decisions. By doing so, it has been possible to illustrate that the invocation of justice in legal discourse was a means of advancing an array of other values that were themselves in tension and that 'justice' was therefore a flexible and, ultimately, fluid concept, that obscured as well as enabled decisions based on those other values. The project suggests that an understanding of justice as consisting of such a package of frequently conflicting values can deepen both understanding and critique of judicial practice.

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Author's Declaration

The data used in this thesis was collected from a variety of archival sources held at the North Yorkshire Record Office, the West Yorkshire Record Office, the Surrey History Centre, the Lancashire Record Office, the Cheshire County Record Office and the East Sussex Record Office. All references are fully acknowledged within the text.

I hereby declare that I am the sole author of this thesis and that I have not previously presented any of the material contained herein.

Chapter 1: Introduction

The Prosecution of Mr and Mrs Bird

On 5th August 1850, Robert Courtice Bird and his wife, Sarah Bird, were arraigned before Mr Russell Gurney, esquire, QC, sitting as Commissioner of Oyer and Terminer at the Devon Assizes in Exeter. The indictment put to them alleged that they had, on numerous occasions between 1st November 1849 and 5th January 1850, beaten and ill-treated Mary Ann Parsons in the parish of Buckland Brewer in the County of Devon with intent to wound her and to do her grievous bodily harm.¹

Upon their being invited to plead, Mr Slade, counsel for Mr Bird, informed the court that both defendants intended to enter the plea of *autrefois acquit*; a plea that they could not be tried for these offences because they had already been tried and acquitted of them on a previous occasion.² What was unusual in the Bird's case was that the previous trial had been for murder.

The Birds were a farming family in the parish of Buckland Brewer in Devon and had, at some point around October 1849, applied to the Bideford Union workhouse for a domestic servant. The master, a Mr Sermon, had recommended that the Birds take Mary Ann Parsons, a fifteen-year old girl he was later to describe as 'strong and healthy but not particularly bright.'³ According to her mother's account, that was the last she had seen or heard of Mary Ann until Mr Bird appeared at the workhouse again on 4th January 1850 to inform the master of her death and to ask for a coffin to bury her.⁴

The circumstances of the death had necessitated a coroner's hearing at which a verdict of wilful murder was entered. Somewhat unusually but, according to *The Exeter Flying Post*, because the crime was 'of such an unusual nature, and of enormity seldom heard in this Christian country', the matter had then also been examined by the district Magistrates, the Rev J.T. Pine Coffin and James Gould, esq. Mary Anne's mother and Mr Sermon both testified, as did neighbours of the Birds. The account given suggests that although Mary Anne had started well at the farm, by November Mrs Bird was complaining to Mr Sermon of her behaviour and Mr Sermon had

¹ 'Assize Intelligence' *The Morning Chronicle* (London, 7 August 1850) 7

² William Blackstone and James Stewart, *Commentaries on the Laws of England ... The Twentieth Edition, Incorporating the Alterations Down to the Present Time* (20th edn, Edmund Spettigue 1841) 597

³ 'Murder in North Devon' *Trewman's Exeter Flying Post or Plymouth and Cornish Advertiser* (Exeter, 17 January 1850) 8

⁴ *Ibid*

suggested they 'ought properly to chastise her'. In the ensuing weeks neighbours reported seeing Mary Ann cut, bruised and bleeding and to have observed her being beaten, sometimes with a hazel rod or a 'furze stub.' The circumstances of the case had caught the attention of the local populace, who had gathered at the time of the hearing, according to the *Flying Post*, intent on 'lynch law'.⁵ The matter had also immediately caught the attention of a wider public, being reported across the country.⁶

The defendants' first trial, the one for murder, took place at the Exeter Spring Assizes in 1849 before Talfourd J, one of the Justices of the King's Bench. The prosecution case was that Mary Anne had been beaten on numerous occasions in November and December 1849. Each attack had been distinctly pleaded on six counts on the indictment. A number of neighbours were called to testify to having directly or indirectly witnessed the beatings. Two surgeons were also called. Dr Turner, who had examined the body when the death was reported, testified to the number of injuries that Mary Ann Parsons' body had suffered. This was confirmed by Dr Edge, one of the surgeons at the Exeter hospital. Both concluded that the immediate cause of death was a blow to the head. The prosecution had relied on the assaults in the six counts as evidence either that 'a long series of ill-treatment, by both prisoners, had produced the weakness and congestion of the brain, through which the death had been caused' or (additionally) as evidence of the hostility of the two defendants towards Mary Ann that explained a final act of killing. The difficulty, however, as the judge saw it and as it was argued by those representing the defendants, was that there was no direct evidence as to who had struck the final, fatal blow and therefore 'there was no evidence to show that this blow was inflicted by the prisoners; and even if the jury thought it was, how were they to say which of the prisoners had inflicted it?'⁷

Rowe, for the prosecution, had then suggested that it might be possible for the defendants nonetheless to be convicted of the assaults that had been proven against them during the course of the trial. That this was possible was a result of the Offences Against the Person Act 1837, which had changed the law by providing that 'where the Crime charged shall include an Assault against the Person, it shall be lawful for the Jury to acquit of the Felony, and to find a Verdict of

⁵ Ibid

⁶ 'Murder of a Parish Apprentice' *The Morning Chronicle* (London, 4 February 1850) 7; 'Atrocious Cruelty' *The Hull Packet and East Riding Times* (Hull, 8 February 1850) 7; 'Murder of a Parish Apprentice' *The Northern Star and National Trades' Journal* (Leeds, 9 February 1850) 6; 'Murder of a Parish Apprentice' *The Ipswich Journal* (Ipswich, 9 February 1850) 7; 'Criminal Record' *The Examiner* (London, 9 February 1850) 92; 'Horrible Cruelty' *The Lancashire Gazette and General Advertiser* (Lancaster, 9 February 1850) 2

⁷ 'Assize Intelligence: Western Circuit - Exeter, March 22' *The Morning Chronicle* (London, 25 March 1850) 7; 'Multiple News Items: Western Circuit' *The Standard* (London, 25 March 1850) 3

Guilty of Assault against the Person indicted.’⁸ This Talfourd J declined to do on the grounds that the powers under s 11 only applied where the assault arose out of the actual blow that was alleged to be the cause of death. In the absence of clear evidence as to which blow this was, he concluded, the Act could not apply.⁹

The trial and the acquittal were widely reported and raised a variety of responses.¹⁰ From outside the law, this case raised worrying questions about what the legal system was for. There had been a failure of something that commentators were content to call ‘justice’. The Political Examiner argued that there was something more than the technical application of laws at stake:

*Reason down the feeling as we may, the desire for retaliation is instinctive and indestructible. It is the wild justice that precedes the discrimination of moral and penal laws and not only survives their enactment, but continues one of the safest guarantees for their effectual administration and observance. Innate and indelible as benevolence itself is this vindictive sentiment in man; and quite as useful in the economy of nature. It is not to be allowed to usurp the place of reason, it is not to be blindly or implicitly obeyed; but its instincts are necessary and right, and its effects good in the main. The general disappointment at the result of the trial in Exeter is entitled to respectful attention ... To guard against the future impunity of such offenders as Robert and Sarah Bird, and against all evils implied in such shock to decency and justice, it is necessary to inquire whether the escape of the guilty has been attributable to the defective state of the law, or to the conduct of its administrators.*¹¹

The Northern Star also perceived a gap between legal processes and justice:

It would seem that what is called justice in this country is dispensed, not upon any fixed principle, but according to the caprices of the presiding Judge for the time being. A case has just occurred, which must rouse universal indignation and disgust

⁸ Offences against the Person Act 1837 (7 Wm 4 & 1 Vict C 85), s 11; T.N. Talfourd and R.P. Tyrwhitt, *Dickinson's Guide to the Quarter and Other Sessions of the Peace* (6th edn, 1845) 555

⁹ *The Morning Chronicle* (London, 25 March 1850)

¹⁰ ‘Spring Assizes’ *The Times* (London, 22 March 1850) 6; *The Standard* (London, 25 March 1850); ‘Acquittal in the Teeth of Facts’ *The Bradford Observer* (Bradford, 28 March 1850) 4; ‘Murder by Torture’ *Freeman's Journal and Daily Commercial Advertiser* (Dublin, 28 March 1850) 4; ‘Assize Intelligence - Exeter’ *The Northern Star and National Trades' Journal* (Leeds, 30 March 1850) 4

¹¹ ‘Miscarriage of Justice’ *The Examiner* (London, 30 March 1850) 1

*throughout the country, and tend more to weaken any sentiment of respect for the law and its administrators than the most inflammable and seditious languages.*¹²

For the *Northern Star*, with its Chartist associations, the class partiality of English justice was the focus of the criticism.¹³ For the *Times*, it was a failure of the law to live up to public expectations.¹⁴ 'Mr Justice Talfourd has greatly disappointed public expectation ...' the paper thundered. 'We look forward with indescribable apprehension to his further administration of criminal justice.'¹⁵

Not all responses were critical of the legal outcome. *The Standard*, for example, criticised *The Times'* polemics. Justice was not to be achieved on a case-by-case basis but through observance of the justice contained in a settled legal code:

*Now judges and juries have not a general commission to do moral justice. They are entrusted with the trial of particular criminals for particular offences. The offence must be accurately described and as accurately proved; or however detestably wicked the accused may be proved to have been, he must be acquitted. If the facts prove a deeper moral, or even legal guilt than that with which he is charged ... the prisoner is entitled to be acquitted. It is unnecessary at this time of day to defend the inflexibility of these rules of criminal jurisprudence. The system which Hale and Foster have defended requires no other champion and we doubt whether any one sane man would alter the system which the natural wisdom of the most humane and constitutional judges has built up.*¹⁶

By the following week it was being reported that the government had, unusually, interceded to press for a further prosecution.¹⁷ Given the principle of double jeopardy, however, it would not be possible for another homicide prosecution to be pursued. Double jeopardy had a well established provenance. Stephen's *New Commentaries* described it as 'a universal maxim of the common law of England, that no man is to be brought into jeopardy more than once for the same

¹² 'Killing No Murder' *The Northern Star and National Trades' Journal* (Leeds, 30 March 1850) 1

¹³ *The Northern Star and National Trades' Journal* (Leeds, 30 March 1850)

¹⁴ *The Times* (29 March 1850)

¹⁵ Editorial, '29th March 1850' *The Times* (29 March 1850) 5

¹⁶ Editorial, *The Standard* (London, 27 March 1850) 1

¹⁷ 'Thursday Evening, April 4, 1850' *The Nottinghamshire Guardian and Midland Advertiser* (Nottingham, 4 April 1850) 2

offence.¹⁸ Instead the Birds would be prosecuted for the assaults they had inflicted. *The Times* was scathing:

*It appears that in the place of the form of trial more appropriate to their offence they are now to be indicted for a common assault upon the person of their victim. Under the circumstances what else can be done than to have recourse to some such clumsy expedient. In consequence of the scandalous mismanagement of the original trial there is now no reasonable expectation of rewarding to them such a measure of punishment as their unutterable brutality deserved.*¹⁹

The defendants were therefore tried again at the Summer Assizes in 1850. Only three of the original six counts were used, one assault taking place on 5th November, one taking place in late November or early December and a third taking place on 11th December. The defendants entered their *autrefois acquit* plea but the trial judge continued the trial and the defendants were found guilty.

The matter was therefore taken to the Court of Crown Cases Reserved.²⁰ In November, 1850, it was argued before five common law judges: Sir Frederick Pollock, the Chief Baron of the Exchequer, Wightman, V Williams and Talfourd JJ, and Martin B. Because they could not agree on the verdict, the matter had to be argued again before all fourteen common law judges in January 1851.

Slade and Cox appeared again for Mr and Mrs Bird and argued that the fact that the defendants had been 'put in peril' of a conviction for assault at the first trial meant that they could not, as a matter of law, be prosecuted for such a crime a second time. On a broad reading, the Act enabled an assault conviction for any assault alleged or revealed in the proof of the felony as part of that transaction. This reading meant that the Birds *had* faced the danger of conviction at the first trial and therefore should not have been tried for assaults a second time.²¹ On another, narrower, reading, the Act only enabled an assault conviction in respect of the actual act alleged to be a felony where that offence was legally or factually incomplete (for example in the case of a robbery where actual theft could not be proven).²² If this interpretation was accepted, the Birds

¹⁸ Henry John Stephen, *New Commentaries on the Laws of England. (Partly Founded on Blackstone)*, vol 4 (Butterworths 1845) 404 and see also John Frederick Archbold, *The New System of Criminal Procedure, Pleading and Evidence* (Butterworths 1852) 111. Both sources based these maxims on *Hawkin's Pleas* (vol 2, c 35) and Hale's Pleas of the Crown (vol 2, 241)

¹⁹ Editorial, '2nd April 1850' *The Times* (2 April 1850) 5

²⁰ *R v Bird and Bird* (1851) 2 Denison 94; 169 ER 431

²¹ *ibid* 169, 172-3, 190-1, 203

²² *R v Birch* (1846) 1 Den 185, 169 ER 204; *R v Bird and Bird* (fn 20) 109-10, 153-4, 160, 163, 180, 183

would not have faced the danger of a conviction for assault at their first trial because the lack of evidence of a clear act of killing meant that none of the assaults on the original indictment could have been *the* felonious assault.²³

The point therefore turned on the exact meaning of the 1837 Act. It was an issue that was to split the judges. Of the fourteen judges who had heard the appeal, eight confirmed the assault conviction²⁴ and six concluded that the defendants were entitled to the benefit of their *autrefois* plea.²⁵ The judgment was complex, not least of all because deciding that these particular defendants were appropriately convicted depended on an interpretation of the 1837 Act that appeared in general to favour defendants.

At the heart of the judicial debate, therefore, was the interpretation of this Act. The first recourse of the judges on both sides was the techniques of statutory interpretation. Talfourd J (for conviction) contrasted a 'true literal interpretation' with alternatives 'not being accordant with the object of the statute, nor justified by the language of the statute, nor founded on any intelligible principle,'²⁶ and 'founded on arbitrary conjecture.'²⁷ Martin B (against conviction) contended for the 'ordinary' meaning of the statute unless absurd or 'repugnant' to Parliament's will.²⁸ Coleridge J (for the conviction) sought to avoid 'a more technical, or ... strictly scientific rule of construction.'²⁹ Sir John Jervis (against), sought 'the plain common-sense meaning of every word used' and Alderson B (against) looked to a 'true construction of the statute' to the same end.³⁰

The problem was that techniques of statutory interpretation did not provide a sure route to a clear conclusion. Sir Frederick Pollock, the Chief Baron of the Exchequer (for the conviction), explained the problem:

I am not surprised that there should be considerable difference of opinion among the assembled Judges; we are called upon to put a construction upon an Act, which, in very general terms, has introduced an anomaly in the administration of the criminal law. The distinction between felony and misdemeanor is as old as the law itself, and many important consequences follow from that distinction ... I think it cannot be

²³ *R v Bird and Bird* (fn 20) 143-4, 153, 160, 165, 177, 187, 208, 212-3, 218

²⁴ Pollock CB, Patteson J, Coleridge J, Wightman J, Cresswell J, Erle J, V Williams J and Talfourd J

²⁵ Lord Campbell CJ, Jervis CJ, Parke B, Alderson B, Maule J and Martin B

²⁶ *Ibid* 150-1

²⁷ *Ibid* 144

²⁸ *R v Bird and Bird* (fn 20) 132

²⁹ *Ibid* 176

³⁰ *R v Bird and Bird* (fn 28) 198

*matter of surprise, when all these various cases may arise, and the statute consists, as regards this part of it, of a few general words only applicable to all, that much doubt may arise as to their meaning, when it is necessary to apply the same words to cases differing so much from each other.*³¹

There was more, however, than ambiguity to contend with; the Act was novel and interpretations being pressed offended some fundamental principles of Victorian legal practice. This case was not unusual in that respect. By the 1850s judges were having to accommodate the wishes of an increasingly energetic Parliament prompted by an increasingly energetic legal reform movement³², one that was seen by those within legal practice not to legislate with enough care. Coleridge J explained that here, in seeking to solve a ‘commonly occurring evil ... the framers were not careful to observe the precise conditions of the existing criminal law.’³³ It was worse, in fact, than that. They had not only failed fully to incorporate the law into existing principles: they had changed them. ‘Indeed,’ he continued, ‘the remedy is founded on an avowed innovation upon it.’³⁴ Coleridge was speaking against allowing the Birds’ appeal. Parke B, who was in favour of the appeal, was no more happy with Parliament for having put the judges in this position, describing the idea of an innovation by the Act as ‘a departure from the clear and intelligible rules of the common law, and has produced no inconsiderable inconvenience.’³⁵

In resolving the ambiguities of such legislation, judges looked beyond the letter of the law for other bases for deciding the case, bases to which they could attach their interpretations. The sorts of things that they looked to will feature within this analysis as concepts of justice, values that defined how lawyers understood the making of appropriate decisions. Not all of these concerns were labelled as ‘justice’ by the judges. In fact many of them were not. Nonetheless they were concepts to which, as this thesis shall seek to show, the label could be and frequently was attached.

One concern that divided the judges in *Bird* was how a risk of prosecution should be understood. This raised questions about the role of legal institutions at the trial and, therefore, about how trials were to obtain accurate (or, in one sense, ‘just’) outcomes. Had there been a risk of

³¹ Ibid 207-8

³² K. Theodore Hoppen, *The Mid-Victorian Generation, 1846-1886* (Clarendon 1998) 201; Michael Lobban, ‘Old Wine in New Bottles’: The Concept and Practice of Law’ in Arthur Burns and Joanna Innes (eds), *Rethinking the Age of Reform: Britain 1780-1850* (Cambridge University Press 2003) 134-5; Boyd Hilton, *A Mad, Bad and Dangerous People?: England 1783-1846* (Clarendon Press 2006) 602, 606

³³ *R v Bird and Bird* (fn 28) 176-7

³⁴ Ibid

³⁵ Ibid 200

conviction simply because the matter was raised by a prosecuting lawyer or included on an indictment? Was it because evidence on the matter had been put before the jury? Was there only such a risk if the judge left the matter to the jury? This was more than a sterile lawyers' debate.

That the fate of a defendant could be determined by decisions of a lawyer was, for Erle J, a troubling conclusion:

If the prosecutor is found to be mistaken in supposing the assaults conducted to the death, and the prisoner is to be acquitted of felony, it is contended, that he must then be convicted of all the assaults which have been proved; but the Legislature cannot have intended that the mistake of the prosecutor should justify an unfair trial.³⁶

Sir Frederick Pollock was equally troubled with the idea that a verdict could depend 'upon the mistake or blunder of the prosecutor, or of his Counsel, or of any of the witnesses; it depends upon the truth itself, as it may come out in evidence and be found by the jury.'³⁷ He went on to consider it 'contrary to first principles, in administering the criminal law' that a person could be convicted 'because some blundering clerk of assize has drawn an indictment, or some rash prosecutor has made an accusation, or some mistaken or incredible witness has associated, by the indictment, by the accusation, or by the evidence, this simple assault with a felony.'³⁸ Such perceptions carried with them particular notions of what an accurate verdict was and how it was determined. Patteson J, for example, was troubled by conclusions that defendants risked convictions 'merely because, in drawing the indictment, they have been so charged, wrongly, and contrary to the real state of the facts.'³⁹ To speak of the facts in such a way was to make particular conclusions about facts and about how truth was to be achieved. For many judges in the majority a person could only be at risk of a conviction if evidence had been left to the jury on that point.⁴⁰ In doing so, they were re-examining the issue of the relative roles of judges and advocates in criminal trials.

In this sense the debate in *Bird* as to whether it was lawyer's suggestions or judicially filtered evidence that create such risks reopened issues that had simmered within judicial and legislative debates in the early decades of the nineteenth century, a disagreement about the adversarial

³⁶ *ibid* 161

³⁷ *ibid* 208

³⁸ *ibid*

³⁹ *R v Bird and Bird* 188

⁴⁰ *ibid* 153 (Williams J), 159 (Erle J), 178-9 (Coleridge J), 185 (Patteson J)

nature of criminal trials. This disagreement had centred around the enactment of the Prisoner's Counsel Act in 1837 and the exploration of its consequences.⁴¹ On one view neutral judges were better in ensuring the truth than hired partisans.⁴² This view reflected a lingering suspicion, still significant among some of the senior judiciary, of the proper role of lawyers at trial. This suspicion underpinned a refusal by these judges to see any danger of a conviction except from evidence *properly filtered by effective judicial processes*. As evidence was judicially filtered, there was no danger of unfairness because defendants were in no danger from convictions on inadequate evidence and half-developed theses. A greater danger stemmed from the unpredictable consequences of basing the case on the content of the indictment or the matters mentioned in a lawyer's speech.⁴³

On the other hand, under the classic logic of adversarial trial, there was no single truth to be obtained by the trial: there were simply conflicting accounts of truthfulness to be offered to jurors from which they were to construct their own sense of truth.⁴⁴ It was this 'laissez faire' notion of truth that was increasingly coming to dominate criminal trials during the middle decades of the nineteenth century⁴⁵ and which informed the perception of the case by judges in the minority. A defendant would, on this view, be at risk from any allegations put forward at trial.

Concerns about accuracy and truth manifested in other ways too. For Erle J, accurate outcomes and a concept of fairness were associated with a judicial concept of a process to which the name justice could be attached:

It is important for public justice to conduct trials for murder with unity of attention, to free the Judge from the technicality in which we are now involved, and the jury from referring the evidence to three alternatives, murder, assault, and acquittal; but it is imperative to release a prisoner on such a trial from liability for various assaults. If he is liable to be convicted, of course he should have full notice and opportunity for defence ... [T]he trial would not appear to me to be fair if the prisoner, when defending himself for murder, is also called on for a contingent defence against

⁴¹ David J. A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865* (Clarendon Press 1998) 164, 173-4

⁴² Lord Lyndhurst, *HL Deb* (26 June 1836); see also *ibid* 72

⁴³ *Ibid* 128

⁴⁴ *Ibid* 124-5

⁴⁵ Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge 2011) 63; Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1991) 71

*charges for several alleged assaults in the course of several weeks, some of which may be open to contradiction, others to justification, and others to mitigation.*⁴⁶

Lord Campbell, who gave the final judgment, also associated the outcome in the case with the attainment of justice. He was the only judge in fact to endorse the 1837 Act, calling it a 'very reasonable law,'⁴⁷ enacted to cure the rigidity and technicality of the common law, and the resultant danger that a defendant who could not be convicted of a felony either escaped completely from his deeds or was subject to the harassment of two trials:

*In the former event, public scandal was given by a failure of justice, and in the latter, the accused party was unnecessarily harassed, and unnecessary expense and trouble were occasioned by a second trial.*⁴⁸

Like the newspaper commentators, judges invoked concepts of justice to identify the solutions they should reach. Both Sir Frederick Pollock and Sir Alexander Cockburn QC also spoke of the 'failure of justice.' Like the newspapers, this was primarily a concern about the outcome of the case. For Pollock this failure was wrongful conviction at the first trial; for Cockburn, it was the more general risk of defendants escaping without any censure where evidently guilty.⁴⁹ Martin B, too, saw the function of the 1837 Act to 'bring the offender to justice.' In fact, the Act was particularly associated with the attaining of justice. Talfourd noted that what the Act sought to achieve might be 'extremely convenient ... where, on failure of the greater charge, an immediate punishment of proved criminality is expedient for the ends of justice.'⁵⁰ Jervis CJ also spoke of the statute as creating a rule that would provide a more reliable route 'best suited to the justice of the case.'⁵¹ For Lord Campbell this was the 'failure of justice' that the Act was intended to prevent.⁵² Clearly there was a sense that there was a right answer to be achieved. It was also recognised by judges on both sides of the debate.

However, this 'right' answer was, for these judges, a legally right answer and justice referred to processes and practices that ensured rights answers generally but this sense of 'right' given a particularly legal quality, as Cockburn's argument suggested:

⁴⁶ *R v Bird and Bird* (fn 28) 161

⁴⁷ *Ibid* 217

⁴⁸ *Ibid* 217-8

⁴⁹ *R v Bird and Bird* (fn 28): 108 (Pollock), 109 (Cockburn)

⁵⁰ *Ibid* 151-2

⁵¹ *Ibid* 210

⁵² *Ibid* 217

Suppose A. indicted for a felony, the case proved; the Judge sees that the jury are unwilling to convict, and that if they have the loophole of a verdict of assault, they would avail themselves of it; must the Judge give them such loophole? Surely this statute cannot be construed to make it imperative on the Judge to be a party to such a defeat of justice.⁵³

There was, therefore, a judicial sense of justice, one that only approximately reflected any sense of justice to be expected from a jury or, for that matter, the newspapers. What seemed to be a commonly understood concept was given a meaning that cohered with legal values of rule-mindedness, consistency and predictability. Talfourd's observation about the ends of justice was followed by the caveat that the Legislature had never intended to give a court any discretion to allow a jury to convict on a lesser count, 'considering that the rule of law ... may apply to cases entirely dissimilar in moral character to the present, and in which a discretion, extended by mere accident, may work liabilities which the law never contemplated.'⁵⁴ Coleridge equally suggested that such a limit on discretion was something that 'justice requires.'⁵⁵ So too Erle's reference to 'the interests of public justice' had also required a restrictive application of the Act for the purpose of specific procedural ends, the 'unity of attention' of the jury on specific points of deliberation.⁵⁶ His reference to public justice was more than a synonym for the deciding of criminal cases: it carried normative content. To invite the jury to evaluate a multiplicity of issues in the way proposed by the defendant would undermine the accuracy and fairness of deliberations and thus 'a sacrifice of justice.'⁵⁷

This judicial discourse on justice shared basic meanings with a wider social conception of justice: it was clearly related to getting the result right. It was however, by having been embedded within legal discourse and used for determining legal outcomes, different in its content and quality.

In fact, given the nature of the case and the media indignation at the original acquittals, it is perhaps surprising that the judgments cited so far made so little of what could have been argued to be the essential justice of punishing the defendants by endorsing the conviction. The two defendants had been responsible for a fifteen-year-old girl who was alleged to have been savagely beaten for two months and then killed by a blow to the head. Having been acquitted of

⁵³ *ibid* 115: although not stated explicitly this may be a concern on the part of the jury of convicting in capital cases, an instance of Blackstone's 'pious perjury': William Blackstone, *Commentaries on the Laws of England* (3rd edn, John Exshaw 1769), vol 4, 239

⁵⁴ *R v Bird and Bird* (fn 28) 151-2

⁵⁵ *ibid* 175

⁵⁶ *ibid* 161 (see page 10 above)

⁵⁷ *ibid* 162

murder, they were prosecuted again, the assaults alleged to have constituted the killing, and a jury had found that they had committed those assaults. It does not seem to have been doubted that the defendants had committed various brutal attacks on the victim. It was not this that appears to have influenced the thinking of the judges. In determining the appeal, the simple justice of the public and the jury was not what the judges seem to have felt the courts should achieve.

None of the judgments of the majority explicitly suggested that the punishment of the defendants in this particular case was either morally or factually appropriate. In fact the only one of the fourteen judgments who addressed the issue was Lord Campbell. His observation shows something of the relationship between legal and wider senses of a just result. In opening his judgement, he said:

After long and anxious deliberation, I have come to the conclusion, that in this case the former acquittal is a bar to the present prosecution. I should feel deep regret if great offenders were to escape punishment, but the due administration of criminal justice requires, that the forms of judicial procedure should be observed. These forms are devised for the detection of guilt, and for the protection of innocence. In the present instance, the defence does not rest upon a mere technicality, but upon the sacred maxim, that "no one ought to be twice tried for the same cause."⁵⁸

This 'due administration of justice' possessed qualities that were different from the simple accurate deciding of individual cases however much this was, as he said, at the centre of what justice was seeking to achieve. That being the case, as Campbell's comment recognises, justice meant seeking to maximise accuracy and appropriateness of outcomes by processes designed for such a purpose. Justice, as applied to court processes, had to mean something relative rather than transcendent.⁵⁹ It is that legally constituted conceptualisation of discourse that is the subject matter of this thesis. It is not an examination of rules of law but of a discourse about a concept that was common within legal debates and adjudications and which had clear normative content and practical function. It influenced outcomes and it impacted upon legal understandings. It was also profoundly ambiguous, a flexible rhetorical tool that could be used to promote or justify a wide variety of values or conceptions.

⁵⁸ Ibid 216: Lord Campbell was also the only judge to openly suggest that Talfourd J should have allowed such a decision to be made by the original jury in the first trial: ibid 216

⁵⁹ Leopold Jaroslav Pospisil, *Anthropology of Law. A Comparative Theory* (Harper & Row 1971) 256: on transcendent distributive justice see Amartya Sen, *The Idea of Justice* (Penguin 2010) 10-2, 15-8, 95-105

Identifying Justice Values

That justice would fail to provide a clear core meaning in this way is, to some extent, surprising. As a term, both then and now, the word appears to invoke a collective or absolute sense of a positive outcome. Justice entails the rightness and appropriateness of an outcome. It is currently defined as ‘conformity (of an action or thing) to moral right, or to reason, truth, or fact; rightfulness; fairness; correctness; validity.’⁶⁰ In the late eighteenth century it carried similar connotations. Johnson’s dictionary gave the word three meanings:

1 *The virtue by which we give to every man what is his due.*

2 *Vindictive retribution, punishment.*

3 *Right, assertion of right.*⁶¹

In 1772 Barlow followed Johnson, defining justice as ‘the virtue whereby we inflict punishment on those that deserve it, and acquit the innocent after fair trial. Figuratively punishment. Right, or the act whereby a person asserts his right.’⁶² The *core* sense of the word justice remained constant in the period from 1770 to 1870. Wharton’s *Law Lexicon* of 1848 defined it as ‘the virtue by which we give to every man what is his due, opposed to injury or wrong.’⁶³ Sullivan’s dictionary of 1854 defined the term as ‘equity, right, law.’⁶⁴ The *Smaller English Dictionary* of 1872 suggested it meant ‘the virtue which consists in giving to everyone what is his due; honesty; impartiality; fair representation of facts respecting merit; equity; agreeableness to right; vindictive retribution; right ...’⁶⁵ The *emphasis* could be argued to have changed, however, and some definitions identified something beyond the mere result of rightness; identifying decision-making and process values that could also be associated with the justice of any case.

The nature of the thesis

R v Bird and Bird raised a number of issues relevant to an understanding of justice as a legal norm. First of all, *Bird* was one of the ‘hard cases’ where explicitly understood rules of

⁶⁰ “justice, n.” in *Oxford English Dictionary* (Oxford University Press)

⁶¹ Samuel Johnson, *A Dictionary of the English Language, in Which the Words Are Deduced from Their Originals, and Illustrated in Their Different Significations by Examples from the Best Writers. To Which Are Prefixed a History of the Language, and an English Grammar* (London 1755) ‘Justice’

⁶² Frederick Barlow, *A Complete English Dictionary: Or, General Repository of the English Language. Containing a Copious Explanation of All the Words in the English Language ... To Which Is Prefixed, a Complete English Grammar* (The Author 1772) ‘Justice’

⁶³ Wharton and JJS, *Law Lexicon, or Dictionary of Jurisprudence: Explaining All the Technical Words and Phrases Employed in the Several Departments of English Law* (Spettigue and Farrance 1848) 349

⁶⁴ R Sullivan, *A Dictionary of the English Language* (A Thomas & Sons 1854) 153

⁶⁵ John Ogilvie and Richard Cull, *The Smaller English Dictionary: Explanatory Pronouncing and Etymological* (Blackie and son 1872) 359

determination and legal recognition did not provide a clear answer.⁶⁶ Judges therefore had to engage in a broader form of decision making than was 'legal' in the narrowest sense. Existing explicitly stated 'rules of recognition', in the form of norms relating to the interpretation of statutes and case law, were not sufficient for providing predictable answers.⁶⁷ Something else had to provide the basis for a normatively acceptable decision. It was in this context that some of the lawyers (both advocates and judges) resorted, to some extent, to an explicit concept of justice to frame an acceptable answer. It is the purpose of this thesis to explore the issue of whether, in doing so, this was simply a cover for the exercise of an unfettered personal discretion or reliance on a broader code of values internal to legal practice that constrained, to some extent, the possible answer the judges could reach.⁶⁸

It is also the case that arguments like those in *Bird* do not simply provide an insight into the function of justice in determining and establishing norms within the legal structure (what might be labelled 'the law') but that such cases also reveal something of what was meant by justice on such occasions. This is a central feature of this thesis. When lawyers spoke of justice, what did they mean? This thesis therefore seeks to explore the ambiguous and flexible qualities of justice as a term for two related reasons. First of all, doing so provides a useful basis for identifying something of the normative logic and the value system of those active within a broad array of social structures and organisation that might be categorised as 'the law'. Secondly, looking more closely at the values associated with justice can enrich scholarship about those social structures by adding further depth and detail to existing analyses of how they operated.

Two methods will be adopted. In Part One of this thesis, the discourse about justice in the central courts will be examined during the period from 1770 to 1870. The purpose in doing so is to identify what values were associated with the term justice. Part Two will involve an examination of practices of a particular set of courts of first instance during the same period: the Courts of Quarter Sessions of the North and West Ridings. There is therefore a focus on what was understood by justice *within* the legal systems. Wider popular concepts of justice are, for the most part, outside the scope of this project. Of course it would be imprudent to ignore such wider conceptions. The engagement and relationship of those outside of legal practice with legal processes provide excellent insights both into wider social experiences and the functioning of the

⁶⁶ Ronald Dworkin, *Law's Empire* (Fontana 1986) 90

⁶⁷ H.L.A. Hart, *The Concept of Law* (Clarendon Press 1961) 61

⁶⁸ Niklas Luhmann, *Law as a Social System* (Klaus A. Ziegert tr, Oxford University Press 2004) 211-229; Richard Nobles and David Schiff, *A Sociology of Jurisprudence* (Hart 2006) 112-25

court processes.⁶⁹ The focus will be, however, on the ways in which justice was perceived and practised within courts.

This approach and the use of two parts is based on a particular perspective of law, legal discourse and legal practice. It is an attempt to apply William H Sewell's synthesis of social and cultural history.⁷⁰ His theory (or those parts of his theory) that apply to this project will be identified more fully in the next chapter. However, for now it is worth noting that Sewell's interest was in combining a social scientist's understanding of social organisations and an historian's understanding of the dynamic and changing nature of human relations.⁷¹ Law, legal history and systems of justice do not feature significantly in his work but his explanation of 'the social'⁷² provides a useful perspective on law and legal interaction. Of particular interest for this purpose is recognition of society as composed of multiple, interacting social structures each with its own rules for given meaning to things (real and symbolic).⁷³ As such his account is suggestive of both the diversity within what might be described as 'the law' but also its capacity for sharing its norms across the variety of its institutions. This helps to explain how different court institutions at the centre and also those in the regions could share understandings of something that was generally labelled justice. Not only this, but this shared conception was perceived as legal and so distinct to, but not totally alien from, a wider justice value. His account also offers a useful way of reconciling law's habits of affirming continuity and stasis while also achieving and, in fact, engendering its own change.⁷⁴ Across time there could be recurrent uses of justice as a concept itself and as an expression of the values it in fact portrayed. This discourse could serve to reaffirm and consolidate what was meant by justice or those other values while also, however, adapting to new circumstances. Sewell is certainly not the only theorist of societies and social change, and this thesis will set his account particularly alongside those of theorists like Bourdieu and Luhmann, who have attempted to provide sociological explanations of how meanings are

⁶⁹ King, *Crime* 353-73; Brewer and Styles, *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* 8-20; Douglas Hay and Nicholas Rogers, *Eighteenth-Century English Society: Shuttles and Swords* (Oxford University Press 1997) 144-5; Peter King, 'The Summary Courts and Social Relations in Eighteenth-Century England' (2004) 183 *Past and Present* 125; King, *Remaking Justice*, 7 and chapters 9 and 10

⁷⁰ William Hamilton Sewell, *Logics of History: Social Theory and Social Transformation* (University of Chicago Press 2005)

⁷¹ *Ibid* 2-18

⁷² In the course of his work he explores, society, culture, social structures and social schemas as methods of understanding human interactions but his conclusion involves resort to a more generic term for the field as a whole: *ibid* 14-16, 125-40, 151-74, 205-13, 228-9, 320-9

⁷³ *Ibid* 131-43, 205-206, 214, 228-9

⁷⁴ *Ibid* 127, 137, 141, 211-3, 217-8

generated within a social organisation to which the label 'law' is frequently attached.⁷⁵ What makes Sewell's theory particularly attractive is his recognition of human agency as central to both the formation and the alternation of these social structures and the values within them.⁷⁶

Sewell offers a theoretical standpoint that suggests that justice was a term to which common understandings could be associated. However different social actors, which is to say different lawyers in different courts influenced by different constraints acquired both within those courts but also from their wider social experiences, could attach different meanings to the same concept. They did so, however, while also still attaching (or assuming others attached) the same meaning to that concept. Justice both did and did not therefore have a universal meaning. It seemed to mean the same thing and because of this seeming did, but in a very loose and malleable way, mean the same thing; however human experimentation and creativity meant that it was versatile and ambiguous, being deployed to explain or achieve different ends. It was an umbrella or a portmanteau concept that in fact reflected and enabled a much wider and richer discourse than the single word might suggest.

Sewell's approach is also the justification for the two parts of this thesis. First of all, and somewhat obviously, an understanding of a linguistic concept of justice in the central courts is vital. Because of its place within the national polity and national legal structures, the law applicable in regional courts was, at least in theory and at least to some extent, the law produced at the centre. Regional courts were answerable to them and acted, again at least in theory, in accordance with their rules. 'At least in theory' and 'in accordance with their rules' because, it is exactly the extent and the ways in which national and regional institutions interacted and the extent to which in doing so they might have promoted the same values, that is at the core of this analysis. In Sewell's terms, regional courts were each different social structures that constructed their own meanings and values by interaction with other social structures of which the central court system (and each of those courts as different systems) was one of the most significant. In fact the thesis that will be advanced is that there was a complicated and complicatedly shifting network of relationships between central, national legal institutions and local, regional courts and, further, that the channels by which ideas moved were not unidirectional. In fact they were

⁷⁵ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805, Luhmann, *Law, Nobles and Schiff*, *Sociology of Jurisprudence*

⁷⁶ Sewell, *Logics* 125-7, 138-40, 142-5, 212-3

not even bi-directional. There were, it will be seen, various interactions not only between the centre and the regions but also between different regions.⁷⁷

It will not be argued that the justice of each of these courts was the same. In fact it is contended that there were not only differences between the centre and the regions but also different schemas of justice values between different courts in the centre. What there was, however, was a partial unifying *discourse* about justice that pervaded these various courts and which gave justice the appearance, if not the reality in practice, of universality. There was a discourse about legal justice in which particular justice values were advanced and debated. Such values would prevail on some occasions and be prevailed over on others. This capacity to prevail or not almost certainly varied, not only from court to court, but also from period to period and even from judge to judge.

This is not to argue that justice had no meaning. It was polysemic⁷⁸ and versatile but it seems to have provided a unifying discourse to which participants attached weight and value. It also seems to have had some core meanings, particularly a strong, but not exclusive tendency to be associated with accurate and appropriate outcomes. It was, however, much more complicated than merely this. The determination of cases in eighteenth- and nineteenth-century England had to be reconciled with two fundamental difficulties that have faced all legal systems before and after this period. These are the problems of factual uncertainty and normative ambiguity. At the point of any adjudication of disputes, certainty about facts is impossible; there is always room for doubt within trial processes.⁷⁹ This reality of a distinction between absolute and moral certainty was an established feature of post-enlightenment thinking.⁸⁰ A concept like 'justice' could not therefore simply mean getting a case right in any absolute factual sense. Equally, questions about the meaning or import of the law were also prone to ambiguity. This stemmed both from the capacity of language to hold more than one meaning and also the contestable nature of the

⁷⁷ Much will be made, therefore of King's observations about the ways in which ideas and practices proliferated in the regions without obvious activity from the centre: King, *Remaking Justice*, 3-5, 11-12, 52-57

⁷⁸ Sewell, *Logics* 143, 167-9

⁷⁹ Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press ; London : Oxford University Press 1969) 163; John Rawls, *A Theory of Justice* (Cambridge 1971) 85; Richard Nobles and David Schiff, 'Theorising the Criminal Trial and Criminal Appeal: Finality, Truth and Rights' in Antony Duff (ed), *The Trial on Trial*, vol 2 (Hart 2004) 244-5; Paul Roberts and A A S Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010) 3-4, 220, 224-5

⁸⁰ Barbara J Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationship between Natural Science, Religion, History, Law, and Literature* (Princeton University Press 1983) Ch 7

values underpinning those meanings.⁸¹ It is these problems of uncertainty and ambiguity that underpinned and explained the rhetorical use of justice in legal discourse.

Part Two of this thesis will move away from linguistic discourse analysis. The text poor sources that will be examined should not, it is contended, be ignored in attempting to come to any understanding of a concept of justice. Sewell's concern is not for simple linguistics but sees cultures and discourses in a much wider sense, preferring to talk of 'semiotic practices'.⁸² In this sense Sewell is suggesting that the culture within any social organisation is not simply constituted by what it says and communicates but what it in fact does.⁸³ Accordingly an understanding of the meanings of justice cannot simply be acquired from the texts in which justice or any of the values that it is suggested justice relates to were discussed, but rather from some attempt to identify ways in which justice was acted upon. To this end Part Two will seek to explore some of the practices of particular social organisations in acting in ways that might be associated with justice and its values.

Discourses about Law and justice – resolving ambiguity

Eighteenth and nineteenth century judicial systems had long since settled into practices of basing decisions on the consistent application of legal rules. It was this that exercised the minds of the judges in cases like *Bird and Bird* most significantly. Their first recourse was to those rules contained in recognised legal sources.⁸⁴ This was not, however, an easy task where, as happened frequently, the meaning of those rules was ambiguous and their potential application unpredictable.⁸⁵ For this reason the judges resorted to a wider normative code which included not only the law itself but also rules for determining the content of that law.⁸⁶ These 'rules of recognition' provided a framework for the identification of the substantive norms to apply to any dispute.⁸⁷ Today we see them in legal analysis under labels such as the 'doctrine of precedent' and the canons 'statutory interpretation.'⁸⁸

⁸¹ Brian Bix, *Law, Language, and Legal Determinacy* (Clarendon Press ; New York : Oxford University Press 1993) 12-3, 23-5; 54-7, 104-6; Nobles and Schiff, *Sociology of Jurisprudence* 14-5, 45, 168-70

⁸² Sewell, *Logics* 337-43

⁸³ *Ibid* 127, 334-8

⁸⁴ W. R. Cornish and G. de N. Clark, *Law and Society in England, 1750-1950* (Sweet & Maxwell 1989) 24; Michael Lobban, *The Common Law and English Jurisprudence 1760-1850* (Clarendon Press 1991) 80-1

⁸⁵ Michael Zander, *The Law Making Process* (6th edn, Cambridge University Press 2004) 265-83; Hart, *Concept* (2nd edn), esp 69-71, 272

⁸⁶ Luhmann, *Law* 123-5, 173; Nobles and Schiff, *Sociology of Jurisprudence* 34-5, 104-6

⁸⁷ Hart, *Concept of Law* Ch 6

⁸⁸ H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 606-8; Zander, *Law Making* 127-152, 263-4; Peter Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law' [2005] 25 *OJLS* 393, 399-406

The rules for determining the content of the law in unusual situations in the eighteenth century achieved the same function in legalizing outcomes but the rules for doing so were not the same. Rather they combined a discretion, which was profoundly disguised as something other than judicial innovation, and more starkly limited by a rule-driven and precedent-minded system of legal practice.⁸⁹ This potential openness of the law came to be tested in new ways as a result of extensive legislative activism as the nineteenth century progressed⁹⁰ but there remained at the core of these legal systems from 1770 to 1870 a form of judicial discretion necessary to deal with the application of existing rules to changing circumstances.⁹¹

Such discretion was not unique to historical legal systems. Not only did ambiguities of meanings and the 'open-texturedness'⁹² of legal definitions ensure this; it is inherent in legal systems as systems of dispute and contention. Contested litigation systemically invites dispute through a population of experts in disputation and rules which acts as systemic encouragements to locate and exploit ambiguity.⁹³ These are features that are inherent to legal systems and therefore an understanding of some of the contemporary reasoning about the nature of legal disputes will help in exploring at least one of the important features of justice concepts to which this project relates.

Because of such tendencies to foster disputes, even rules of recognition were not enough to provide consistent decisions (or even approximately consistent decisions) in cases appearing in courts. This can be seen from *Bird and Bird*. A 'literal' or a 'common sense' decision could be used to support different meanings of the Offences Against the Person Act 1837. Judges therefore cast their nets wider to trawl for an acceptable means of reaching a correct outcome. Justice was one of the values to which they resorted: the duty to get cases right arguably informed, influenced and constrained their decisions about what they would or could do in situations of such doubt.

It was in this context of disagreement that concepts of justice played their part. By being synonymous with the 'right' result and invoking conceptions of 'correct' process for reaching

⁸⁹ Lobban, *Common Law* 80-1; David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford University Press 2000) 314-5; John H. Baker, *An Introduction to English Legal History* (4th edn, Butterworths 2002) 199-200; Gerald J Postema, 'Philosophy of the Common Law' in Jules L. Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of the Law* (OUP 2002) 77; King, *Remaking Justice* 37-8; Zander, *Law-Making* (6th edn) 303

⁹⁰ Nobles and Schiff, *Sociology of Jurisprudence* 58-60, 67-72

⁹¹ Hart, *Concept of Law* 126-7; Bix, *Legal Determinacy* 17-22

⁹² Hart, *Concept of Law* 120-32

⁹³ James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (University of Wisconsin Press 1985) 34; Roger Cotterrell, *The Sociology of Law* (2nd edn, Butterworth 1992) 202-3; Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005) 12-3

such a result, justice offered a means for expressing views as to the overall rightness of results. Where therefore established laws failed to provide clear answers and ambiguity created a need for further normative content, courts would draw on a wider set of values. It has been suggested that lawyers would draw on external values such as 'common sense' in reaching these decisions. Other values such as 'fairness', 'equity' or 'sound policy' were also invoked to identify right results.⁹⁴ In fact there is an extent to which some of these values, particularly justice and equity, were not wholly externals, being terms both of wider social, but also a particularly internal legal, significance and signification. It is that particular concept of justice that is the subject of this study: one embedded within legal discourse and drawing on its legal particularity while also retaining elements of a wider social meaning. In so doing, it is intended to both draw on and add to existing historical and contemporary scholarship on justice and the values that can be associated with it.

Existing historical scholarship on justice

The concept of justice within legal scholarship is incomplete. There is an extensive body of literature that has sought to define and evaluate the place of distributive justice concepts within the philosophy of law. While the role of justice in forming or developing law has to some extent been recognised,⁹⁵ other aspects of the use of justice concepts within legal discourse have been overlooked.

Scholarship has sought to address the concept of justice during the long eighteenth century. One historiographical tradition has sought to draw upon its hegemonic function in supporting existing class structures.⁹⁶ Hay has suggested that a particularly personal and discretionary form of justice, but one that allowed ordinary people their chances to obtain and to achieve justice, was used to legitimate rule by an elite oligarchy,⁹⁷ particularly as 'a powerful ideological weapon in the arsenal of conservatives.'⁹⁸

Hay's critique has formed the core of a sustained debate about the values, practices and motives of those administering justice during the long eighteenth century. E.P. Thompson too has suggested that:

⁹⁴ Lobban, *Common Law* 59, 82, 90-2

⁹⁵ Luhmann, *Law*; Nobles and Schiff, *Sociology of Jurisprudence* 92-125

⁹⁶ Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* (Q. Hoare and G. N. Smith trs, International Pubs. 1971) cited in Michael D. A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet & Maxwell 2001) 981-2

⁹⁷ Douglas Hay, 'Property, Authority and the Criminal Law' in Douglas Hay and others (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (1st edn, Pantheon Books 1975) 35-9

⁹⁸ *Ibid*, 37

[T]he hegemony of the eighteenth century gentry and aristocracy was expressed, above all, not in military force, not in the mystifications of a priesthood or of the press, not even in economic coercion, but in the rituals of the study of the Justices of the Peace, in the quarter-sessions, in the pomp of the Assizes and in the theatre of Tyburn.⁹⁹

However, it would be dangerous to take accounts of law and justice as systems of mere legitimization too far.¹⁰⁰ As Thompson has argued:

[I]f we say that existent class relations were mediated by the law, this is not the same thing as saying that the law was no more than those relations translated into other terms, which masked or mystified the reality ... For class relations were expressed, not in any way one likes, but through the forms of law; and the law, like other institutions which from time to time can be seen as mediating (and masking) existent class relations (such as the Church or the media of communication), has its own characteristics, its own independent history and logic of evolution.¹⁰¹

Walter has suggested in his analysis of Essex grain riots during the eighteenth century that the law and justice was a potent 'fiction' but one that was widely agreed to cross classes.¹⁰² Not only did the symbol of the rule of law legitimise authority, however, it also became the standard by which to judge 'the just exercise of authority.'¹⁰³ Peter King endorses this view in part but with significant qualification. 'Despite problems encountered by the authorities,' he suggests, 'it would be unwise to ignore the law's potential as a system of ideas and as a creator of images.'¹⁰⁴ The law was not, he suggests, simply an instrument for sustaining social control by a propertied oligarchy, although it clearly achieved that function in part and with some success; rather it sustained a level of social cohesion by being an arena of negotiation between different class interests. In doing so, ideals and ideas were important.

Ultimately this thesis proceeds on the basis that, as Thompson has suggested, the system of justice during the eighteenth and nineteenth century not only had 'its own characteristics, its

⁹⁹ E.P. Thompson, *Whigs and Hunters* (Penguin 1977), 262

¹⁰⁰ John H. Langbein, 'Albion's Fatal Flaws' (1983) 98 *Past and Present* 96; Peter King, *Crime, Justice, and Discretion in England, 1740-1820* (Oxford University Press 2000) 2-3; Cairns, *Advocacy* 5

¹⁰¹ Thompson, *Whigs and Hunters* 262

¹⁰² John Walter, 'Grain Riots and Popular Attitudes to the Law: Maldon and the Crisis of 1629' in John Brewer and John Styles (eds), *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* (London 1980), p 14

¹⁰³ *Ibid*, p 14

¹⁰⁴ King, *Crime*, 373

own independent history and logic of evolution¹⁰⁵ but also that '[t]he law may be rhetoric, but it need not be empty rhetoric.'¹⁰⁶

Alongside this critical literature, there is a wider body of literature that has drawn on such perspectives to explore a number of aspects of criminal practice as a value system during the late eighteenth and nineteenth centuries.¹⁰⁷ King and Beattie, in particular, have conducted extensive examinations of the practices and the results of assize courts and, up to a point, quarter sessions courts in ways that provide an extensive perspective of the impact of criminal justice on those captured by its procedures.¹⁰⁸ At the same time, particular aspects of the practice of the criminal courts, such as the increasing acceptance of defence counsel in assize trials, have been used to identify something of the value system underpinning these areas of legal practice.¹⁰⁹

In other areas of law, such as the substance of civil law, there is also a rich tradition of legal scholarship that seeks to set aspects of the normative structure of the law in a wider social context.¹¹⁰ Equally Lemmings, in particular, has explored the nature of the legal profession during similar periods and its part in the construction of civil society.¹¹¹ In other areas too of legal practice and legal development, Hanoverian and Victorian attitudes to the legal system and its place in a wider society have been examined.¹¹²

There is therefore a wealth of literature about how judicial processes worked and what values can be discerned from their operations in the period from 1770 to 1870. Many of these accounts illustrate the values at work in the system. Discretion is shown to have played a significant part in the criminal processes particularly before 1800¹¹³ while the significance of fidelity to formal procedures, particularly pleading procedures, is recognised as a feature of many legal processes

¹⁰⁵ E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1st edn, Penguin 1977) 262

¹⁰⁶ *Ibid* 263

¹⁰⁷ *Ibid* 32-33; John Brewer and John Styles, *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* (Hutchinson 1980) 12; Beattie, *Crime and the Courts*, 587-8; Frank O'Gorman, *The Long Eighteenth Century* (Arnold 1997) 290-1; David J. A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865* (Clarendon Press 1998), 5; V. A. C. Gatrell, *The Hanging Tree: Execution and the English People, 1770-1868* (Oxford University Press 1994); Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge 2011) 125, 132 to name but a few

¹⁰⁸ J. M. Beattie, *Crime and the Courts in England, 1660-1800* (Clarendon 1986); Peter King, *Crime, Justice, and Discretion in England, 1740-1820* (Oxford University Press 2000); Peter King, *Crime and Law in England, 1750-1840: Remaking Justice from the Margins* (Cambridge University Press 2006)

¹⁰⁹ John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press 2003); David J. A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865* (Clarendon Press 1998)

¹¹⁰ P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979); Lobban, *Common Law*

¹¹¹ David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford University Press 2000)

¹¹² Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1991); Mulcahy, *Legal Architecture*

¹¹³ King, *Crime* 355-6

of the period.¹¹⁴ It has also been recognised that these values internal to law have been related, to varying extents, to wider philosophies, particularly to laissez faire socio-economic values in the nineteenth century.¹¹⁵

This thesis will attempt to add to this literature in a very specific way. Literature on the history of legal systems has, thus far, examined its values through interpretation of the effect and consequences of its rules. This thesis proposes, in contrast, to examine the term justice itself. In doing so, it is not proposed that this will correct or contradict interpretations of legal values but to supplement them by examining what, when justice was invoked, it was used to mean and what it was attempting to achieve. As shall be seen, there are particular associations that can be made between 'justice' and more specific values that sometimes cohere with these interpretive accounts. Equally, some of the interpretations of the logic and value system of legal practice set out above do not feature significantly in the judicial discourse. This discrepancy shall only become readily apparent after examination of Part Two and will be addressed more fully in the conclusion but, for now, it is sufficient to note that, examining what the courts spoke about when invoking justice, not only enables an analysis of the values at play in that discourse but also the raising of questions of other norms about decision-making and appropriate outcomes (such as discretionary judgments) that did not feature so explicitly in the discourse. If some courts spoke about justice, why did they not speak about it in terms of flexibility and case-by-case determinations to an extent consistent with the practice of other courts? This is a question that shall be addressed more fully in Part Two and in the conclusion.

Existing modern scholarship on justice

The focus of this thesis is upon the historical uses of concepts of justice. Nonetheless modern scholarship on value systems operating within courts will help in understanding some of the content of this discourse. There are two reasons for this. First of all, for all its potential to change over time, judicial practices have stayed sufficiently consistent that many of those debates about just procedures are echoed today. For this reason, recognition of some of the modern ideas of the normative content of trial processes will be useful in contextualising the content of historical judicial discourse. They will also be useful in contrasting the two – the discourse from 1770 to 1870 does not reflect how modern procedures are understood normatively. Furthermore some understanding of the modern debate about justice supports an important secondary conclusion

¹¹⁴ Atiyah, *Freedom of Contract* 388-397; Lobban, *Common Law* 61-7, 98-104 and see fn 89 above.

¹¹⁵ Atiyah, *Freedom of Contract* 235-7; Cornish and Clark, *Law and Society* 63-8, 71; Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1991) 71; Cairns, *Advocacy* 52-3; Mulcahy, *Legal Architecture* 63

that this thesis aims to present: that the ambiguity of justice as a definitional, rhetorical and analytical device poses dangers in its use both in historical and modern settings.

This is not a thesis on the meaning of substantive, distributive justice but rather justice as an explanation of processes of decision-making. Modern scholarship on distributive justice is not, for this reason, a significant feature of this work and will only play a part in examination of its influence in the interpretation of legal norms.¹¹⁶ There are, however, useful perspectives on modern legal systems and their practices which can prove useful in evaluating the procedural justice of the past. This scholarship has almost entirely concentrated upon criminal rather than civil justice. There are a few exceptions that have been triggered by reform debates since the 1990s.¹¹⁷ Perhaps most notable of these exceptions is that of Hazel Genn, whose analysis of the function and form of civil justice has challenged a growing critical orthodoxy about the function of formal trial processes in modern society.¹¹⁸ As Genn has pointed out, the difficulty in evaluating a concept like civil justice is its breadth and complexity rather than its importance.¹¹⁹ Nonetheless Genn has suggested that the central value of civil procedure is making correct decisions. 'The system of procedure,' she suggests:

*is designed to ensure that judges have all the appropriate evidence available so that they can find the material facts and apply the substantive law to those facts. In this way, procedural rules reflect a sense of justice. Procedure is the means by which substantive rights are enforced.*¹²⁰

This perception of justice as factual accuracy accords with conceptualisations we have already seen and will feature significantly during this thesis. Two further points are worthy of note. First of all, Genn drew upon Bentham's natural system and the concept of rectitude of decision making in reaching these conclusions.¹²¹ For all Bentham's polemics, it will be seen that this was a concept that was already deeply integrated into judicial conceptions of justice from the 1770s onwards. Secondly, Genn notes that the accuracy of outcomes is not the only value. Other

¹¹⁶ This will be examined more fully in chapter 2 but is also addressed on page 18 above

¹¹⁷ Leonard Hoffmann, 'Changing Perspectives on Civil Litigation' (1993) 56 MLR 297; Cyril Glasser, 'Civil Procedure and the Lawyers - the Adversary System and the Decline of the Orality Principle' (1993) 56 MLR 307; Déirdre M. Dwyer, *The Civil Procedure Rules Ten Years On* (Oxford University Press 2009); John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press 2014): even these sources have not created the sorts of systematic field models of evaluation created in respect of criminal justice

¹¹⁸ Hazel G. Genn, *Judging Civil Justice* (Cambridge University Press 2010)

¹¹⁹ *Ibid* 5-6

¹²⁰ *Ibid* 13

¹²¹ Jeremy Bentham, 'The Works of Jeremy Bentham, Published under the Superintendence of His Executor, John Bowring' (*William Tait, 1843*) ; Genn, *Civil Justice* 13

process values such as fairness, notice and participation are important features of what civil justice values in its procedures.¹²² Zuckerman too has attempted to provide an evaluation not only of the values of civil justice but also a recognition that such values must be reconciled, particularly a reconciliation of rectitude, promptness and cost.¹²³ These values, too, will be found in the archival records.

Criminal procedure has a much more extensive canon of literature that can be used to identify some of the likely themes of any historical discourse on just procedures. Heffernan has suggested that modern procedural criminal justice 'is concerned with the fairness of investigative and adjudicative procedures.'¹²⁴ Rather than purely and exclusively seeking to distinguish the guilty from the innocent, criminal justice systems pursue other values such as universal access to procedural rights and the protection of personal rights and liberties.¹²⁵

Equally, both Duff's *Trial on Trial* project and Ashworth and Redmayne's evaluation of the criminal process, recognise important values within modern trial systems beyond accuracy of outcomes.¹²⁶ Ashworth and Redmayne suggest that the trial is 'not just a diagnostic procedure, of which the sole purpose is to establish as accurately as possible ... what happened.'¹²⁷ They and Duff recognise the normative importance of rights protection within trial processes.¹²⁸ Recognising that truth is an important but not the only value of adjudication, however, raises questions about truth's relationship to values like rights and fairness, particularly they are what Ashworth and Redmayne have described as 'side constraints on the pursuit of that truth' or whether they are equal in importance to accuracy.¹²⁹ Duff has suggested the latter. 'What matters,' he suggests '... is not just that the truth be established, but that it be established by an appropriate process of calling the defendant to answer the charge' and that the normative content of the criminal trial is that it is a process of 'calling to account.'¹³⁰

¹²² Genn, *Civil Justice* 14-6

¹²³ A. A. S. Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press 1999) 11

¹²⁴ William C. Heffernan, 'Social Justice/Criminal Justice' in William C. Heffernan and John Kleinig (eds), *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* (Oxford University Press 2000)

¹²⁵ *Ibid* 51

¹²⁶ Antony Duff (ed) *The Trial on Trial*, vol 1 (Hart 2004); Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th ed. / Andrew Ashworth and Mike Redmayne. edn, Oxford University Press 2010)

¹²⁷ Ashworth and Redmayne, *Criminal Process* 25

¹²⁸ Duff 23-4; Ashworth and Redmayne, *Criminal Process* 27, 58-60

¹²⁹ Duff 23

¹³⁰ *Ibid* 25-6

Ian Dennis' writing on rules of evidence also identifies issues of tensions within the normative structure of trial procedures, again specifically between rights and accuracy. These tensions, he suggests, might be reconciled through an over-arching aspiration towards legitimacy.¹³¹ Judicial adjudications, he suggests, will only gain acceptance to the extent that they are seen as 'legitimate.' Decisions should have 'integrity' (in being both factually accurate and consistent with systemic moral values) and 'acceptability' (i.e. they should reflect wider communal preferences and opinions).¹³²

These are all arguments for the prevalence of particular values within modern systems. As such they can only offer some guidance in any evaluation of historical justice practices. They do offer some such value however. First of all, they identify the significance (and difficulty) of the reconciliation of values within a process of decision-making. Secondly, they suggest some of the values that it will be worth looking for in any historical analysis. This must, however, be done cautiously: it will be seen that while accuracy and truth dominated historical discourse, it was values other than the protection of rights and democratic participation that frequently competed with truth in determining what was a just outcome. Equally many values such as those that are often associated with fairness and participation were valued for their potential for truth enhancement.

Modern scholarship also reminds us that there are in fact tensions *within* the truth-enhancing justice process claims. Even where truth is accepted (or assumed) to be the premier value of adjudication, it is not entirely clear *how* such truth is best secured. On the one hand it is argued that truth is best achieved by 'free proof', the assumption that the best adjudications will result from there being few or no restrictions on the evidence put before the courts.¹³³ Set against such an aspiration for as much information as possible, is the desire that evidence should be regulated and restricted so that it does not mislead or distract.¹³⁴ This is a tension at the heart of debates about the admissibility of evidence but also relates to questions about the roles of institutions within justice processes, particularly juries.¹³⁵

Equally there are tensions between the *ways* in which accuracy and truth are best secured given the impossibility of achieving absolute certainty about past events. One such tension is between

¹³¹ I. H. Dennis, *The Law of Evidence* (4th edn, Sweet & Maxwell 2010) Ch 2

¹³² *Ibid* 49 and see I. H. Dennis, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' [2010] Crim LR 255 258-60

¹³³ William Twining, *Rethinking Evidence: Exploratory Essays* (2nd edn, Cambridge University Press 2006) 194-6; Dennis, *Evidence* 31

¹³⁴ Dennis, *Evidence* 33-4

¹³⁵ Roberts and Zuckerman, *Criminal Evidence* 73-4

adversarial and inquisitorial trial systems: a tension that was in many ways to occupy debates on criminal procedure in the first half of the nineteenth century and to linger into the second half and beyond. It was such a concern that animated some of the disagreement in *R v Bird and Bird*. At the heart of this tension is a disagreement related to that about free proof and credible evidence: two differing views on the best forms of securing accuracy, whether to place faith in a controlling body, the inquisitor, who regulates decisions and ensures their accuracy, or to adopt a laissez-faire attitude to proof in which it is the parties as adversaries whose unfettered engagement with dispute about the truth of a case is more likely to ensure that the (or at least a) truth is secured.¹³⁶

In addition to the sorts of normative accounts advanced by Duff, Ashworth and Redmayne and Dennis and others, the scholarship of justice systems as models can also prove a useful starting point for the evaluation of normative tensions within justice discourse. Of particular interest are Packer's models of criminal justice.¹³⁷ Packer proposed two models as 'polarities', 'competing systems of values' presented as extremes with which to evaluate modern criminal justice processes.¹³⁸ Under his *Crime Control* model, the prevention of crime to protect the 'innocent citizen' is the core aim of criminal justice. As a result, efficient, administrative and uniform but relatively informal screening processes with a 'premium of speed and finality' become distinctive features of criminal justice.¹³⁹ In contrast a *Due Process* model places a premium on equality, formality, and the protection of liberty.¹⁴⁰ This difference is founded on a different conceptual emphasis, one that identifies dangers of error in crime control and therefore seeks to place obstacles to guilt determinations from processes of rigorous formal scrutiny of trial verdicts.¹⁴¹

Packer's models offer considerable value in understanding and evaluating systems of justice.¹⁴² There are, however, limits. They are models for a particular system of justice, specifically an adversarial one,¹⁴³ and focus on an evaluation of criminal processes rather than criminal *justice* as such or justice discourse more generally. There are also conceptual limitations. Not only is the model embedded in a particular legal and political culture but it is also embedded in a particular time and therefore, potentially, lacks the flexibility as a tool for evaluation away from its US

¹³⁶ Jenny McEwan, 'The Adversarial and Inquisitorial Modes of Criminal Trial' in Antony Duff (ed), *The Trial on Trial*, vol 1 (Hart 2004) 63-4; Roberts and Zuckerman, *Criminal Evidence* 51-2

¹³⁷ Packer, *Criminal Sanction* ch 8

¹³⁸ *Ibid* 154

¹³⁹ *Ibid* 158

¹⁴⁰ *Ibid* 165-71

¹⁴¹ *Ibid* 163-5

¹⁴² Ashworth and Redmayne, *Criminal Process* 40

¹⁴³ Packer, *Criminal Sanction* 156

adversarial late twentieth century paradigm.¹⁴⁴ This has made the model overly selective in terms of the values it evaluates.¹⁴⁵ In part this problem is due to the binary nature of Packer's approach: he has created two models as ideal types within which packages of values are located.¹⁴⁶ There have been attempts to create other models to explain criminal processes such as that of Michael King.¹⁴⁷ King, focusing his analysis on the social function of criminal justice, extended Packer's models to include a rehabilitative 'medical' model, a managerial 'bureaucratic' model, a 'status passage model' that focused on denunciation and a 'power model', the function of which was to maintain class power.¹⁴⁸

A model-based approach also presents another conceptual difficulty before it can be applied to historical evaluation. Packer makes particular normative assumptions in his models that will not be clearly supported in the historical context. Formality and formalism, for example, are more closely associated with the due process and therefore become associated with rights protection and liberty. This can be seen in aspects of the historical discourse but, as shall be seen, it was not simply a concern for liberty that informed the desire for formality in eighteenth and nineteenth century contexts. While King's models provide other possible alternatives that might explain a normative base for particular values, they all pose the danger of assuming that any particular value within justice obtains its internal normative force from a particular sense of what systems of justice are for. This presents a danger of over-simplification. Formalism, for example, as a value within justice processes and justice discourse could be seen to have more than one underlying rationale. Occasionally it furthered claims of liberty but on other occasions formalism could enhance the sanctity and legitimacy of the process and, as such, could even be deployed against arguments aiming to enhance liberty. In contrast therefore to Packer, the approach here will make no assumption about the necessary or probable relationship between any sets of values. Therefore while models serve as useful ideal-types to focus debates on matters of process and policy,¹⁴⁹ they may create the danger of clouding analysis of justice values across different periods and in a range of circumstances.

In fact, given the nature of this project, it would also be dangerous to focus too closely on models of criminal justice for two reasons. First of all, many of the models are only indirectly relevant to justice as such. As analyses of the process, they understandably portray wider concerns. These

¹⁴⁴ Ashworth and Redmayne, *Criminal Process* 41

¹⁴⁵ *Ibid* 40-1

¹⁴⁶ Stuart Macdonald, 'Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes' (2008) 11 *New Criminal Law Review* 257 263-71

¹⁴⁷ Michael King, *The Framework of Criminal Justice* (Croom Helm 1981)

¹⁴⁸ *Ibid* 13, 19-28

¹⁴⁹ *Ibid* 29

wider concerns will be useful at points in understanding the nature and limits of an operative concept of justice but a more flexible approach to evaluating justice is required. Secondly, the dominance of model-based academic discourse has been, thus far, upon criminal justice in this area. This project is concerned with concepts of justice on a more general scale within legal discourse and therefore an excessive focus upon criminal models presents the danger of distraction. For the purposes of historical analysis, therefore, a more flexible approach to the identification of values within what might sweepingly be called ‘the law’ or ‘legal process’ is to be sought.

Part One: Judicial Discourse at the Centre

In attempting to identify the concepts of justice in the central courts in Part One, an analysis of the discourse will therefore be conducted. This will be wider than traditional doctrinal legal analysis because the concept under investigation, justice, was not created under norms of legal rule-finding such as *stare decisis* and the doctrine of precedent. It is, in that limited sense, extra-legal, being an aspect of a wider normative structure under which the content of legal rules was determined or re-determined. Examination of the legal textual sources will be a useful way of discovering both the norms and values with which the term justice was associated at any given time.¹⁵⁰

This initial research into the discourse on justice will mostly involve an analysis of the reports of cases determined in the Westminster (and other central) courts and reported in *The English Reports* for the whole period and in *The Law Reports Series* from 1865 onwards.¹⁵¹ These cases have been located through searches in the Westlaw legal database. The bulk of the analysis will involve examination of the detail of the justice discourse in the courts but alongside this there will be some consideration of a wider numerical context within which justice concepts are contained in the dataset comprising these reports.

Such a methodology is partially based on the approach adopted by Peter de Bolla in his research into the concept of Human Rights. De Bolla’s approach has been to use the online literature database, *Eighteenth Century Collections Online* (‘ECCO’), to search for human rights ‘concepts’ (i.e. words or word groups) and to chart their use across particular periods by examining how

¹⁵⁰ Dworkin, *Taking Rights Seriously* 44. Adopting Dworkin’s theory, however, does not involve using it in quite the same way Dworkin did; the current project is an exercise in ‘external scepticism’ intent on understanding but neither changing nor endorsing the values being advanced: for this debate on legal interpretation see Stanley Eugene Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Clarendon 1989); Dworkin, *Law’s Empire*, 78; Freeman and Lloyd, *Lloyd’s Introduction to Jurisprudence* (7th edn) 1375-1419

¹⁵¹ *The English Reports* (HeinOnline); *The Law Reports* (Incorporated Council of Law Reporting)

these concepts were distributed across discourse. De Bolla suggests that there is an 'architecture' or 'grammar' of concepts in that some terms are 'load bearing' because the fuller meaning of such terms is to be obtained by examination of their associations with other words or phrases. De Bolla has suggested that mapping these sorts of word associations by data-mining methods offers the possibility of identifying an 'architecture' of concepts by associations of particular words or phrases and therefore seeing their use in a wider context.¹⁵² Similar approaches are developing. Langford, for example, has adopted such an approach, using the Law Reports Series and the Old Bailey Sessions Papers in an attempt to form a sense of the concept of 'fair trial'.¹⁵³ However the full statistical approach is not central to this thesis. This is primarily because of concerns about what de Bolla calls 'noise' within the data set, the distorting influence of irrelevant references to the term under scrutiny. For de Bolla, such noise does not necessarily undermine the value of his analysis.¹⁵⁴ The smaller dataset in the law reports, the prevalence of reified justice terms (such as 'Justice of the Peace') and the limitations on the Westlaw search algorithms, make it difficult to search for justice terms and other words without also obtaining numerous irrelevant references. As will be seen, steps have been taken in the limited statistical searches used, to limit references to 'justice' to those relating to the normative uses of justice or just adjudication. It is therefore not possible with the Westlaw database to conduct reliable searches for word associations (e.g. justice and truth) in ways that do not present significant risks of irrelevant hits (e.g. 'in truth the Justice of the Peace was wrong').

A more limited approach has therefore been taken which has aimed to map out justice terms and phrases that are more reliable in illustrating the discursive practices of these courts in an impressionistic fashion. To this will be added a far more substantial analysis of the values to which the term justice or related phrases were applied by more traditional methods of textual reading. Therefore those cases that are relied upon are those in which, on examination of the case, it can be shown that justice was being referred to in particular ways and with particular meanings.

Part One will therefore examine the ways in which justice was used in the courts and its place within legal discourse more generally. It will be argued that concepts of justice played a role in the interstices of legal reasoning in providing limits upon and interpretations to existing rules. Across the period from 1770 to 1870 this role was secondary to 'the law' as traditionally

¹⁵² Peter De Bolla, *The Architecture of Concepts: The Historical Formation of Human Rights* (Fordham University Press 2013) 4-8

¹⁵³ Ian Langford, 'Fair Trial: The History of an Idea' (2009) 8 *Journal of Human Rights* 37

¹⁵⁴ De Bolla, *Architecture of Concepts* 8-9

conceived. It was not, however, an obviously secondary role: frequently the ambiguities in the law, the sorts of unresolved problems that can be seen from cases like *R v Bird and Bird*, required decisions to be frequently taken in the name of justice.

Having explored the role of justice within legal decision making generally in chapter 2, chapter 3 will then focus upon a particular aspect of the discourse: that relating to procedural, as distinct from substantive or distributive, justice. A significant quantity of academic and philosophical time and effort has been devoted to distributive justice in jurisprudential literature.¹⁵⁵ There has also been extensive examination of the law-creating and defining practices of the courts. There has been, as noted above, less explicit literature in any form that links understanding of either modern or historical understandings of trial and legal processes and a discourse on justice. As will be seen, this was, however, a significant element of what the courts and lawyers were talking about when they used justice as a rhetorical concept. The thesis will therefore aim to offer useful and new additional perspectives on both the concept of justice and the value systems contained within a concept of justice that underpin legal procedures.

Chapter 3 will therefore examine the norms and values that were being invoked when procedural justice was being invoked. The account will show that a broad range of values could be carried by the word 'justice' and that, although the term was frequently associated with truth itself or truth-enhancing values like notice and effective participation in processes, justice discourse was a medium for disputes about the nature of all manner of trial procedures. Ultimately, it will be suggested that there was a lack of a clear conceptualisation of justice but out of such discourse it is possible to identify a range of justice-related values that are useful for understanding the value system of central courts from 1770 to 1870 but also useful as a basis for examination of those areas of judicial practice where the discourse is less text-rich.

Part Two: Justice Away from the Centre

The second part of this thesis will attempt to draw on the justice values identified in the first part in order to evaluate some of the practices of a trial court away from the judicial centre.

As an example, the records of the Courts of Quarter Sessions, of the West Riding and the North Riding, will be examined. These are two of the many courts dispensing justice away from Westminster Hall.¹⁵⁶ The practices of any and all of these courts could reveal something of the

¹⁵⁵ Rawls, *Justice*; Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977); Dworkin, *Law's Empire*; Ronald Dworkin, *Justice in Robes* (Belknap Press 2006)

¹⁵⁶ Strictly, given that some of the cases that will be examined were decided in Chancery (in Lincoln's Inn) and in the Ecclesiastical Courts, 'Westminster Hall' is inaccurate; it is, however, a convenient term of reference for a collection of interacting institutions that were also frequently generically called 'the

ways in which justice was used as a concept. In fact a broad examination of numerous such courts would provide useful support for one of the main aspects of this thesis; that different legal institutions were also different social institutions with their own distinct but interacting normative identities, and that therefore any suggestion of a single concept of justice is an oversimplification. Unfortunately, such a project is too large for this thesis, and would be achieved at the expense of other dimensions of difference, particularly the dimensions of geography and time. There will therefore be a narrower focus.¹⁵⁷

It might have been possible to achieve a combination of statistical and discourse analysis by examining the Assize courts, particularly the practices of the Old Bailey. These courts have been the subject of extensive historical scholarship and this has revealed a great deal about the nature and practice in criminal cases.¹⁵⁸ What happened at the Assize courts, as an important meeting point of central and local justice, is not unimportant to this thesis.¹⁵⁹ They were, however, compared to the Quarter Sessions, more an extension of the centre than a distinctly local institution. Although local prosecutors, local juries and local witnesses (not to mention local defendants) gave the Assizes strong local features, at the heart of proceedings was usually one of the judges of the superior courts and the barristers and serjeants who accompanied him. As such the assize courts combined the legal understanding and the values of the centre to a much greater extent than was likely at the Sessions.¹⁶⁰

The Quarter Sessions were more predominantly local institutions. They therefore possess qualities that allow interesting comparisons not only between the centre and particular localities, but also between different localities.¹⁶¹ Admittedly, the Petty Sessions could also provide such a localised perspective and probably had a wider impact upon non-legal communities.¹⁶² On the other hand, their general lack of openness and wider varieties of recording of processes present

superior courts': Baker, *English Legal History* (4th edn) 101-3, 126-134. Generally throughout this work they will be referred to as the central courts.

¹⁵⁷ Beattie, *Crime and the Courts* 6-7. Beattie's focus, of course, was on the criminal law but spanned different institutions, times and places. His work was also over 600 pages long.

¹⁵⁸ Ibid, King, *Crime*; J. M. Beattie, 'The Pattern of Crime in England 1660-1800' (1974) 62 *Past & Present* 47; Beattie, *Crime and the Courts*; Langbein, 'Albion's Fatal Flaws'; John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press 2003); Cairns, *Advocacy* to name but a few. Admittedly some of these sources, King and Beattie, in particular have also looked at the practices of the Quarter Sessions but not as distinctly as it is proposed to do so here.

¹⁵⁹ Hay, 'Property' 27-8; Beattie, *Crime and the Courts* 323-4

¹⁶⁰ William Blackstone, *Commentaries on the Laws of England*, vol 4 (1st edn, printed at the Clarendon Press, 1769) 266; Beattie, *Crime and the Courts* 300; Lemmings, *Professors of Law* 30, 44; King, *Crime and Law* 40

¹⁶¹ King, *Remaking Justice* 53

¹⁶² King, 'The Summary Courts and Social Relations in Eighteenth-Century England', 126

problems for making comparisons.¹⁶³ Furthermore, with a recent trope of studies of justice's notebooks, the previous paucity of information about the judicial practice of magistrates sitting in Petty Sessions has been more than amply supplied.¹⁶⁴ If any one of the three major localised court systems is now, relatively deserving more extensive examination, it is that of the Quarter Sessions.

A further reason for the examination of the Quarter Sessions as a court, and something that makes them profoundly interesting when discussing the practice of justice, is their ambiguous legal status. The Sessions had grown out of a collection of medieval and early-modern statutes combined with generations of local activism. The result was that by the 1770s and, in fact, all the way up to the 1870s, the Quarter Sessions possessed a broad array of powers but no centrally-defined constitution. The result was that from the late eighteenth century they began to develop their own systems and procedures. This rule development illustrates some of the attitudes to decisions and decision-making at the core of Quarter Sessional practice and therefore offers opportunities to explore particular notions of the making of just decisions.¹⁶⁵

The second part of this thesis, therefore, involves the examination of records of the Quarter Sessions. These records are not text-rich and so different methodologies from those in Part One are being pursued. Two particular sets of sources will be explored. The first consists of the rules and standing orders developed in the eighteenth and nineteenth centuries, sources that provide insight, when read alongside the national body of laws, into some of the decision-making values to which particular benches of Justices adhered. In addition to these, the records in the minute books of the North Riding Quarter Sessions and the indictment books of the West Riding will also be examined. This will identify particular aspects of judicial practice suggestive of some (but not all) of the justice values being adopted in these courts. The approach here will reflect, but not match, the extensive research conducted into the Surrey courts by Beattie and into the Essex

¹⁶³ These problems are far from insurmountable and systematic comparison of petty sessional justice is an fruitful area for future research

¹⁶⁴ Ruth Paley (ed) *Justice in Eighteenth Century Hackney: The Justicing Notebook of Henry Norris and the Hackney Petty Sessions Book* (London Record Society 1991); Gwenda Morgan and Peter Rushton (eds), *The Justicing Notebook (1750-64) of Edmund Tew, Rector of Boldon* (Surtees Publication 2000); Gwenda Morgan and Peter Rushton, 'The Magistrate, the Community and the Maintenance of an Orderly Society in Eighteenth-Century England' (2003) 76 *Historical Research* 54; Drew Gray, 'The People's Courts? Summary Justice and Social Relations in the City of London, C.1760-1800' (2008) 11 *Family & Community History* 7; Drew Gray, 'Making Law in Mid-Eighteenth-Century England: Legal Statutes and Their Application in the Justicing Notebook of Phillip Ward of Stoke Doyle' (2013) 34 *The Journal of Legal History* 211

¹⁶⁵ Norma Landau, *The Justices of the Peace, 1679-1760* (University of California Press 1984) *passim*; David Eastwood, *Governing Rural England: Tradition and Transformation in Local Government, 1780-1840* (Oxford University Press 1994) 43-8

courts by King.¹⁶⁶ Rather, the use of these records will build on the exploration of procedural justice values in the discourse of the central court conducted in Part One.

The rules and practices of these courts suggest that the relative flexibility of procedures during the late eighteenth century created pressures on Sessional courts, both in Yorkshire and elsewhere, to create their own systems to regulate some of their trial processes. In doing so, these courts showed concerns for the effective regulation by ensuring effective notice and participation in Quarter Sessional trials. Although the underlying rationale for these rule innovations is not stated, it does seem clear that courts away from the centre were struggling to create trial procedures that ensured effective and accurate trial adjudications. Equally, it will be seen, such courts had to reconcile the strong sense of legal formalism that pervaded English justice with their own tendencies to exercise wide discretionary practices. Again, the rationale for such wide discretions is not clear but it seems likely that there was a significant attachment, even into the mid nineteenth century, to fact-based outcomes prevailing over any significant tendency to standardisation.

In summary, taking Parts One and Two together, this thesis aims to present new perspectives on the concept of justice. It seeks to do so in three ways. First of all, in Part One, there is an investigation into the sorts of values that were in fact being supported or contested when justice as a word arose in legal discourse. This is historically interesting in itself. Secondly, however, being aware of these meanings, it is possible to ask new and different questions about the nature of justice practices or particular courts in Part Two. Doing so has provided some very provisional conclusions about how the sorts of values identified in Part One might be examined in text-poor sources. It is contended that this is valuable in widening the analysis of such sources but that there is a lot of room for yet further investigation. What does appear clear is that questions about how to run just processes, like other sorts of outcomes that King has analysed, were transmitted between different locales and shared amongst different jurisdictions in complicated ways that are not easy to trace.¹⁶⁷ Understanding these different courts as distinct but overlapping social structures that in turn interacted with other non-legal social structures (some of them very diffuse but effective transmitters of ideas all the same) provides a useful way of understanding the nature of justice ideas in Georgian and Victorian society. Although central promulgation of a particular concept of just practice is the story of the second half of the period under investigation, it appears that, again, in the gaps provided by the national legal code, localised justice practices persisted.

¹⁶⁶ Beattie, *Crime*; King, *Crime*; King, *Crime and Law*

¹⁶⁷ King, *Crime and Law* 39-41, 46-69

Thirdly and finally, the account of justice presented here is of a diffuse concept that nonetheless purports to provide unanimity and acceptability of outcomes. In this sense it is a problematic concept to use, whether for the purpose of judicial determinations or in academic analysis, without more precise definition and explanation. To this concern I will return in the conclusion.

Part One

The Justice Values of the Central Courts

Chapter 2

The Justice Values of the Central Courts

In this Part of the thesis, the justice values of the central courts will be examined. These are the courts located in London, the Court of King's Bench, the Court of Common Pleas, the Court of Exchequer, the Chancery Court, the various Ecclesiastical Courts, the twelve (later fifteen) judges sitting *in banc* and those decisions of the twelve judges sitting at various nisi prius hearings on circuit or in London that were reported in the bodies of reports.

These courts might, by 1770, be suggested to dispense a form of national justice. This was not settled and absolute, however; regional and local justice lingered well beyond the 1870s. Counties palatine had their own justice systems and many distinctly local courts persisted into the twentieth century. During the nineteenth century, however, there was a gradual harmonisation of forms of central justice by extension of the reach of these courts and the abolition of various local institutions.¹⁶⁸ Such a Victorian development of a more centralised and uniform scheme of justice was to manifest ultimately in the Supreme Court of Judicature during the 1870s.¹⁶⁹

It is not proposed to trace the complexities of these processes of centralisation except insofar as they impact upon or explain the justice discourse of the period. It is, nonetheless, worthy of note simply because in recognition of the diversity of the court system. Some aspects of this relationship will be examined in the analysis of particular local courts, the Quarter Sessions, in Part Two. Rather, for the purposes of this analysis, this Part will focus on the justice discourse of these 'central' courts during the period from 1770 to 1870.¹⁷⁰

What ties these various courts together for the purposes of this analysis is their having been reported in sets of law reports during the eighteenth and nineteenth centuries.¹⁷¹ This makes them a useful, accessible source for purposes of analysis. It is, however, more than arbitrary convenience. These law reports were tools of use by legal professionals. They not only recorded

¹⁶⁸ Cornish and Clark, *Law and Society* 18-9, 29-33; John H. Baker, *An Introduction to English Legal History* (4th edn, Butterworths 2002) 26-7

¹⁶⁹ Cornish and Clark, *Law and Society* 38-45

¹⁷⁰ They will be referred to as 'central' courts as a form of shorthand to reflect both their location within the capital and also their national quality. The use of the term 'Westminster courts' would be misleading given that this is only appropriate for the courts of King's Bench, Common Pleas and Exchequer and even many of their trials took place elsewhere: *ibid* 18-9, 23-4.

¹⁷¹ These are the nominate reports that were to be digested in the English Reports and, from 1865, the *Law Reports Series*.

the discourse of those appearing in cases but also constituted a part of the discourse itself. It is not claimed that they formed the whole of the discourse; it is only possible with caution to suggest that they formed a significant element of it. However, being a record of judicial pronouncement and legal argument and also one of the main sources used by judges and lawyers to determine the law, they are a useful starting point for an investigation into what was said and what was meant by justice during the period in question.

Theoretical Framework

What will follow is an analysis of the way in which justice as a term was invoked in argument or, more strictly, how the phrase was recorded as having been invoked in a body of reports about such arguments and judgments. The purpose of doing so is to trace the understandings, meanings and applications of one of a set of legal values within a distinct area of social interaction and activity that might crudely be termed 'the law'. This qualified use of the term 'the law' is intended to convey a sense of a broad collection of formal institutions (the various courts), institutional actors (lawyers, judges, reporters and commentators) and the normative code under which they operated (both the substantive rules that were recognised as the law but also the underlying value system that informed how those rules were put into use).

In this sense, it is intended that the law is recognised as a humanly constructed social field that was relatively, but not absolutely, autonomous from other aspects of human social activity and which, within that social field, constructed its own norms, meanings, techniques, practices and understandings to which the term 'legal' could be attached.¹⁷² These norms or rules or understandings of what would count as 'legal' or 'the law' were internally generated by this social field.¹⁷³ It is within this process of self-definition that discourses about justice play their part: they were part of what legal systems did in creating and acting upon their own normative code.¹⁷⁴

Pierre Bourdieu has advanced one explanation of how concepts like justice might have particular meanings and associations within a social entity like 'the law'.¹⁷⁵ A similar account can be seen in Nobles and Schiff's adoption of Luhmann's systems theory.¹⁷⁶ There are, however, two aspects to these theories that need to be refined before they can offer a valuable basis for understanding

¹⁷² Cotterrell, *Sociology* 81-2; Luhmann, *Law* 89-90; Sewell, *Logics* 118, 206-9, 346; Nobles and Schiff, *Sociology of Jurisprudence* 10, 19

¹⁷³ Nobles and Schiff, *Sociology of Jurisprudence* 12-3, 23-4, 28

¹⁷⁴ *Ibid* 20

¹⁷⁵ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *The Hastings Law Journal* 805 and see Richard Terdiman, 'The Force of Law: Toward a Sociology of the Juridical Field by Pierre Bourdieu: Translator's Introduction' (1987) 38 *The Hastings Law Journal* 805; Freeman and Lloyd, *Lloyd's Introduction to Jurisprudence* (7th edn) 699-700

¹⁷⁶ Luhmann, *Law*; Nobles and Schiff, *Sociology of Jurisprudence*

justice discourse for the period from 1770 to 1870. The first is the challenge of defining the terrain across which the discourse is to be mapped, in other words the ambiguity and oversimplification in terms like a 'social field' or 'system' when examined in a historical (or, for that matter, a modern) legal context. The second challenge presented by theories like Bourdieu and Luhmann is the danger, in constructing law as a social structure in this way with rules of meaning, that such interpretations may fail to explain the diversity and mutability (as opposed to the stability and universality) of meanings of concepts like justice within such a social field.¹⁷⁷

For this reason these other conceptualisations of social fields and structures as the loci of discourse will be examined in light of William H Sewell's broad and more flexible conceptualisation of 'the social.'¹⁷⁸ By this, Sewell is emphasising social (as in 'social scientific') explanations of the world as composed of a multiplicity of social structures ("fields" in Bourdieu's lexicon). His aim is to reconcile the value of 'social' and 'cultural' historiographies by drawing on each. From social history he takes understandings of society as constituted by units of human organisation.¹⁷⁹

Bourdieu has described the creation of legal meanings as values of products of discourses with a distinct 'juridical field,' an 'area of structured, socially patterned activity or "practice,""¹⁸⁰ one of a number of social fields which has a distinct tendency to rationalize and categorise general concepts in a formally legalistic way through processes such as case method, case analysis and the doctrine of precedent.¹⁸¹ Luhmann (and Nobles and Schiff) has suggested a similar conceptualisation of the creation of 'legal' meanings by the adoption of a particular 'code' of interpretation specific to a legal 'system'.¹⁸²

Bourdieu, however, has tended to suggest a static model for the juridical field. He suggests such fields are self-reinforcing 'mental structures', habits of mind that are 'an endless circle of mutually reinforcing metaphors'.¹⁸³ Such a view, according to Sewell, makes significant changes within such a field 'seem impossible'.¹⁸⁴ If so, one would expect a uniformity and a constancy to a

¹⁷⁷ Sewell, *Logics* 137-41; Anthony King, 'Thinking with Bourdieu against Bourdieu: A 'Practical' Critique of the Habitus' [Blackwell Publishers, Inc.] 18 *Sociological Theory* 417, 427-9

¹⁷⁸ *Ibid* 369

¹⁷⁹ *Ibid* 28, 124, 318-33

¹⁸⁰ Terdiman, 'The Force of Law: Toward a Sociology of the Juridical Field by Pierre Bourdieu: Translator's Introduction', 805

¹⁸¹ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' *ibid*, 817; see also Pospisil, *Anthropology of Law* 18-37

¹⁸² Luhmann, *Law* 173-211, Nobles and Schiff, *Sociology of Jurisprudence* 37-40, 97-9, 107-8, 189-90:

Luhmann is adopting a computing analogy in describing a system defined by a code

¹⁸³ Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press 1977) 91

¹⁸⁴ Sewell, *Logics of History* 139

concept like 'justice'. Neither Bourdieu nor Nobles and Schiff are in fact silent on the matter of change to legal meanings over time. Both recognise such a process and attempt to explain, in part, how meanings are in fact adopted, transformed and potentially variable within legal discourses.¹⁸⁵ Bourdieu's analysis, however, favours accounts of the legalization of particular norms (i.e. the absorption of them *into* legal discourse) rather than possibilities of evolution or transformation of norms *within* the law or due to influences from outside of it. To that extent, while concepts are changed by legal processes, law itself remains static.

At the core of Bourdieu's theory, is an assumption that structures, like a juridical field, reinforce meanings and that all activity, even if aimed at subversion, alteration or innovation, ultimately reinforces structural rules and ossifies meanings.¹⁸⁶ There is a certain truth to this observation. A concept of law does seem to be a constant of human society. Furthermore legal structures (if not others) reaffirm and sustain rules about consistency. For Luhmann, in fact, these consistency-enhancing norms are a manifestation of 'justice' in the form of treating like cases alike.¹⁸⁷ Understood in this way, a legal social structure would possess uniform and underlying concepts. The rules of its discourse, its doctrines of precedent, its preference for particular justice values over others, for example, would make such change or diversity improbable if not impossible. Luhmann's explanation of a social system is more explicit in recognising such an existence of change. In fact, Luhmann recognises another aspect of 'justice': the avoiding of injustice as an aspect of law's coding that facilitates change from case to case.¹⁸⁸ This systems theory, however, tends to accentuate the autonomy or at least 'relative' autonomy of the legal system in ways that reduce its power to explain *how* such change and diversity can occur.¹⁸⁹

For Sewell, Bourdieu's tendency to assume stasis within fields is not wrong *per se*.¹⁹⁰ Rather, it is incomplete because Bourdieu has not recognised a number of key concepts necessary for an understanding of 'structures of discourse and meaning' such as Bourdieu's fields that explain how meanings can differ or change over time.¹⁹¹

Sewell therefore suggests an alternative understanding of socio-cultural structures that recognises both their capacities to constrain and reproduce ideas and meanings but also the

¹⁸⁵ Bourdieu, 'The Force of Law', 848, and see fn 212 above

¹⁸⁶ *Ibid*, 850

¹⁸⁷ Luhmann, *Law* 217-20; Nobles and Schiff, *Sociology of Jurisprudence* 107-8

¹⁸⁸ Luhmann, *Law* 211-30, Nobles and Schiff, *Sociology of Jurisprudence* 45-50, 60-72, 91-125

¹⁸⁹ Luhmann, *Law* 79-83, 105-20; Nobles and Schiff, *Sociology of Jurisprudence* 10-12, 19 46-7,

¹⁹⁰ He accepts as very much the point of the analysis of cultural structures an acceptance of their primary tendency to constrain and prevent change: *ibid*, 139

¹⁹¹ *Ibid*

possibilities of conceptual change over time.¹⁹² Sewell prefers to conceptualise social interaction much more broadly, defining 'the social' (i.e. society as a whole) as 'first, an articulated, evolving web of semiotic practices ... that, second, builds up and transforms a range of physical frameworks that both provide matrices for these practices and constrain their consequences.'¹⁹³ A legal system would be one or more of the strands on this web and 'the law' would consist of the semiotic practices, the physical frameworks and the enabling and constraining matrices. Justice, it is contended here, is one of those semiotic practices.

Sewell, in conceptualising this articulated evolving web, develops Bourdieu's recognition that societies are collections of fields. He parts company with Bourdieu, however, by stressing the importance of the varied nature of such fields. Sewell suggests that Bourdieu's assumption that such fields operate in similar ways and have the same qualities and practices is based upon an 'unrealistically unified and totalized concept' of how social interactions work; the idea that all social structures have the same ways of creating and constraining meanings and values.¹⁹⁴ Luhmann makes a clearer case for a uniquely legal method or 'code' for structuring meanings, but this too is still based on one particular conceptualisation about how societies generally work. Such a preference for a 'systems' way of understanding the creation of meanings within social organisations leads to a binary logic. The result is that Luhmann suggests that within law, there is a simple classificatory discourse, a 'legal/non-legal' code that determines legal content and legal meaning.¹⁹⁵ Thus there would be a *legal* understanding of justice useful as part of this legal coding and *non-legal* understandings wholly 'other' to such a legal discourse.¹⁹⁶

While such an understanding of legal and non-legal systems of meaning provides value in attempting to give meaning to justice as a concept, such a starting point is enhanced by engaging with Sewell's more flexible understanding of how ideas may work within human interactions. In contrast, Sewell suggests that society consists of a multiplicity of fields 'which exist at different levels, operate in different modalities' that vary in their logics and dynamics. He also stresses that such a social structure can contain different sub-structures within it, each a pocket of distinct but related activity with its own variety and differences of practice out of which further developments and adaptations of meaning can occur.¹⁹⁷

¹⁹² Sewell, *Logics of History*, 137-8

¹⁹³ Sewell, *Logics* 369

¹⁹⁴ *Ibid.*, 139

¹⁹⁵ Luhmann, *Law* 180-2

¹⁹⁶ Nobles and Schiff, *Sociology of Jurisprudence* 12

¹⁹⁷ Sewell, *Logics* 140

A benefit of recognising such a multiplicity of structures is that it emphasises the importance of interactions between such structures (or strands of Sewell's web) as a means of understanding how differences of meaning within and between different structures can occur. To recognise that justice was a term both of and outside of legal discourse, and that when invoked it could be meant in legal or non-legal ways even within legal discourse (or that those using the term may not have been equally conscious of the distinction), provides a better explanation of the ambiguity and the capacity for changing meanings of such a concept. Sewell therefore adds both to Bourdieu's theory and to system theory by emphasising that how ideas change is explained not simply by the fact that structures can operate in different ways but that because they are also interconnected and overlap, changes of meaning in one can put tension on meanings in another.¹⁹⁸

Sewell's understanding of a social network of structures and sub-structures appeals intuitively and accords with perceptions of current and historical societies that are composed at international, national, regional, institutional, professional, local and disciplinary levels.¹⁹⁹ It also provides a much sounder basis for understanding legal discourse on justice by requiring such analysis to address and engage with the overlapping and interacting nature of various central courts, their relationship with the courts away from the centre, as well as better illustrating the spider's web of connections and relationships between courts, lawyers, judges and the other social groupings of which they were part or with which they interacted. No lawyer appealing to, and no judge utilising, justice as a concept in any court did so in isolation from, or ignorance of, some of its potential meaning in legal, and wider, social discourse.

Sewell has sought to combine aspects of what might be considered social structure and the concept of 'culture'. Concepts, he suggests, are given meaning by the norms or rules of that culture.²⁰⁰ In more prosaic terms, concepts that are not consciously defined as 'the law' might, when examined from a distance, be recognisable as legal because they are part of a legal culture. In this sense justice will be argued to be part of a legal discourse, despite the fact that it does not traditionally feature explicitly as part of the system of recognised rules for determining what the law is, nor even necessarily how it should work. It is the argument of this thesis that, nonetheless, justice had an important role in determining how the complicated socio-cultural entity (or entities) that might be labelled 'the law' in fact worked.

¹⁹⁸ Ibid, 143

¹⁹⁹ Ibid, 205

²⁰⁰ Sewell, *Logics* 16, 160, 209

Sewell therefore offers a much more convincing means of gauging and understanding social change. In part this is because of a particular emphasis on the capacity for human creativity, innovation and adaptation as part of social interactions. It was in this sense that he meant that semiotic practice 'builds up and transforms ... physical frameworks.'²⁰¹ Human agency allows reconciliation between tendencies of social systems to constrain meanings and the evident reality that meanings and practices within such systems are not static. The content of the law and how it was applied changed, not simply due to external interventions such as legislation, but because there were mechanisms for change within legal discourses. These capacities for change have also engendered diversity of meaning.

In many senses Sewell's theoretical framework, when combined with theorists like Bourdieu and Luhmann, provides a rich basis for understanding the nature and importance of judicial discourses on justice. This can be taken in two parts. First of all, Sewell's theory can explain whether, why and how a concept like justice can have developed different meanings. Secondly, he provides the means of understanding why such a change is itself important for any wider understanding of law and legal processes.

Differences of meaning

To answer the first part, the meaning of justice can have, and will have, changed. Because law overlapped at so many points with so many other social structures and because it itself is divided into various social structures, there are many overlapping and interconnected discourses about justice rather than just the one. Ideas, concepts or terms can be 'transposed': an idea commonly understood in one particular situation can be adapted to be used elsewhere differently in other situations.²⁰² Justice, when invoked by radicals in political discourse of the late eighteenth century, could have different meanings, associations and functions from justice invoked by judges at the same time. Because such social spheres (and all the others in which justice had meaning) were not wholly distinct, and because those invoking such justice terms were not members of just one such social sphere (lawyers were other things too), there was capacity for meanings in different spheres to blur or changes in meanings to transpose from one to the other, and the adaptations of meanings to be transferred between different social structures.²⁰³

This potential for ambiguity is, Sewell suggests, enhanced by the inherently unpredictable and ambiguous nature of the physical world to which the symbolic world of something like the law

²⁰¹ Ibid 369

²⁰² White, *Heracles Bow* x-xii; MacCormick, *Rhetoric and the Rule of Law : A Theory of Legal Reasoning* 12-5

²⁰³ Sewell, *Logics* 212-3, 340-2

relates.²⁰⁴ Therefore why and for what purpose a lawyer (being also a politician, a gentleman and a member of many other social discourses) might use a concept of justice would depend upon the variable circumstances of participants in legal disputes. Legal systems, as systems for resolving disputes, both encouraged stable rules but also fostered disagreement and therefore differences of opinion. They therefore engendered their own processes of creativity that fostered changes and diversity of meaning.

In part this was because what cases were *about* could influence the arguments to which justice could be put. That a phrase did or did not spring to the mind of an advocate was certainly due to a variety of circumstances. However, meaning and expectations about word use are significant. Those in the business of speaking or communicating develop strategies, consciously or unconsciously, for making such word choices. A sense of what works, what is appropriate, irrelevant, excessive, inadequate or persuasive, is a feature not only of good communication but of communication generally and is informed by the normative structure of the arena in which such choices are made.²⁰⁵ In the legal sphere, such rhetorical approaches are most commonly defined by a body of norms that is generally understood to be 'the law.' Judges choose arguments that 'fit' best within the existing field of acceptable outcomes.²⁰⁶ Lawyers will do the same to persuade judges that the option they are seeking will make that fit.

This is, as JB White has suggested, more than mere logic; it requires a wider understanding of what works in legal conversation. The law itself is, he suggests:

*the particular set of resources made available by a culture for speech and argument on those occasions, and by those speakers, we think of as legal. Those resources include rules, statutes, and judicial opinions, of course, but more as well: maxims, general understandings, conventional wisdom, and all the other resources, technical and non-technical, that a lawyer might use in defining his or her position and urging another to accept it.*²⁰⁷

The word 'justice' or related phrases are such resources, rhetorical tools that had value in courtroom advocacy. Invocation of justice as a term was the product of choices whether conscious or unconscious, deliberate or glib. Equally, words with normative content such as

²⁰⁴ Bourdieu, *Outline of a Theory*, 83 cited in Sewell, *Logics of History*, 141-2

²⁰⁵ Donald Brenneis, 'Language and Disputing' (1988) 17 *Annual Review of Anthropology* 221, 228; Randall MacGowen, 'The Image of Criminal Justice and Reform of the Criminal Law in Early Nineteenth-Century England' (1983) 32 *Buffalo Law Review* 89, 91-3

²⁰⁶ Dworkin, *Law's Empire* 43-8

²⁰⁷ James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (University of Wisconsin Press 1985) 33

justice became more or less acceptable or expected (or unacceptable or unusual) as time and circumstances changed, as the values within the social structure changed. However, the precise meaning of 'justice' was far from clear or simple; it was subject to change, disagreement and development.²⁰⁸ Because justice was accepted as holding some sort of meaning in its own right but also because it lacked a single clear meaning it was, as a concept, open to reinterpretation and re-use.

Justice may have had, at any particular time, a core, established and accepted meaning; it might be perceived as a rhetorical tool that could achieve particular results (i.e. it was likely to win arguments in particular ways). However, because the cases about which those arguments were to be made were prone to be different one from the other, lawyers seeking to meet particular ends (winning cases) would be compelled to creative applications of any such term. A lawyer faced with an established set of rules and expectations, an obstacle course of statute law, established cases, etc. would, in representing a client, look for the best arguable interpretation of those rules and deploy them in the most useful way for that client. This is a reflection of what a judge will do in achieving the 'best fit' for new situations to the established legal code.²⁰⁹ This does not, however, require absolute fidelity to existing norms; at the boundaries of accepted meanings there are opportunities for new interpretations and therefore there is built into any social code of meanings the very means by which such meanings can change.²¹⁰

The Importance of Differences of Meaning

Secondly, understanding the breadth and adaptability of understandings of justice also provides a more solid basis for understanding the nature of judicial practice and the nature of the legal code. This thesis is based on the view that what is commonly known as 'the Law' is a social construction that consists not simply of the substantive rules recorded in legal texts,²¹¹ but that it also consists of a much broader field of values, practices, expectations and understandings that define and limit the ways in which the law operates. In this sense one might see the normative structure of the law in terms of Sewell's 'semiotic practices' existing within a 'physical framework' (consisting of courts, lawyers, enforcement personnel, textbooks, law reports, legal databases, etc.) built up by human agency not only by engaging in discourse (arguments and judgments) but also in the actions undertaken in and around that discourse (applying and adopting justice values in acting in particular ways). It is this combination of practice, physical

²⁰⁸ Raymond Williams, *Keywords* (Fontana Press 1983) 17; Sewell, *Logics of History* 345

²⁰⁹ Dworkin, *Law's Empire* 52, 143, 227-8, 245-58; Nobles and Schiff, *Sociology of Jurisprudence* 102-125

²¹⁰ Sewell, *Logics* 141

²¹¹ Pospisil, *Anthropology of Law* 35

framework and human agency that creates a social organisation that explains ‘the law’ of the eighteenth and nineteenth century as well as explaining that of the twenty-first century. As such a social structure, law has tendencies both to change and to resist change, tendencies which in turn encourage diversity of meanings and understandings.²¹²

There are two useful implications of seeing law in this way. First of all, this examination of justice through discourse provides insights into concepts of justice, which can enrich academic or critical evaluation of such systems. Examining what lawyers and judges mean by justice is useful for trying to interpret, in other situations, practices of justice. It is this use of justice concepts that will be attempted in Part Two of this thesis.

Secondly, by examining the breadth of uses of justice terms in the remainder of this chapter and in the remaining chapters of this Part, it will be seen that justice as a concept has, like many concepts, a contradictory quality. It both suggested a universality or consistency of meaning. It was this that gave it its rhetorical purchase. To label an option ‘just’ was to give it a vindication and status that made it more effective. However, as shall be seen, exactly what was meant by ‘justice’ on such occasions was far from clear. It was a versatile rhetorical tool of multiple potential uses that therefore obscured quite a range of disagreement. There are therefore problems with using the term without qualification. This insight will be examined more fully in the conclusion to this thesis.

The range of meanings will be examined in chapters 3 and 4. The remainder of this chapter will, however, seek to map out the range of uses of justice and related phrases in the period from 1770 to 1870 and to identify the ambiguous nature of its role in such judicial discourse.

References to Justice in the Central Courts

The English Reports and the Law Reports contain 71,550 reports for the period between 1770 and 1870. In 5,016 (i.e. 7.01%) of them there is a reference to justice (not being a reference to justices as a term for either a judicial officer or a court).²¹³ Although identifying the quantity of use of terms within a discourse as a whole provides a rough indication of the importance of that concept, such use on its own can only provide limited insights into the ways in which justice was used rhetorically in such a period. Justice, as a phrase, carries a broad range of significations and reflects a diversity of values. These values can be reflected in judgments without necessarily being described as ‘justice.’ It is not, therefore, suggested that the number of references to

²¹² Luhmann, *Law* 144-7, 194; Nobles and Schiff, *Sociology of Jurisprudence* 60, 72-86, 91-95

²¹³ See Appendix 1: References to Justice in Reported Cases

justice shows anything particular about its importance as a concept. Rather it is the purpose of this project to examine what, *when justice was referred to*, it *signified* as a concept. The ways in which particular words or phrases were associated does show something of the conceptual significance attached to them.²¹⁴

There is therefore value in examining the justice discourse of the central courts as reported in the law reports so long as this is done with a degree of caution. Doing so provides a sense of the place justice had within discursive and rhetorical practices of the social structures that together constituted the central court system of England and Wales. Examining when and how terms were used and attempting to tease out from those usages a sense of how they were perceived in deciding disputes will provide a sense of what was seen to be the normative basis for “just” decisions and decision-making processes.

Where Justice Terms were used

To understand the impact of legal values emanating from Westminster into a wider legal culture, an obvious starting point would be the Court of King’s Bench. However to limit examination to a single court would be to misunderstand the inter-relationship of the courts of record during the eighteenth and nineteenth centuries. The processes of review under the writ of error procedures and the use of all 12 common law judges on circuit and for reserved opinions ensured that the principles and values of the common law courts of King’s Bench, Common Pleas and Exchequer of Pleas were strongly interdependent. Equally Courts of Equity provided a series of checks on common law actions and so equitable principles and values were increasingly adopted in common law courts.²¹⁵

Furthermore, across their careers and especially early on, lawyers frequently practised in a variety of courts.²¹⁶ Judges too would move during their judicial careers from one court to another. Sir James Eyre and Sir Vicary Gibbs, for example, both spent time as Lord Chief Baron and then as Chief Justice of the Common pleas whereas, given the political nature of the appointment, many senior judges had sat in a different court before becoming Lord Chancellor. Lord Sir Alexander Wedderburn (Lord Loughborough), Charles Pratt (Lord Cambden), Sir John

²¹⁴ Gustav Stern, *Meaning and Change of Meaning* (Ind UP 1964) 23-6; Sewell, *Logics* 331; De Bolla, *Architecture of Concepts* 26-31; Langford, ‘*Fair Trial: The History of an Idea*’, 40

²¹⁵ For example in the development of entitlements of vendors to repossess property sold to bankrupts ‘in transitu’ (*Ellis v Hunt* (1789) 3 Term Rep. 464; 100 ER 679) and in the increasing recognition of a common law right to recover money had and received under a failure of consideration (*Straton v Rastall* (1788) 2 Term Rep 366; 100 ER 197)

²¹⁶ Lemmings, *Professors of Law* 30, 161-3

Scott (Lord Eldon) had all spent time as judges in other courts before taking up their places on the woolsack. This practice was to continue into the nineteenth century.²¹⁷

This project will start, therefore, by examining references to justice concepts across all of the central courts of record. Initially searches have been conducted simply for the term “justice” and then, to refine the search for “justice” in the singular and lower case and also explicitly excluding particular references to judicial institutions or personnel.²¹⁸ This approach provides a sense of the number of cases in which justice in a narrow, normative sense was used in argument or judgment. From this point forward references to this narrower category of justice quotations will be referred to as ‘limited’ justice.

First of all, how concepts of justice were invoked will shed some light on how such concepts developed, changed and were transmitted across the central courts. In order to focus analysis, the results of initial, broad searches were used to identify specific terms or phrases in which the word justice was invoked within the central courts. This process led to the identification of the most prominent phrases in which justice could be raised in a normative sense. The resulting terms are:

“the interests of justice”	“doing justice” (or other variations)
“the requirements of justice”	“purpose of justice” (or “purposes”)
“the principles of justice”	“bring to justice”
“rule of justice” (or “rules of justice”)	“the justice of the case”
“the course of justice”	“natural justice”
“the ends of justice”	“substantial justice”
“miscarriage of justice”	“complete justice”.

²¹⁷ Foss, *Biographical Dictionary*; ‘Chief Justices of the Common Pleas (C.1200–1880)’ (*Oxford University Press*, 2013) <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/theme/93045>> accessed 17 Nov 2013; ‘Chief Justices of the King’s Bench (C.1234–1880)’ (*Oxford University Press*, 2013) <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/theme/93046>> accessed 17 Nov 2013; ‘Lord Chancellors of England and Great Britain (1060s–2009)’ (*Oxford University Press*, 2013) <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/theme/92824>> accessed 17 Nov 2013

²¹⁸ The search used was: Free Text: “#justice % (“Mr Justice” OR “a justice” OR “chief justice” OR “lord justice” OR “justice of the peace”)”; Date – between: 01/01/xxx0 and 31/12/xxx9 (e.g. xxx0 being 1770 and xxx9 being 1779, etc). The use of “#” restricts the word to the exact letter used. The use of “%” excludes hits with the terms cited. This does mean that it is possible that useful terms which also include terms like “Mr Justice” could have been excluded by the process, which is one of the reasons this research should not be taken to offer a full statistical survey of the usage of terms. It is nonetheless usefully indicative of patterns of growth and development.

The results of these searches were themselves examined to remove rogue terms.²¹⁹ These terms will generally be referred to as ‘select’ or ‘focused’ references to justice in the ensuing analysis.

Examination of the patterns of usage and/or reporting of justice terms reveals shifting tendencies to use each of these terms. The term, “administration of justice”, shows this pattern. The raw figures on the extent of recording of the use of this term can be seen (along with other terms referred to above) in Table 2 in Appendix 1. That table suggests that during the late eighteenth century, the bulk of references to the administration of justice came from reports of the proceedings of the Court of King’s Bench. However, by the early decades of the nineteenth century, the House of Lords and Privy Council and the Chancery courts were becoming more likely to refer to administration of justice as a concept.

	House of Lords	Court of Appeal	KB & QB	Probate	Chancery	Crown Cases Reserved	Common Pleas	Admiralty	Exchequer	Assize & Old Bailey	Ecclesiastical	Total % of all Limited Justice References	Number of Limited Justice References
(1750-1759)	0.7%	0.0%	3.6%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.7%	5.1%	137
(1760-1769)	1.0%	0.0%	13.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	14.1%	99
1770-1779	2.2%	0.0%	2.7%	0.0%	0.0%	0.0%	0.0%	0.0%	1.1%	0.0%	0.0%	6.0%	184
1780-1789	0.0%	0.0%	4.2%	0.0%	1.5%	0.4%	0.0%	0.0%	0.0%	0.4%	0.0%	6.6%	259
1790-1799	0.9%	0.0%	6.5%	0.0%	3.0%	0.3%	1.2%	0.9%	0.3%	0.3%	0.6%	14.0%	336
1800-1809	0.8%	0.0%	3.7%	0.0%	8.9%	0.0%	0.3%	0.8%	0.0%	0.8%	0.5%	15.8%	380
1810-1819	2.3%	0.0%	3.6%	0.0%	6.7%	0.0%	0.8%	0.6%	1.5%	1.5%	1.0%	18.0%	478
1820-1829	3.3%	0.0%	4.9%	0.0%	2.0%	0.4%	2.7%	0.5%	4.5%	2.5%	1.3%	22.1%	553
1830-1839	6.1%	0.0%	5.2%	0.0%	5.2%	0.1%	3.0%	0.1%	3.9%	1.2%	1.3%	26.4%	667
1840-1849	5.1%	0.0%	2.3%	0.0%	6.5%	0.4%	2.0%	0.6%	2.5%	0.7%	1.1%	21.1%	837
1850-1859	5.0%	0.0%	5.2%	0.0%	8.2%	1.7%	3.6%	1.3%	3.1%	0.1%	0.3%	28.6%	686
1860-1869	7.7%	0.0%	3.1%	0.2%	4.7%	0.2%	4.2%	2.0%	2.0%	1.6%	0.3%	26.1%	636
(1870-1879)	6.8%	3.5%	2.6%	0.2%	6.4%	0.4%	1.1%	2.0%	1.8%	0.0%	1.1%	25.9%	455

Table 1: References to Administration of Justice as a percentage of all (limited) references to justice

This can also be seen in Table 1 above, which shows the number of references to administration of justice as a percentage of the references to justice (in the limited sense) during each decade. This comparison eliminates some (but not all) of the variability in the raw figures that can be attributed to the differing levels of court reporting between the different courts. These figures therefore show how often, *when justice was referred to in discourse*, these were references to

²¹⁹ For example, in the context of ‘interests of justice’, those cases that concerned a justice of levying particular interest rates were omitted. Westlaw’s search facility removes some common words such as “the”, “and” and “or” and does not, when asked to look for phrases, distinguish between the end of one sentence and the start of another. Therefore “... rate of interest. The justice ...” would appear on an “interests of justice” search.

the figures set out in the chart.²²⁰ Given the unevenness of court reporting, it is not possible to state how significant a term like the administration of justice was, relative to other terms within legal discourse in general.²²¹ It is, however, possible to evaluate, up to a point, the extent to which such justice terms were used relative to references to justice generally. Table 1 shows that, at particular points, a significant proportion of all the references to justice in reported court discourse were associations of justice and its administration. This appears to be particularly so with the reports of King's Bench judgments in the 1770s and, to a lesser extent, in the 1790s, to the Chancery courts in the 1800s and 1850s and to the House of Lords and Privy Council from the 1850s onwards.

Comparing the use of 'administration of justice' as a phrase with other selected terms noted above²²² provides some basis for understanding whether there is any significance to be attached to the use of that term compared to others. This can be particularly seen from the tables contained in Appendix 2. Each of these tables sets out the use of each term in one of the central courts (or a group of them such as the ecclesiastical courts). For each such court, a table shows three related sets of data. The top part shows the actual number of references to each term in that court each decade. The central section shows the extent of use of each term as a percentage of the total use of the selected terms during that time (e.g. the use of 'administration of justice' as a percentage of the total use of those terms). The bottom section shows the relative frequency of each of these terms (i.e. the commonest of these terms during each decade being noted as "1st", etc.). Along the bottom of each table there is the mean ordinal frequency (i.e. the average ordinal frequency of each term across all decades in that court) and the mode ordinal frequency (i.e. the commonest ordinal frequency of the particular term across all decades). These two figures give an impression of the commonest terms in each court across the 100 year period.

How these tables can usefully be read can be seen by examining one of these tables. A consideration of the use of the term "the justice of the case" in the Chancery courts can be determined by looking at Table 3, for example. Examination of the raw numbers (at the top of that table) shows that this term, like all others, was almost absent in the 1770s. This is probably

²²⁰ The two decades before and the decade after the period under investigation has been included so that the 1770s and the 1860s can be seen in a wider context.

²²¹ The nature of court reporting, combined with the capacity of a single case to be litigated in parallel through use of writ of error proceedings between the different Westminster courts makes it difficult, particularly up until the early/mid decades of the nineteenth century, to simply count the number of cases reported from each court: on the subject of the complexity of cross-litigation within the Westminster court system see W. R. Cornish and G. de N. Clark, *Law and Society in England, 1750-1950* (Sweet & Maxwell 1989) 23-5, 38-43 and Baker, *English Legal History* (4th edn) 136-7

²²² See p 48

due to the scarcity of reporting of speeches in the Court of Chancery. As such, the raw numbers have limited value.²²³ The central part of the table is more useful. It shows this term in fact to have been used relatively frequently among references to justice in Chancery reports, for example amounting to almost 40% of all such references in the 1780s. In fact, examination of the term across the middle part of the table as a whole, suggests that it never dropped below 10% of all references in the Chancery courts.

It seems possible to note in outline that Chancery courts resorted to the phrase, “the justice of the case” more readily in the late eighteenth century and the mid-nineteenth century than at other points. The bottom part of the table helps to illustrate this. The “justice of the case” was the most frequent term from 1760 to 1780 (allowing for a seeming gap in the records during the 1770s) and from 1840 to 1860, and was again the commonest term in the 1870s. In fact from the 1750s to the 1870s the term was consistently common, being the commonest, second or third most common throughout the whole period and averaging 1.8th (if such a position is mathematically possible) and was second most common term most often. The bottom portion of table 1 also indicates an arguably more reliable trend of usage, namely that while the term was particularly frequent during the late eighteenth and mid-late nineteenth century, it fell into relative disuse (while still remaining quite common) in the early decades of the nineteenth century.

Patterns of Usage

Comparing the use of justice terms in different courts and periods, therefore, provides some idea of how a concept of justice operated within legal discourse at the centre.

House of Lords

Starting with the House of Lords, it would appear that the most frequent terms were “the administration of justice” and “doing justice”. In contrast to the Chancery courts “the justice of the case”, although common, was not a term in regular use. After these three terms, the two that tend to appear most frequently are “the principles of justice” and the “requirements of justice”, with “principles” being significantly preferred to the “rules of justice” as a term of reference. Equally, however, “rules of justice” appears to be a term of some significance in the first three decades. The main negative terms are used almost interchangeably. To “bring to justice” is hardly ever used. With the exception of the possible decline of the use of “rules of justice” noted above, the terms are relatively static.

²²³ de Bolla uses raw data in preference to percentages on the grounds that doing so is less likely to obscure particular trends. In this particular exercise, however, the historic unevenness of court report suggests comparison among references will give more accurate impressions.

King's Bench

In the Court of King's Bench and the Court of Queen's Bench after 1836, again "the justice of the case", "doing justice" and the "administration of justice" were the commonest terms used.

Although references to the administration of justice were significant across all courts (see Table 1 above), the term was no more common than others in reports of the King's Bench. The perception of administration of justice as a dominant term in the general discourse is a function of an increase, in the closing decades of the eighteenth century, of reporting of King's Bench cases due to the advent of the short and relatively contemporaneous Term Reports.²²⁴

In fact, as can be seen from Table 2 in Appendix 2 and from Table 1 above, legal references to the administration of justice were to become far more common within the King's Bench during the nineteenth century rather than in the late eighteenth century. Across the period and until the 1870s, the terms most likely to be used were "doing justice" and "the justice of the case". Both of these terms, in contrast to terms like "the rules of justice" or the "interests of justice", might be seen as vaguer, broader terms useful in invoking broad notions of correctness and appropriateness without requiring more precise enunciation of the content of justice's 'rules' or 'interests' (or even 'principles' or 'ends'). This facility of use suggests a great deal about the nature of their dominance in the discourse.

That the administration of justice was one of the more common terms can also be explained in this way. It could be a frequent term of reference for the general business of the courts. There is more to it than just this, however. The King's Bench²²⁵ exercised control over exercises of authority under the prerogative and quo warranto procedures. The function of these processes was to ensure that processes had been properly followed (and justice properly administered).²²⁶ Of all the courts, therefore, the King's Bench was the one where discussions of the nature and quality of the "administration" of justice were most likely.

As will be seen, the term "administration of justice" was to grow for reasons only indirectly related to any changes in normative understanding of the concept of justice itself and its importance. As the state's control over local legal processes grew during the nineteenth century, a process of reification and systematisation of the legal process as a whole led to a

²²⁴ Veeder Van Vechten, 'The English Reports, 1292-1865' (1901) 15 Harvard Law Review 1 22-3; Baker, *English Legal History* (4th edn) 184

²²⁵ Until the accession of Queen Victoria the court was, of course, the King's Bench. Therefore the term 'King's Bench' will be used to refer to the King's Bench and Queen's Bench (and Queen's Bench Division) courts generically across the period. Where a specific mention is made to the court at some particular point in time, the most appropriate term will then be used.

²²⁶ Baker, *Legal History* 145-6, Edward Jenks, 'The Prerogative Writs in English Law' (1923) 32 Yale Law Journal 523, 528-30

transformation of the “administration of justice”, an explanation of what judges and those they reviewed *did*, into the “Administration of Justice” as a single *institution* in which those things were done.²²⁷

Chancery

The significance of the “justice of the case” has already been noted in the Chancery Courts. In contrast to the King’s Bench and House of Lords, table 3 of Appendix 2 shows that terms like “doing justice” and the “administration of justice” were not quite as significant in Chancery discourse. The term “principles of justice” appears to have been a far more firmly embedded feature of the discourse although never (at least until the 1870s) forming a major element of how justice was invoked. The Chancery courts were therefore constructing their own discourse about justice reflective of their equitable jurisdiction. This discourse, however, used the same terms as other courts. As will be seen later, this did not always mean that they were used in the same way and for the same ends or that they were given the same weight. They were, however, sufficiently similar that they could be, and were, often carried across from the discourse of one court to another. It is in the Chancery courts that the term “the interests of justice” appears to make its first judicial appearance and from which, it would appear, it was adopted elsewhere.

Other courts

There are fewer references to justice in the other courts but certain trends or tendencies can still be picked out. ‘Doing justice’ and the ‘justice of the case’ are the commonest forms of expression in nearly all courts with the ‘administration of justice’ generally following close after. In the ecclesiastical courts (i.e. the Court of Arches, the Consistory Court, etc.)²²⁸ the ‘administration of

²²⁷ It is worth noting that this growth in a body of laws about the conduct of justice processes probably also explains the growth of this term in the House of Lords and Privy Council during the nineteenth century as a function of imperial expansion. A considerable number of Privy Council cases concern the exercise of judicial authority in colonies and dependent territories. See for example: *Re the Justices of the Supreme Court of Judicature* (1829) 1 Knapp 1, 12 ER 222; *Smith v Justices of Sierra Leone* (1841) 3 Moo PC 361, 13 ER 147; *Kielley v Carson* (1842) 4 Moo PC 63, 13 ER 225; *Guhan and others v Lafitte* (1842) 3 Moo PC 382, 13 ER 155; *Kerakoose v Serle and Others* (1844) 3 Moo Ind App 329, 13 ER 380; *R (otp Bombay Government) v Byramjee and others* (1846) 3 Moo Ind App 468, 18 ER 577; *Willis v Gipps* (1846) 5 Moo PC 379, 13 ER 536; *Montagu v Lieutenant Governor and Executive Council of Van Dieman’s Land* (1849) 6 Moo PC 489, 13 ER 773, *re Grant* (1850) 7 Moo PC 141, 13 ER 833; *Rainy v Justices of Sierra Leone* (1852) 8 Moo PC 47, 14 ER 19; *re Estates of Jersey* (1853) 9 Moo PC, 14 ER 268; *Cloete v The Queen* (1854) 8 Moo PC 484, 14 ER 184; *Cursetjee v Perozeboye* (1856) 6 Moo Ind App 348, 19 ER 130; *Falle v Le Sueur & Le Huquet* (1859) 12 Moo PC 501, 14 ER 1002; *Secretary of State for India v Sahaba* (1859) 8 Moo PC 22, 15 ER 9; *re petition of Godfray and others* (1859) 8 Moo PC 263, 15 ER 99; *re Petition of the States of Guernsey* (1861) 14 Moo PC 368, 15 ER 345; *Ram and Huraram v Beg* (1862) 14 Moo PC 329, 15 ER 329; *Falkland Islands Company v R* (1863) 1 Moo PC NS 299, 15 ER 713, *Patrule v Devu* (1864) 10 Moo Ind App 60, 19 ER 895; *Re Wallace* (1866) 4 Moo PC NS 140, 16 ER 269; *AG NSW v Bertrand* (1867) 4 Moo PC NS 460, 16 ER 391; *McDermott v Beaumont* (1868) 5 Moo PC NS 466, 16 ER 590

²²⁸ Appendix 2, Table 6

justice' is the commonest concept cited although the numbers of references are quite limited. In the reports of cases from the Court of Crown Cases reserved²²⁹ and the selected reports of assize cases²³⁰ a slightly different pattern appears, although again the numbers are too small to advance anything other than tentative conclusions. The only term used with any reliable frequency in the Court of Crown Cases Reserved is the 'administration of justice' and this term also dominates discourse on justice among the reported Assize cases. In those courts, however, there appears to be a slightly higher tendency in relative terms to talk in terms of the 'ends of justice' and the 'course of justice' than in other courts. The Admiralty courts²³¹ appear to have been more willing than other courts, to rely on the 'principles of justice' as a term of analysis and exposition than the other courts. Again the number of references is limited but it does appear that the 'principles of justice' was the preferred rhetorical device in Admiralty cases related to the development of principles of international justice ancillary to the growing prize court jurisdiction from the 1790s onwards.²³²

Meanings of Justice Revealed by Justice Terms

The data suggest that different courts had their own rhetorical practices but that there appears to have also been substantial coherence of terms at a superficial level. Although the frequencies of use differed, the same terms were used. This does not show that these terms necessarily signified the same thing in each milieu. Why things were said, and what was most tactically useful, varied from court to court. Such rhetorical preferences are likely to have been influenced by the legal environment in which such speakers operated; constrained as each court was by its own normative structure, the 'legal world' within which it operated.²³³ Limits of convention, expectation, perceptions of persuasiveness, as well as normative restraints derived from the rules and expectations by which 'the law' channelled legal discourse into particular patterns. Terms at particular times were more or less acceptable or common or useful to rhetoricians. As the figures show, however, change occurred despite such restraints: development and innovation in legal discourse made different terms, across decades, more or less usual or acceptable. There is to be seen, therefore, a tension between the idea of a potentially rigid, self-sustaining legal structure, in which there were 'right' arguments, on the one hand, and an understanding of legal

²²⁹ Appendix 2, Table 8; the reports listed in the *English Reports* as originating from the Court of Crown Cases Reserved include reports from the 12 judges predating the formal creation of the CCR in 1848.

²³⁰ Appendix 2, Table 9

²³¹ Appendix 2, Table 7

²³² See n 424 below.

²³³ Sewell, *Logics of History* 127-8; White, *Heracles Bow* 33-4

systems as flexible and adaptable and therefore vulnerable (or open) to wider social changes, both material and normative.²³⁴

Each time justice was invoked in a court there was a point to be made by doing so: the support of propositions for which it was advanced. Equally, invocations of justice by judges was part either of pre-judgment discussion with counsel or the justification of a decision itself. An examination of the circumstances of such invocations can, therefore, reveal how justice could justify or support particular conclusions.

In order to focus analysis within reasonably manageable bounds, it is proposed to examine more closely only some of the terms noted already in an attempt to examine this normative content of legal and judicial discourse. Analysis will be focused upon references to three different justice-related terms: 'the administration of justice', 'the principles of justice' and 'the interests of justice.'²³⁵

The use of the phrase, 'the administration of justice' as a technical phrase has already been noted. It was used as part of the test applied in proceedings for amoval or under quo warranto procedures, where the question was the suitability of a defendant for particular posts related to 'the administration of justice'²³⁶ or where certain posts were limited in law to certain persons because of their function in 'the administration of justice'.²³⁷

The normative content of such technical references to administration of justice is limited and behind these particular uses of the term there was a broad range of situations when reference to the administration of justice was little more than a substitute for 'what we do' or 'how things are done' in legal processes. It could signify little more than what might now be understood as 'the legal system'.²³⁸ Even in such cases, some weight should be attached to the use of 'justice' rather

²³⁴ Bourdieu, 'The Force of Law', 812-6; Sewell, *Logics of History* 212-4, 227-9, 339-40

²³⁵ Not only are those precise phrases being examined but variations in which the justice its related noun were conditioned by ajectives such as in the case of 'the administration of public justice', 'the first principles of justice', or 'the interests of natural justice'. Searches for these terms involved using connectors so that these words could be located within 3 words of each other either way. Other phrases or word combinations have removed from analysis by a process of reading and checking.

²³⁶ See for example on amovals: *R v Mayor of London Otp Wooldridge* (1785) 4 Doug KB 360; 99 ER 922; *R v Amery* (1788) 2 Term Rep 515; 100 ER 278 and on quo warranto writs: *Darley v R* (where the use of the term 'administration of public justice' as the test to be applied in such cases was criticised for being unduly broad).

²³⁷ For example from the period 1770 to 1799, see: *R v Carter* (1774) 1 Cowp 220; 98 ER 1054, *R v Mayor and Burgesses of Lyme Regis* (1779) 1 Doug KB 149; 99 ER 98; *R v Thomas Amery* (1788) 2 Term Rep 515; 100 ER 278; *R v Pasmore* (1789) 3 Term Rep 199; 100 ER 531; *R v Cudlipp* (1796) 6 Term Rep 503; 101 ER 670

²³⁸ The term 'legal system' was in fact hardly ever used in discourse before 1870. It was used in *R v Almon* by Mr Justice Wilmot in a reference to 'the legal system of justice': *R v Almon* (1765) Wilm 243; 97 ER 94,

than 'law' as the referent. While many such references may be relatively meaningless, on other occasions, there was specific signification in speaking about the administration of something called 'justice.' This could be particularly so when judges used verb forms of administration ('administer justice' or 'the justice administered'). Occasionally the phrase 'administration of justice' was a load-bearing platform for values or concepts accommodated within a normative concept of justice in that it was used to define or illustrate what justice values were achieved by such administration.²³⁹ It is these normative uses upon which this analysis will focus.

The phrase, 'the principles of justice', was generally used with more precision than 'administration of justice' although it too, was often used to make reference to general principles by which cases were decided. Examination of this particular phrase is merited, if nothing else, by Atiyah's description of the period from 1770 to 1870 as the 'Age of Principles.'²⁴⁰ There were, he suggests, principles of everything: ethics, morality, jurisprudence, politics, commerce, etc. The precise boundary between rules and principles does not appear to have been clear, Atiyah described such a principle as a 'generalization which helped to explain the way the world worked.'²⁴¹ As examination of the tables in Appendices 1 and 2 will show, 'the rules of justice' had its own distinct discourse. It was, tellingly, far less significant than the discourse of principles. When lawyers spoke of the ingredients of justice or of justice as a collection of such ingredients, those ingredients were the more fluid-sounding 'principles' than rigid rules. Justice did not, it would seem, willingly entertain anything quite so rigid.

Like the administration of justice, it was often possible for 'the principles of justice' to be used to make sweeping references to doing things properly. In this sense the principles were a package of rightfulness that the speaker did not necessarily intend to unpick and define. However the context of such invocations also frequently illustrates something of the content of these principles. Again, it is these norm-specific uses that have been located within the discourse and which will be used within the following analysis.

No phrase relating to justice was immune to being used sweepingly. It could also be so with the 'interests of justice'. Lord Eldon, for example, seems to have been partial to using the term

258, 96. 'Legal system' could as frequently be used to refer to a body or, indeed, system of laws rather than the process that determined cases (*Burgess v Wheate* (1759) 1 Wm BI 123; 96 ER 67, 125; *Goodtitle and Others v Otway* (1796) 1 Bos & P 576; 126 ER 1074, 619). In fact, other than in *Almon*, the term 'legal system' appears only to have been used only twice before 1870 to refer to the collection of legal institutions and its rules: *Hills v Mitson* (1853) 8 Ex 751; 155 ER 1555, 762; *Barclay Chapman and Others v the Oriental Bank Corporation* (1864) Moo PC NS 463, 15 ER 976, 494, 498

²³⁹ On the idea of concepts as 'load-bearing' see De Bolla, *Architecture of Concepts* 38-9

²⁴⁰ Atiyah, *Freedom of Contract* 345-58

²⁴¹ *Ibid* 346

‘general interests of justice’ to speak in terms of the deciding of cases appropriately overall.²⁴² It seems, however, that ‘interests of justice’ was, of the three, the phrase most likely to be used to make some specific (although not always clear) reference to a particular value or set of values that could be described as justice’s interests. Again, this is not absolute, but close examination of uses of interest of justice, certainly from the 1820s onwards, shows an increasing tendency to use the phrase to refer to particular aspects of a compound of values to which the word justice could be applied. Even where the term was used generically in this way (and the same applies to principles of justice and administration of justice terms), a close reading shows that the reference to justice carries specific normative meaning.²⁴³ The interests of justice has some additional value for the purposes of this study in that it appears to have risen to prominence during this period. In fact, the interests of justice took on, at the end of this period, a particular function as a statutory term to provide discretions to administrative and quasi-judicial officer holders in the exercise of their powers.²⁴⁴ This is a function of the term that appears to have continued right into the 21st century. What came into being as a phrase of use during the early nineteenth century came, even during the period being investigated, to be a term of particular use in justice discourse, uses that appear to have continued thereafter. That further trajectory is outside the scope of this thesis although some of its implications will be returned to in the conclusion.

There are certainly other phrases that merit attention but space does not permit their consideration. ‘Requirements of justice’, ‘rules of justice’ and ‘purposes of justice’ are likely to carry as much normative weight as ‘interests’ or ‘principles of justice’.²⁴⁵ ‘Doing justice’ or ‘justice of the case’ are, as can be seen from Appendix 2, as likely to cover as broad a range of legal discourse as ‘administration’ or ‘principles’. In the interests of space, however, the terms ‘administration of justice’, ‘principles of justice’ and ‘interests of justice’ will be used to explore this justice discourse. The conclusions that follow are all therefore subject to this important

²⁴² See, for example: *Re James* (1803) 8 Ves Jr 337, 340; 32 ER 385; *White v Lady Lincoln* (1803) 8 Ves Jr 363, 374; *Eagleton and Coventry v Kingston* (1803) 8 Ves Jr 438, 480; 32 ER 425; *Mortlock v Butler* (1804) 10 Ves Jr 292, 307; 32 ER 857; *Ex parte Bennett* (1805) 10 Ves Jr 381, 385; 32 ER 983

²⁴³ For example, references in *Re James* and *Ex parte Bennett* (fn 242 above), Lord Eldon was invoking a set of principles restricting the entitlement of legal professionals to trade in their clients’ property to support notions of a type of impartial justice. The ‘general interests of justice’ in such a case were not a generic platitude but carried normative content specifically from the word ‘justice’ in that phrase.

²⁴⁴ Prisons Act 1865, Sch 1, para 54 (duty of prison governors to allow access of prisoners to legal advice); Foreign Enlistment Act 1870, s 18 (power of judges to grant warrants of removal to another jurisdiction). The immediate continuation of this trend in the 1870s can be seen in The Slave Trade Act 1873, s26; the Rivers Pollution Prevention Act 1876, 11 and the Summary Jurisdiction Act 1879, s 44

²⁴⁵ As shall be seen below (fn 806) the ‘as justice required’ was used to define part of the statutory test for the appeals under The Crown Cases Act 1848. This was one of the first attempts to incorporate justice into statute law as a legal test. As can be seen from *R v Mellor* (fn 807), this was a problematic statutory definition.

caveat: what appears to be meant by justice may, upon further investigation of other terms, come to be seen differently. It is possible that judges when invoking the rules of justice or the ends of justice had a different justice with a different set of justice values in mind. This does not, however seem likely.

The analysis will be conducted in two stages. First of all, in this chapter, the role that justice had in legal discourse in general will be examined. This will explore the relationship between justice and what, then and now, is commonly described as the law. It will show that the role of justice in such discourse was as a lever for dispute resolution in situations of ambiguity within existing rule structures. It will also be seen that justice discourse was used to temper more stringent legal edicts. In both respects, however, it is suggested that justice did not offer a single, clear solution and that its power in influencing decisions was, while noticeable, generally weak.

A more detailed analysis will then be conducted in the next chapter of those cases in which justice was invoked to address questions about legal procedure. This involves setting to one side a large number of cases in which justice was enjoined for the sake of determining the substantive content of the law or the moral appropriateness of its outcomes in any distributive sense. This is necessarily selective. This project could not cover all aspects of legal justice discourse during this period and a focus on procedural justice in particular is intended to advance a central claim of this thesis: that both historical and contemporary scholarship of legal systems will be advanced by a fuller and more detailed understanding of the meanings and significations invoked by participants in processes of normatively constrained decision-making.

Admittedly, a substantive/procedural distinction within justice cannot be assumed. Some areas of legal practice exist where such a distinction is less clear. The historical role of pleading practice in defining the outcomes to litigants and therefore the law that might apply to any dispute forced procedural issues (what constituted good pleading) and substantive issues (what a person's entitlements were) into a blurred relationship: how to plead effectively became, at times, the solution to the case.²⁴⁶ Equally, as shall be seen in the next chapter, procedural rules relating to the allocation of costs also inevitably related to issues of desert and entitlement that one would normally expect to be the preserve of substantive rather than procedural law. However, with these caveats in mind, it is proposed to focus analysis in the next chapter on the ways in which justice was invoked within discourse about the processes that the courts should follow in dealing with disputes.

²⁴⁶ Lobban, *Common Law* 67-71

Before doing so, however, it is necessary to explore, in outline, the part justice discourse played in judicial decision making more generally.

The Impact of 'Justice'

The central courts were referred to as 'Courts of Justice' and the judges of the King's Bench and the Common Pleas were addressed as 'Justices' or 'Chief Justices'. In the counties, nearly all legal determinations outside of courts leet and special jurisdictions were effected by 'Justices of the Peace.' Justice therefore was clearly embedded in what these courts did. They were, however, courts of law. Whatever the meaning that had been attached to courts over the centuries since these titles were acquired, by the 1770s, it was clear that what the Justices of the Courts of Justice were dispensing was law rather than any pure or abstract form of justice. In fact it was commonly accepted that there was a form of *judicial* or *legal* justice that was distinct from more common understandings of the term.

Lord Brougham was to express this distinction in 1834:

[T]he Court is called upon to exercise none other than its ordinary jurisdiction, according to the general rules which regulate the administration of equity, applying these in the accustomed manner, and abiding by the wonted forms. All considerations of discretion, fairness, equity, justice, in the vulgar sense of the words, as contra-distinguished from that equity which, originally founded in the principles of natural justice and reason, has however, by authority, decision, and even statute, long grown into a system, and assumed a technical consistence and shape—any rules, or any principles, or any feelings other than those, which are of daily recurrence and application in this place to the cases of an ordinary description which daily occur—I distinctly renounce and disclaim—being bound by the self-same doctrines, contained within the same limits, and compelled to walk by the same forms as in any question brought before me by one of the king's subjects suing another, according to the known rules of equitable procedure.²⁴⁷

Justice, then, could be conceived as part of the foundation of a rule system that was not, itself, 'justice'. Judges did not simply apply the law; justice had a foundational role under or between any concept of law in the form of rules to be followed and, in determining disputes, there was a

²⁴⁷ *Clayton v Attorney General and others* (1834) 1 Coop t Cott 97, 120; 47 ER 766, 775. The recognition of popular notions distinct from legal notions was not always this negative. In *The Aline* (1839) 1 W Rob 111, 166 ER 514, Dr Lushington (at 120, 518) distinguished 'common equity' from legal equity and considered (not negatively) its relationship with 'mere justice.'

wider interest in applying those laws appropriately. In part this required that laws were appropriately applied on the facts and by following proper processes. These are the matters of procedure that will be evaluated in the next chapter. However, there were also concerns that the law, given that it was not always clear how it should be read or understood or indeed what it was, should be applied in the morally or logically correct way. There was therefore something more to legal adjudication than simply identifying rules. It was at this point that justice, alongside other, extra-legal concepts, was deployed.²⁴⁸

Justice as the basis for rule development

Justice therefore offered a conceptual underpinning of legal adjudications. Frequently justice phrases were invoked to explain, support or sustain established rules of law. This was the case in *Lindon v Hooper* where 'principles of private justice and public convenience' were used to resist further innovation of an action for money had and received in cases of distress of goods.²⁴⁹ Equally, in *Wilkins v Carmichael* Lord Mansfield CJ, explained (or perhaps justified) the lawyer's lien over goods as 'established on general principles of justice'.²⁵⁰ Justice concepts were clearly recognised as a foundation for legal systems and processes.

Mansfield was no strict legalist.²⁵¹ In fact his legacy, recognised years after his judicial tenure, was that of a principled innovator, one who constructed the law out of a wider normative code, one in which justice was key. Speaking in 1828, Best CJ was to say:

*Lord Mansfield, speaking many years ago against subtleties and refinements being introduced into our law, said they were encroachments upon common sense, and mankind would not fail to regret them. It is time, he says ... our jurisprudence should be bottomed on plain broad principles, such as, not only Judges can without difficulty apply to the cases that occur, but as those whose rights are to be decided upon by them can understand. If our rules are to be encumbered with all the exceptions which ingenious minds can imagine, there is no certain principle to direct us, and it were better to apply the principles of justice to every case, and not to proceed to more fixed rules.*²⁵²

²⁴⁸ Lobban, *Common Law* 59, 79-81

²⁴⁹ *Lindon v Hooper* (1776) 1 Cowper 414, 419; 98 ER 1160, 1161

²⁵⁰ *Wilkins and Others, Assignees of Brooke, a Bankrupt v Carmichael* (1779) 1 Douglas 101, 104; 99 ER 70, 71

²⁵¹ Atiyah, *Freedom of Contract* 121-2; Lobban, *Common Law* 86, 98-9

²⁵² *Strother v Barr* (1828) 5 Bing 136, 153; 130 ER 1013, 1019

Mansfield was not unique in this respect. Late eighteenth century law was not applied by a simple established doctrine of 'precedent' but was determined by a far more complicated (or at least less clearly defined) set of intellectual activities. Judges did not, to the extent that they would later, feel 'bound' by a fixed system of precedent.²⁵³ Although loyal to established rules, a broad set of considerations influenced legal decision-making.²⁵⁴ Not least among these was 'justice'. In *Lindo v Lord Rodney* in 1782, for example, Lord Mansfield cited 'eternal principles of justice' as one of the foundational rationales of the creation of the prize court system, cited alongside 'mutual convenience', 'the wisest regulations of policy, and the consent of nations' as requiring the establishment of a 'system of procedure, a code of law and a Court for the trial of prize.'²⁵⁵

Justice could, therefore, be invoked to support legal development, whether by justifying interpretations of the law in situations of doubt or in providing remedies to new situations. This was reflected in the aphorism that 'if the law confer a right, it will also confer a remedy.' It certainly seemed to be accepted that procedural innovation could be warranted for the sake of justice.²⁵⁶ There was a strong relationship in both common law and equitable courts between invocations of justice and a concern to ensure remedies were accessible and available where deserved, a relationship that was to continue into the nineteenth century.²⁵⁷ In *Birkley v Presgrave* (1801), for example, the principle was invoked by Lord Kenyon in the following terms, 'If the law confer a right, it will also confer a remedy. When once the existence of the right is established the Court will adapt a suitable remedy, except under particular circumstances where there are no legal grounds to proceed upon.'²⁵⁸ That this was so was, according to Le Blanc J, a matter of 'the common principle of justice.'²⁵⁹ The equity courts, too, drew on a sense of what it was to administer justice to explore how laws could be interpreted to offer equitable remedies.²⁶⁰

Justice was in this sense pre-legal; the absence of established legal rules that gave justice its rhetorical latitude for norm-creation. Where existing laws and the principles upon which they

²⁵³ Lobban, *Common Law* 80-7; Baker, *Legal History* 198-200

²⁵⁴ Lobban, *Common Law* 90

²⁵⁵ *Lindo v Lord Rodney* (Hilary term, 22 Geo 3) noted in the footnote of *Le Caux v Eden* (1781) 2 Doug 594 (at 616), 99 ER 375 (at 388)

²⁵⁶ *Attorney General v Lambirth* (1818) 5 Price 386, 395-6; 146 ER 641 and see generally Lobban, *Common Law* 61-2

²⁵⁷ *Armstrong v Smith* (1805) 1 Bos & P NR 299, 304; 127 ER 477, 480; *Richards v Davies and others* (1831) 2 Russ & M 347, 351; 39 ER 427; *Viner v Vaughan* (1840) 2 Beav 466; (1840) 4 Jur 332; 48 ER 1262

²⁵⁸ *Birkley v Presgrave* 1801) 1 East 220, 226; (1801) Russ & Ry 256; 102 ER 86

²⁵⁹ *ibid* 229

²⁶⁰ *Kennedy & Kennedy v Earl of Cassilis and Others* (1818) 2 Swans 313; 36 ER 635; *Francklyn v Colhoun* (1819) Swans 276; 36 ER 860

were based were clear, it was more often the case that legal innovation would not be pursued. Legal change was generally a matter for Parliament.²⁶¹ However concerns about the injustice of ineffective processes or the abuse of partially developed rules, could prompt instances of judicial creativity even where the law was reasonably clear (if not entirely settled and certain). So, in *R v Woolf* (1819), Bayley J was willing to overcome concerns about the ‘mischievous consequences’ of stretching existing rules to extend the court’s powers to levy fines against those already imprisoned, observing that ‘mischievous consequences would ensue to the Crown and the regular administration of justice, from a delinquent withdrawing all his property from the effect of a judgment.’²⁶²

Such a relationship between ensuring just results and legal development continued into the mid-century. Thus it was that Lord Cottenham, as Lord Chancellor, could suggest that it was ‘the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy.’²⁶³ As the century progressed, this link became more explicit. In 1843, Sir James Wigram VC stated, in *Foss v Harbottle* (1843), ‘If a case should arise of injury ... for which no adequate remedy remained ... the claims of justice would be found superior to any difficulties arising out of technical rules.’²⁶⁴

These appeals to justice were, however an unreliable lever for legal change. It paid to reconcile them with authority. The attitude of individual judges and the temerity of claims for change made a difference. So it was that Lord Eldon was frequently unmoved by arguments that remedies and solutions should be found simply on the grounds of justice. In *Burroughs v Elton* (1805), he refused a request to make an order for a plaintiff on the grounds that he could not find any precedent for what the plaintiff was requesting (having adjourned the hearing for the purposes of doing so). It was not that he did not accept the justice of the plaintiff’s request; in fact he noted, that ‘principles of natural justice require it in many instances. There being however no precedent. I hesitate to make one. There is no case resembling this in circumstances; but there are many, in which natural justice required it as strongly upon other circumstances as this

²⁶¹ This was, therefore the basis for the appeal by Starkie in a footnote to *Speight v Oliviera* (1819) 2 Stark 493; 171 ER 715 that ‘The claim to damages’ in cases of seduction of a servant, which claims were ‘founded upon principles of strictest justice, the enforcement of which is absolutely essential to curb licentiousness and preserve the morals of society,’ should be reformed and were surely ‘worthy the attention of the Legislature to find a remedy for an evil of such magnitude’ (at 496, 716)

²⁶² *R v Woolf* (1819) 2 B & Ald 609; 106 ER 488

²⁶³ *Wallworth v Holt* (1841) 4 My & C 619; 41 ER 238, 635

²⁶⁴ *Foss v Harbottle* (1843) 2 Hare 461, 492; 67 ER 189, 203

case.²⁶⁵ No such concerns, however, were sufficient to move him to make an order in the absence of clear legal authority to do so.

In fact as the nineteenth century progressed, and precedent concepts became better established, justice lost some of its purchase as a basis for legal innovation. On the common law side, this can also be seen in Maule J's observation in *de Bode's Case* (1848) that 'neither the Queen's Bench nor any other Court of Law administers justice in general; and that, if the suppliant's claim was not cognisable by the Queen's Bench as a claim in law, it might be that the Court had no power to give any judgment at all.'²⁶⁶ Equally, by the 1840s, the Chancery courts would only innovate cautiously. Sir James Wigram VC qualified his claims for remedy-led innovation noted above by continuing, 'on the other hand, it must not be without reasons of a very urgent character that established rules of law and practice are to be departed from, rules which, though in a sense technical, are founded on general principles of justice and convenience.'²⁶⁷

The matter of balancing competing claims, which could each of them be equated with a just result or, as Wigram suggested, were built from justice concerns, provided the courts with sufficient reason not to strike out into the open waters of judicial creativity but to keep to the shores of gradualist development from existing principles. It was in the interstices between established rules that justice would be most effective rhetorically. Justice could be invoked to find methods of understanding and interpreting new cases and determining the extent to which old cases provided useful answers to them.

By the 1850s, the notion that justice could be used to create new rights was therefore subject to some trenchant criticism. In *Jefferys v Boosey* (1854),²⁶⁸ the issue was the existence of copyrights at common law. Speaking of the dictum of Willes J in *Millar v Taylor* in 1769, Lord Pollock CB told the House of Lords:

[H]e appears to think that, because, upon general principles, he has satisfied himself of the justice and propriety of an author possessing such a right, therefore by the Common Law it exists. The passage is a remarkable one, and shows what were his views of the Common Law, and what, probably, he thought would not be considered strange or novel by the rest of the Judges ... [H]e says, "It could only be done on principles of private justice, moral fitness, and public convenience, which, when

²⁶⁵ *Burroughs v Elton* (1805) 11 Ves Jr 29, 39; 32 ER 998, 1002

²⁶⁶ *Baron De Bode's Case* (1848) 13 QB 364, 387; 116 ER 1302

²⁶⁷ *Foss v Harbottle* (fn 264) 492, 203

²⁶⁸ *Jefferys v Boosey* (1854) 4 HL Cas 815, 10 ER 681

applied to a new subject, make Common Law without a precedent." My Lords, I entirely agree with the spirit of this passage, so far as it regards the repressing what is a public evil, and preventing what would become a general mischief; but I think there is a wide difference between protecting the community against a new source of danger, and creating a new right. I think the Common Law is quite competent to pronounce anything to be illegal which is manifestly against the public good; but I think the Common Law cannot create new rights, and limit and define them, because, in the opinion of those who administer the Common Law, such rights ought to exist, according to their notions of what is just, right, and proper.²⁶⁹

Willes J reflected a concern about the relationship between law and justice that was not new in the 1850s. His was a concern that even as 'Courts of Justice', such justice was best achieved through fidelity to existing understandings of the law. This itself was 'just'. In fact it was possibly the primary principle of justice, that the most appropriate outcome was not necessarily that which appeared to meet immediate expediency but one that matched settled understandings of what such an outcome should be. It was only, ultimately, when this sort of primary justice was lacking that other justice concerns could be allowed to influence the determination and interpretation of the law.

Justice subordinate to law

For these reasons, claims of justice would not be allowed to interfere with the stability and certainty of the law and the senior judges were confident in these preferences. The forms and structures of the law mattered first and foremost. The contrast was expressed by Lord de Grey CJ, in *Norris v Waldron* (1772):

At first sight it seems hard, upon principles of natural justice, that a plaintiff should have his whole costs, where he fails nine parts in ten. But the rule is a positive one, arising from the express directions of the Statute of Gloucester, which makes no distinction ... But till the Court shall upon consideration make a new rule for this purpose, we are bound to follow the established practice.²⁷⁰

Equally, Lord Mansfield CJ felt bound to give effect to legal judgments against his instincts as to the requirements of justice:

²⁶⁹ *ibid* 935-6, 728-9

²⁷⁰ *Norris v Waldron* (1777) 2 Wm. Bl. 1199, 1200; 96 ER 707

*I think it must be so, and the other authorities are, I am afraid, too strong to get over ... It would have been a very right principle of law to have said ... the construction which makes the lease good shall prevail; ... If you think you can find a contrariety of authorities, I should be glad to lay hold of it, and should be glad to bring the matter back to common sense and the clearest principles of justice ...*²⁷¹

Mansfield and de Grey were not atypical in seeing legal fidelity to firm and predictable rules and processes as the safeguards of justice rather than as potential obstacles to its attainment. In this sense acting consistently with past decisions was central to just adjudication rather than a restraint on it. Thus it was that in *Ancaster v Meyer*²⁷² Lord Thurlow could reject the arguments advanced in favour of a novel construction of a will with the words:

*[T]his rule has been laid down so long, and acted upon so constantly, that if other judges were to put the construction of wills upon other grounds, how wiseoever it might have been originally to have done so, it would be very unwise to make the administration of justice take a course contrary to former rules.*²⁷³

In fact, and unsurprisingly, this tendency to defer justice issues to settled legal authority was a constant of the justice discourse through the eighteenth and nineteenth centuries.²⁷⁴ As Parliament became more dynamic, laws became increasingly statutory. Judges were sometimes doubtful of the advantages of acting outside of legal rules even when it was not settled that any particular rules applied. When, for example, the Admiralty Court came to exercise its jurisdiction for the first time under s 22 of the Admiralty Court Act in *the Banda and Kirwee Booty (No 1)* adjudication (1866), Dr Lushington was invited to ‘decide the conflicting claims upon what has been called the broad principle of justice and equity, that is, to lay down once for all a new code of rules of joint capture according to my own discretion, irrespective of precedent and practice.’²⁷⁵ Dr Lushington, however, declined. His duty was, he said, ‘to make a judicial, not an arbitrary, decision’ and to:

ascertain the true principles on which claims to joint capture depend, in order to apply those principles to the special circumstances ... now under consideration; and in doing so I am not at liberty to treat the subject as a tabula rasa, and to shut my

²⁷¹ *doe d Bayntun v Watton* (1774) 1 Cowper 189, 191-2; 98 ER 1037, 1039

²⁷² *Ancaster v Meyer* (1785) 1 Bro CC 454; 28 ER 1237

²⁷³ *Ibid* 463

²⁷⁴ *Douglas v Forrest* (1828) 4 Bing 686, 702; 130 ER 933, 940; *Cocking v Ward* (1845) 1 CB 858; 135 ER 781 (where the argument for the defendant that allowing the plaintiff’s case would ‘be nothing less than repealing the statute’ was accepted by the court)

²⁷⁵ *Re Banda and Kirwee Booty (No 1)* (1865-7) LR 1 A & E 109, 131

*eyes to all that has been done in past times ... I am bound, not only to exercise my own reasoning on the subject matter, but to borrow all the light I safely can from the decisions in cases of prize, and from the usage in grants of booty.*²⁷⁶

It is perhaps surprising to see the adoption of broad principles of justice and equity being likened to arbitrary decisions but, from the perspective of legal decision-making, the point can be understood: creativity during adjudication was the creativity of reasoned (i.e. rationalised) development from a broad (if frequently imprecisely defined) value system that could be expressed as 'principles.'²⁷⁷ This value system was substantially based on relatively fixed norms that were generally conceived of as 'law'.

There were frequent occasions when judicial understandings of the law or of justice were at odds with those imposed by Parliament, a trend that was to increase as Parliament became increasingly active during the nineteenth century.²⁷⁸ In such circumstances, concepts of justice were useful tools to facilitate interpretation or adaptation. Judges showed fidelity to clear laws, judicial or statutory, to a considerable extent. Such change could, however, put pressure on established notions of justice as rule-fidelity as has been seen already in *R v Bird and Bird*.²⁷⁹

On other occasions, the just following of rules could be a force for change. In *Robinson v Robinson* in 1859, for example, the judges of the Queen's Bench halted proceedings in anticipation of the enactment of the Matrimonial Causes Act 1858. The rationale was a combination of truth-oriented justice (which will be examined more fully in the next chapter) and a concern that they should achieve results that were loyal to the law, not so much as it was, but as it was about to be. Cockburn CJ expressed the opinion of the court, saying that some of its members had:

a strong impression that justice ... requires, that if no case is made out against the co-respondent, he should be discharged from the suit, and enabled to give evidence on what is specially within his own knowledge. In these doubts I, having been one of the majority on the former occasion, think it right to say I now concur. It has since come to our knowledge that it is intended to introduce a clause in a Bill now before Parliament to solve this doubt, and to enable the Court, if it does not already possess the power, to dismiss a co-respondent and make him an admissible witness. It is

²⁷⁶ *ibid* 131-2

²⁷⁷ Atiyah, *Freedom of Contract* 344-58

²⁷⁸ *ibid* 251-2

²⁷⁹ *R v Bird and Bird* (1851) 2 Denison 94; 169 ER 431

*probable that this clause will apply to pending suits; if so, we shall be too glad to avail ourselves of it in the present case. Even if such a clause should not become law, I for one should think it incumbent on the Court to reconsider the conclusion at which it had arrived, and that as matters now stand, the interests of justice do require that Dr. Lane, against whom no case is established, should be dismissed from the suit.*²⁸⁰

In *Robinsons'* case, new law and the factual merits appeared to require the same result. This was not, however, always the case. Where it was not, there was a strong expectation that established rules would prevail. In this way, references to administering just results could also be used to explain seemingly unpalatable or immoral decisions required by rules of law. Dr Lushington, sitting in the Consistory Court, for example, felt bound to dispense justice against his instincts, stating:

*I truly say constrained, for, if left free from all legal restrictions ... Looking at all the circumstances of this case it would have been a much more acceptable duty to me to have pronounced for the separation than against it. Unquestionably, Mr. S. has no claim to favour from the Court, still he is entitled to justice; and that, to the best of my ability, I must administer, without permitting a regard to the comfort of any individual to interfere with the due course of law.*²⁸¹

Fidelity of the law was therefore the primary virtue of legal determinations and justice discourse as a whole tended to reinforce this value. It would, where possible, be acceded to. This was not always, however, the case.

Justice as restraint of rules

Justice was not simply a creative concept; it also limited legal rules and potential abuses of formal legalism and technicality. In *Holman v Johnson alias Newland*, for example, Mansfield refused to adopt a broad but technical reading of rules preventing immoral or illegal bargains where no substantive harm had been caused under a particular contract on the basis of 'good sense, and upon general principles of justice,' which he considered to require the enforcement of bargains and promises.²⁸²

²⁸⁰ *Robinson v Robinson* (1859) 1 Sw & Tr 362, 388; 164 ER 767

²⁸¹ *Simmons v Simmons* (1847) 1 Rob Ecc 566; 163 ER 1137, 578

²⁸² *Holman v Johnson alias Newland* (1775) 1 Cowp 341, 344; 98 ER 1120, 1122-3; the contract in question related to the purchase of un-dutied tea that was not shown to be due to be brought into the United Kingdom.

Justice therefore could be used to define the limits of existing rules or principles. In this sense, justice in the form of equitable dealing could also be invoked. Although it was in the common law courts that principles of justice appear to have been most commonly reported in the 1770s and 1780s, this was frequently by equation with principles of equity.²⁸³ Thus it was, for example, that in *Straton v Rastall*, a plaintiff's claim to 'money had and received' (a cause of action 'founded on principles of justice') failed where it was concluded that he could not show he had 'equity and conscience on his side'.²⁸⁴

What is, however, perhaps surprising in such circumstances is that principles of justice are almost never reported as being cited in the courts of equity themselves during the later decades of the eighteenth century.²⁸⁵ It is, of course, possible that within the equitable courts justice concepts were far more fully elided with traditional equitable doctrines and therefore expressed as 'equity' rather than 'justice'. Certainly when writing extra-judicially, senior chancery practitioners associated equitable doctrines and a concept of justice quite closely. Of the ten principles identified by John Freeman-Mitford (later Lord Redesdale) in his *Treatise on Equity Pleadings*, two were explicitly and significantly linked to a concept of justice distinct from principles or rules of law:

2. *Where the Courts of ordinary jurisdiction are made instruments of injustice.*

3. *Where the principles of law by which the ordinary Courts are guided give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent; and it may be collected that Courts of Equity, without deciding on the rights of parties, administer to the ends of justice by assuming a jurisdiction.*²⁸⁶

²⁸³ *Ellis v Hunt* (1789) 3 Term Rep 464; 100 ER 679 (entitlement of vendor to reclaim goods being delivered to a person declared bankrupt); *Towers v Barrett* (1786) 1 Term Rep 133; 99 ER 1014; *Straton v Rastall* (1788) 2 Term Rep 366; 100 ER 197 (actions for money had and received)

²⁸⁴ *Straton v Rastall* (n 283) 199

²⁸⁵ During the 1770s there was only one in which any 'principles of justice' term was used: *Campbell v Leach* (1775) Amb 740, 27 ER 478 ('general principles of justice and equity'). During the 1780s there were only another three: *Foley and Foley v Burnell et al* (1783) 1 Bro CC 274, 28 ER 1125 ('very strong principle of justice' for preserving property); *Shirley v Stratton* (1785) 1 Bro CC 440, 28 ER 1226 ('The principles of justice and good sense cannot be obscured for ever, by any technicalities') and *Dering v Winchelsea* (1787) 1 Cox Eq. Cas. 318, 29 ER 1184 ('contribution is bottomed and fixed on general principles of justice, and does not spring from contract').

²⁸⁶ John Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill* (2nd edn, London 1787) 103.

This association of equity and justice continued to inform the value system of the courts of Chancery into the nineteenth century.²⁸⁷ In fact justice appears more explicitly to have entered the discourse of the Chancery and its practitioners from the 1790s onwards.²⁸⁸ This did not necessarily lead to success; even in the Chancery Court, concepts of justice were frequently contrasted to established laws, simply for the latter to be preferred.²⁸⁹ Furthermore justice would be invoked, by advocates and by judges, to prevent equitable procedures being used to undermine the process of common law.²⁹⁰ During the stewardship of Lord Eldon, in fact, such arguments based upon justice were not necessarily likely to succeed in the absence of substantive support from established cases.²⁹¹ However, concepts of equitable justice were, both under Eldon and afterwards, a significant element of discourse about equitable remedies, particularly where justice was sought to support equitable restraint of common law rules deemed to be contrary to the 'principles of justice'²⁹² or where invoked to provide more equitable apportionments of burdens and liabilities than common law courts could provide.²⁹³

Justice as Interpretation

It was, however, in circumstances where legal clarity was lacking that justice had a greater role and it was at these points that the exhortation of justice shows the quality and nature of the justice concept. As the law became increasingly statutory from 1770 to 1870, the function of legal interpretation changed. The function of justice as an interpretive mechanism remained, however.

Sometimes such justice-based interpretation was simply a matter of refusing unpalatable choices. In *Hamilton and Smyth v Davis*, Lord Mansfield refused an interpretation of statute law concerning the status of wrecks that was 'directly contrary to the plain and clear principles of justice and humanity'²⁹⁴ (an interpretation that, it was suggested, made

²⁸⁷ *Queen of Portugal v Glynn* (1840) 7 Cl & F 466, 479; 7 ER 1147, 1152; *Pennell v Roy* (1853) 3 De GM & G 126, 138; 43 ER 50, 55

²⁸⁸ See Appendix 2

²⁸⁹ *ex p Bromfield* (1792) 3 Bro CC 510, 515; 29 ER 673, 675

²⁹⁰ *Utterson v Mair* (1793) 2 Ves Jr 95, 97; 30 ER 540, 541; *Eastabrook v Scott* (1797) 3 Ves Jr 456, 459; 30 ER 1103, 1105; *Law v East India Company* (1799) 4 Ves Jr 824, 832; 31 ER 427, 431

²⁹¹ See, for example, *Burroughs v Elton* (fn 292) 39, 1002

²⁹² *Wright v Simpson* (1802) 6 Ves Jr 714, 719-20; 31 ER 1272, 1275; *Burroughs v Elton* (1805) 11 Ves Jr 29, 39; 32 ER 998, 1002; *Craythorne v Swinburne* (1807) 14 Ves Jr 160, 162; 33 ER 482, 483; *Lopdell v Creagh* (1827) 1 Bli NS 260, 267; 4 ER 868, 871;

²⁹³ *Stone v Yea* (1822) Jac 426, 433; 37 ER 911, 914; judges were conscious of a potential injustice in seeking to make tactical litigation choices to deprive parties of effective access to equitable remedies: *Rogers v Frank* (1827) 1 Y & J 409, 414-5; 148 ER 730, 732

²⁹⁴ *Hamilton and Smith v Davis* (1771) 5 Burrow 2732, 2738; 98 ER 433

the entitlement to property from a wrecked ship dependent on whether any living creature had survived).²⁹⁵

It was more likely that justice would be theoretically effective where there were gaps or uncertainties in the body of law. In *Hamilton*, Lord Mansfield's view was profoundly underpinned by the absence of case law or commentary that suggested such an interpretation. In more challenging situations, concepts of justice could sway decisions more significantly. *Tickell v Read* concerned conflict in the authorities as to whether a master could intervene to defend a servant who was being attacked without the master himself facing the risk of an action for assault. One view was that such a master would be able to rely on his defence of his servant. A conflicting view suggested that such a master could not use force, rather being limited to bringing an action in the courts for compensation for the lost services due to any injury to the servant. Faced with an even balance of case law, Lord Mansfield supported the master's entitlement to act in accordance with 'principles of justice and of law' noting that:

*Burn cites also Salkeld, that a master cannot justify, because he might have an action for the loss of his service ... I see no reason from that case, or any principles of justice or law, why the plea might not have been allowed; for when a servant defends his master, it is not for his own sake, but for his master's; and when the master defends his servant, a man like himself susceptible of wounds and injuries ... a person under his special protection, it seems to be very far from sufficient to say, the master needed not to have been a loser if his servant's bones had been broken; for he might have recovered in an action for loss of service. What compensation or benefit is this to the servant? And the true justification, I take it is, that he did it in defence of the servant, and by obligation of that protection which he owed him for his service.*²⁹⁶

In such circumstances, principles of justice (as distinct from or in parallel to principles of law) could frequently be invoked as an aid to the interpretation of statutes or common law where literalism did not provide an obvious answer. Lord Kenyon CJ also felt able, in *Braithwaite v Bradford* (1796), to interpret an Inclosure Act in a way that was 'according to the words and meaning of the Act of Parliament, and according to the justice of the case, and ... contrary to no

²⁹⁵ *Moon v Durden* (1848) 2 Ex 22, 41; 154 ER 389

²⁹⁶ *Tickell v Read* (1773) Lofft 215, 215-6; 98 ER 617

authority'.²⁹⁷ In *Armstrong v Smith* (1805), Heath J stated, 'Judges have always construed acts of parliament according to the plain principles of justice and equity, where such construction has not been precluded by express words.'²⁹⁸ This was also expressed to be a working principle in the courts of equity too.²⁹⁹ Justice, suitably constrained by fidelity to legal texts and legal authority, provided a mechanism for the attainment of morally appropriate outcomes and procedures. In this way statutes could be interpreted (in the absence of clear meanings to the contrary), for example, against retrospective application.³⁰⁰

Insofar as 'principles of justice' were invoked in statutory interpretation there were two potential meanings to the phrase. In one sense, this could mean simply the ordinary course of legal dealings and the principles of law. It seems that it was in this sense that Sir James Wigram VC used the phrase in *Du Vigier v Lee* (1843) when he said, 'I am bound to scan its provisions with the utmost care, if, in any case, those provisions are in apparent conflict with the ordinary principles upon which justice is administered.'³⁰¹ On the other hand, principles of justice could frequently be used in this sense to refer to a broader and less rule-restricted understanding of the justice concept. It seems that this was the sense in which Lord Abinger used the phrase in *Thompson v Gibson* (1841), when he stated that 'principles of justice and common sense' allowed him to interpret 'immediately afterwards' under a statute³⁰² as meaning 'within such reasonable time as will exclude the danger of intervening facts operating upon the mind of the Judge, so as to disturb the impression made upon it by the evidence in the cause.'³⁰³

The 'interests of justice', too, could be deployed to justify interpretations of legislation. It was on this basis that Erle J had justified his limited interpretation of the Offences Against the Person Act 1837 in *R v Bird and Bird*, arguing that justice's interests were in a form of fairness that require juries to be focussed in their deliberations and therefore that the 1837 Act had to be interpreted in a way that limited the capacity for indictments to be loaded with alternative counts.³⁰⁴

The reality is that there was a need to do something more than simply embed new legislation into a body of established legal principles. Increasingly reformist tendencies of Parliament during

²⁹⁷ *Braithwaite v Bradford* (1796) 6 Term Rep 599, 602; 101 ER 724. It should be noted that Lord Kenyon was explicitly following the dictum of legal fidelity laid down by de Grey LCJ in *Norris v Waldron* noted above (fn 270). The principles of justice in these cases are considered further on page 12 below.

²⁹⁸ *Armstrong v Smith* (1805) 1 Bos. & P. N.R. 299, 304; 127 ER 477, 480

²⁹⁹ per Parke B in *Cockerell, Tagore and Day v Dickens* (1840) 2 Moo Ind App 353, 342; 18 ER 334, 375

³⁰⁰ *R v Churchwardens v Dursley* (1836) 5 Ad & El 10, 15; 111 ER 1070, 1072,

³⁰¹ *Du Vigier v Lee* (1843) 2 Hare 326, 332; 67 ER 134, 138

³⁰² 3 & 4 Vict, c 24, s 2

³⁰³ *Thompson v Gibson* (1841) 8 M & W 281, 286-7; 151 ER 1045, 1047

³⁰⁴ *R v Bird and Bird* (1851) 2 Den 94, 161; 169 ER 431

the nineteenth century could create problems of practice and procedure of their own, especially where they had a significant impact upon accepted notions of law, as the challenge in *R v Bird and Bird* has shown. In *Barker v The Tithe Commissioners* (1841), it was attempts to reform and simplify the law and procedure under the Tithe Act 1836³⁰⁵, relating to tithes that caused difficulties of interpretation. Lord Abinger CB again sought to interpret the relevant act in ways that did not prevent a party from access to a just determination of their case. He said:

*If this question were to be considered on the mere ordinary principles of justice and equity, nobody, I apprehend, could doubt that a man who made one claim which turned out to be imperfect, ought not to be precluded from making another of a different sort, in the same manner as he might have done before the act ... The legislature intended to put an end to all controversy about tithes, by providing a summary and conclusive jurisdiction, and to give to that jurisdiction the same powers to decide litigated questions which courts of law had before. Would not one suppose that they would make some provision that a party should not be barred by the mere form of a claim in the first instance, when he had a substantial claim behind? Would it not be reasonable that the commissioners should have power to adjudicate upon a bonâ fide claim, if the party had one? If so, we ought to construe the act of Parliament in the way we should suppose it was intended to operate, if the words will allow it; if the words bind us to do an act of injustice, we are bound by those words; but we must be fully satisfied there are such words, before we put such a severe construction upon the act.*³⁰⁶

The law did, however, frequently impose what were recognised as unjust results. In such cases fidelity to clear law was a common reason for accepting what was seen to be factual injustice. In such circumstances, the higher ends of justice might be invoked to support those rules that were, in specific cases, leading to unpalatable verdicts. In *Freeman v Tranah* (1852), for example, the court was faced with a request by the executrix of a plaintiff for the enforcement of an order for judgment that had been made before the plaintiff's death. Under statute, the claim of such an executor could only be entered within two terms of death. This had not happened because the defendant had adopted tactical procedures in the probate proceedings. It was recognised by the courts that this had been a tactic to delay judgment in the original action. The plaintiff was clearly felt to be entitled to a judgment morally but equally clearly considered to be without legal recourse. While, under existing rules, the court could have set aside the time limit if they were a

³⁰⁵ 6 & 7 Will 4, c 71, s 45

³⁰⁶ *Barker v Tithe Commissioners* (1841) 9 M & W 129, 147-48; 152 ER 55, 63-5

result of the court's actions, they had no express power to do so when the delay was due to any other cause. Sir John Jervis, the Chief Justice, however, expressed both his unhappiness with the outcome and his commitment to honour it:

*I must confess that I have most unwillingly brought my mind to the conclusion that this rule should be discharged; because I think it is the duty of the court in all cases to the utmost of its power to do substantial justice ... But the rule upon which they proceed ... is not applicable to the present case. I much regret the result: but I feel bound by the authorities; and, in deference to them, as well as to the opinions of my learned Brothers, I think this rule must be discharged.*³⁰⁷

Maule J agreed:

*I agree, that, in this particular case, justice would be better administered by making the rule absolute, than by discharging it. But there is no court in England which is intrusted with the power of administering justice without restraint. That restraint has been imposed from the earliest times. And, although instances are constantly occurring where the courts might profitably be employed in doing simple justice between the parties, unrestrained by precedent or by any technical rule, the law has wisely considered it inconvenient to confer such power upon those whose duty it is to preside in courts of justice. The proceedings of all courts must take a defined course, and be administered according to a certain uniform system of law, which in the general result is more satisfactory than if a more arbitrary jurisdiction was given to them. Such restrictions have prevailed in all civilized countries; and it is probably more advantageous that it should be so, though at the expense of some occasional injustice. The only court in this country which is not so fettered, is, the supreme court of the legislature.*³⁰⁸

Justice discourse therefore played a key role in developing and defining the existing content of the law. In this sense, however, it was, unsurprisingly secondary to the rules of law themselves. In fact this was seen and justified as a manifestation of just principles themselves; the courts could still be 'Courts of Justice' by preferring law to justice in 'simple' or 'substantial' forms where the law provided clear guidance. This deference was sometimes, but not always, labelled 'just'. Where the law was less clear, however, justice arguments played their part in defining how law could be clarified or developed. The analysis has not yet examined what in such cases was meant

³⁰⁷ *Freeman v Tranah* (1852) 12 CB 406; 138 ER 964, 411

³⁰⁸ *Ibid* 413

by justice. This, or more specifically, the justice values raised by matters of procedural justice, will be the focus of the next chapter. Before going on to examine the content of this justice discourse, however, it is necessary first briefly to recognise a further justice function, one without which the nature of justice discourse cannot be fully understood. This is the role of justice not in providing guidance on the right content of the law (and its implementation) but the role of justice in providing legitimacy and authority for legal decisions as a whole. This was not (as the matter would much later be expressed) the justice being 'done' but rather the justice being 'seen to be done.'³⁰⁹

Justice as legitimisation of the legal process

In one sense the administration of justice in particular was synonymous with concepts of rightful rule through the dispensing of rightful results by rightful processes. It was the monarch's coronation oath to "administer justice to his people" and it was from this oath that the courts recurrently claimed the weight of their authority and legitimacy.³¹⁰ The coronation oath reflected a general political and social expectation that the king and his servants, the courts, would provide "justice", thus this active sense of justice as administered (as opposed, for example, to simply being 'done') could reinforce links between the monarch as the original font of justice and the judges as the dispenser of its waters. As such, judicial references to the administering of justice not only supported and sustained the authority and legitimacy of the courts but also betokened a close relationship between regal and judicial authority. Talk of administering justice therefore enhanced the authority of the courts by drawing on royal authority rather than by asserting the authority of the courts as independent institutions.

Administration of justice was also used to legitimate judicial rule in ways that fitted more fully with a Burkean Whig vision of the constitutional order. Thus it was that Buller J stated, in 1791, that 'the common law of the land is the birthright of the subject, under which we are bound to administer him justice.'³¹¹ This was not, however, popular justice. What invocations of the administration of justice promoted was a value-neutral process at the service, but not the servant, of the popular will. Lord Abinger also justified a decision to uphold a verdict of the Glamorgan assizes that, on the face of it, have seemed to be the product of unacceptable partiality, with the observation that, 'It is our province to administer justice, and, in doing so, not to permit ourselves to be influenced by any apprehension of the opinion which the public may

³⁰⁹ *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, 259 (per Lord Hewart CJ).

³¹⁰ *R v Almon* (1765) Wilm 243; 97 ER 94

³¹¹ *Master v Miller* (1791) 4 Term Rep 320; 100 ER 1042, 344

form.³¹² This activist sense of administering justice provided a justification for processes of adjudication that placed such decisions and processes outside of wider social expectations and opinions while stressing their value for wider society.

The legitimating discourse took two inter-relating forms: concerns about the reality of the justice of the system (i.e. that a decision or process should be just because that is what was required of a judicial system) and concerns about the perception of the system as just. The two could be conflated (or, at least the distinction left unclear) as can be seen in *Hodgkinson v Wilkie* (1795), where Lord Stowell described the buying of evidence to support a party's case as 'highly derogatory to the administration of justice' in a way that, if not punished, would 'draw upon this Court imputations unfavourable to the purity of its proceedings.'³¹³ Equally, in *Kelfe v Ambrose* in 1798, Lord Kenyon dismissed an interpretation argument on the basis that 'it would be a reproach to the administration of justice to put a construction on this Act of Parliament, so contrary to the intention of the Legislature, as well as to common honesty.'³¹⁴

Justice lay at the very heart of what legal processes were seen to be there to achieve. In fact 'administration of justice' became central to supporting proceedings against those who sought to suggest judicial processes were anything other than just. This was more than crude iconography, however. Wider justice concerns could prevail over the mere protection of its image. So it was that in *Hime v Dale* (1804), a plaintiff sought to protect his copyright over a song being sold on the streets of London. The song in question was 'Abraham Newland' which ran:

*The world is inclined To think Justice blind;
Yet what of all that? She will blink like a bat
At the sight of friend Abraham Newland!
Oh! Abraham Newland! Magical Abraham Newland!
Tho' Justice 'tis known Can see thro' a mill stone,
She can't see through Abraham Newland!*

Abraham Newland had been the chief cashier of the Bank of England and so his name had become the nickname for Bank of England banknotes.³¹⁵ Garrow, in defending the author's application for protection of his copyright:

³¹² *Morris v Vivian* (1842) 10 M & W 137; 152 ER 414, 139; the two jurors had spent the night before returning the verdict in the house of one of the defendants in a civil claim.

³¹³ *Hodgkinson (Alias Wilkie) v Wilkie* (1795) 1 Hag Con 262; 161 ER 546, 268

³¹⁴ *Kelfe v Ambrose* (1798) 7 Term Rep 551; 101 ER 1127, 554

³¹⁵ Jonathon Green, *Green's Dictionary of Slang* (Chambers 2010)

*begged to draw their Lordships' attention to the libellous nature of the song, and contended it was of such a description that it could not receive the protection of the law in whatever shape it had appeared. It professed to be a panegyric upon money; but was in reality a gross and nefarious libel upon the solemn administration of British justice. The object of this composition was, not to satirize folly, or to raise the smile of innocent mirth; but, being sung in the streets of the capital, to excite the indignation of the people against the sacred ministers of the law, and the awful duties they were appointed to perform.*³¹⁶

It was a bold argument on behalf of someone being sued for the sale of that very song. The court was not willing to accede to such a point simply out of concern about the image of the courts. Such concerns for the image of justice were balanced against the legal merits of the case. Arguments of this sort, like all arguments, were weighed in the balance. Lord Ellenborough agreed that if the 'composition appeared on the face of it to be a libel so gross as to affect the public morals, I should advise the jury to give no damages' but went on to say, 'I think the present case is not to be considered one of that kind' and Lawrence J was to point out that Garrow's argument would also apply to the Beggar's Opera.³¹⁷

The image of justice was therefore to continue to inform judicial determinations alongside justice's normative claims. Such concerns could frequently be elided but, as will be seen, the image of the administration of justice as just informed a significant element of the justice discourse. Judges would frequently express the need for particular normative outcomes or expressions of justice in terms of what would credit or disgrace justice.³¹⁸ Quite what would credit justice or what failings would disgrace it, in other words, quite what justice was said to consist of, will be the subject of the next chapter.

³¹⁶ *Hime v Dale* cited in *Clementi v Golding* (1809) 2 Camp 25; 170 ER 1069, 32

³¹⁷ *ibid*

³¹⁸ See, for example *Fagg v Nudd* (1854, fn 332) and in *Edward v Hodges* (1855, fn 333)

Chapter 3

Procedural Justice

Justice discourse did not simply seek to resolve the outcome of cases. How justice should be achieved was an equally dynamic feature of this discourse. While tendencies to defer to defined rules and laws largely held true on this issue too, the courts seem generally to have been more willing to draw on the use of justice as an operative norm when resolving questions of procedure. This relationship can be seen in the statement of Sir Michael Foster in *Crown Law*:

*Upon the whole, my opinion is, that all general rules touching the administration of justice, must be so understood as to be made consistent with the fundamental principles of justice; and consequently all cases where a strict adherence to the rule would clash with those fundamental principles, are to be considered as so many exceptions to it.*³¹⁹

The result was that while courts were resistant to creating or adapting laws on the grounds of the justice of the outcome, they were more willing to apply rules of procedure flexibly for the sake of effecting justice. Lord Hardwicke was understood to have said, 'where he saw that justice might be effected by the adoption of any unusual proceeding, that if there were no precedent for it he would make one.'³²⁰ As a claim for legal innovation that was preyed in aid of claims for procedural innovation, this was openly accepted as true.³²¹

The heart of the matter was that the courts held a responsibility for effecting justice through the legal processes. Fidelity to what was established remained their primary duty but courts also had a responsibility for the end result of each case, for resolving the disagreement and so, even where there were no rules to follow, they would still need to determine an appropriate outcome. In such situations, justice was relied upon to provide or justify steps and processes where such were lacking. In *ex parte Greenacre* (1837),³²² for example, both Littledale J and Coleridge J relied on justice to provide a basis upon which to

³¹⁹ M Foster, *A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746 in the County of Surrey, and of Other Crown Cases. To Which Are Added Discourses Upon a Few Branches of the Crown Law*. (Sarah Cotter 1767) 38

³²⁰ *Attorney General v Lambirth* (1818) 5 Price 386, 395-6; 146 ER 641

³²¹ *ibid*, 431, 649 (per Lord Richards, CB)

³²² *ex parte Greenace* (1837) 8 Car & P 32, 173 ER 386

proceed where statute law was silent. The statute in question concerned the powers of the court to allow a defendant copies of depositions created by a coroner's court for use at a subsequent criminal trial. The relevant statute³²³ made no such provision. Littledale J concluded that:

*if they are material to the ends of justice, we may give them. The question is, whether they are not within the spirit of the Act. If the Legislature had had its attention called to the omission of such depositions, would they not have included them in the Act? But we think, upon the general authority we have, we may grant this application if we consider it material to the interests of justice.*³²⁴

Coleridge agreed but was at pains to emphasise the decision as the exercise of an inherent power rather than as some attempt to reinterpret legislation:

*I only wish to protest against it being taken as my opinion that we have any right to extend the meaning of an Act of Parliament to anything, because we may suppose that if the attention of the Legislature had been called to the subject they would have included it. I go upon the general grounds of our general authority ... [A]s a Court of justice, if we think it essential to the interests of justice, to order a copy of them to be given to him?*³²⁵

The capacity to act with such flexibility could be posited as a necessary element of any principles of justice.³²⁶

The English common law, as well as the practices of the ecclesiastical courts and the courts of equity, were, however, heavily based around rules of procedure and there were, by the late eighteenth century, already extensive rules and established practices. Consistency with and fidelity to rules therefore carried great weight here as much as in relation to substantive law. In fact substantive common law was into the early nineteenth century defined by its procedures.³²⁷ As such, legal practices would often prefer technical accuracy to other values.³²⁸ The capacity for adaptation and re-interpretation of rules of procedure

³²³ The Criminal Law Act 1826, 7 Geo 4, c 64, s 4

³²⁴ *ex parte Greenacre* (n 322) 33-4

³²⁵ *ibid* 34

³²⁶ In *Small v Attwood* (1838) 3 Y & C Ex 105, 160 ER 633, for example, Lord Abinger, for example considered the necessity 'on all the principles of justice' that a judge have the power to make situation-dependent orders about the timing of payments into court (at 133-4)

³²⁷ Lobban, *Common Law* 61-2

³²⁸ *Ibid* 71-7

and practice could be bounded by this preference as much as it was by norms of rule consistency.

Inclinations towards technicality varied from court to court and even, to some extent, from judge to judge. Mansfield had a reputation for impatience with technicality for its own sake. Eldon and Ellenborough were regarded as sticklers for it. Neither reputation is absolutely correct but Lemmings has suggested that a tendency of English legal training and practice in the latter half of the eighteenth century stressed formalism and fidelity to rules. To this, in fact, Mansfield, educated in Scotland, was an outsider.³²⁹ As the nineteenth century progressed, technicality in the form of precise and accurate pleading was the direction of reform, particularly in relation to practices of pleading.³³⁰ It would be a mistake, however, to confuse technical precision and accuracy with either rule fidelity or simple adherence to forms and formality. The former could frequently be associated with an accuracy-based justice,³³¹ the latter with consistency and rule-fidelity.

Generally, however, a willingness to determine cases on matters of strict formalities was to vary during the nineteenth century. While fidelity to established law would remain central to judicial activity and their concepts of justice, courts became, by the 1850s, much less willing simply to accept established rules of procedure (and rules of pleading in particular) as reason enough to determine cases in particular ways. In part a consciousness of the image as much as the reality of justice influenced this approach. In *Fagg v Nudd* (1854), for example, previous practices of simply deciding cases on formalities were stated to be 'not creditable to the administration of justice'³³² and in *Edward v Hodges* (1855) Sir John Jervis suggested that technical failings depriving a defendant of a defence 'would indicate a very rude state of society, and be a great reproach to the administration of justice.'³³³ This was not simply a matter of ignoring clear legal rules. It was rather a distinction, essentially between established law, which justice would require should be adhered to, and those rules that lacked either provenance or rationale. This can also be seen from the statement of Sir John Romilly, Master of the Rolls in 1864:

I must say that, unless I find myself bound by fixed and settled rules, by decisions which it is impossible to gloss over, I should be reluctant to give way to a mere

³²⁹ Lemmings, *Professors of the Law* 115-7, 144-8

³³⁰ Lobban, *Common Law* 211-9

³³¹ *Ibid* 219

³³² *Fagg v Nudd* (1854) 3 El & Bl 650; 118 ER 1286 per Lord Campbell at 651 although it is in fact difficult to be certain that Lord Campbell was suggested that he, society or Parliament had held that opinion.

³³³ *Edwards v Hodges* (1855) 15 CB 477, 491; 139 ER 510

*technical device to defeat the intention of the testator, and the due administration of justice.*³³⁴

Legality was therefore of great importance but in reviewing processes, both of the centre and of the peripheries, a wider concern for justice was what mattered. There was a distinction to be drawn between situations in which rules of procedure were seen as established and those in which they were not, and it was recognised that not all decision makers were to be bound in the same way. As Abbott CJ expressed it in 1819:

*[T]here is a material distinction between those rules which are founded on the immutable principles of justice, from which neither the Court nor an arbitrator can be allowed to depart, and those which depend on the practice of the Court: from the latter, indeed, the Court will not depart, because it is of great importance in Courts of Justice to adhere to them, even though it may operate to the prejudice of some particular case. For by abiding by general rules we avoid that uncertainty which would be productive of very great inconvenience to the suitors of the Court. But an arbitrator, to whom a particular cause is referred, is not placed in this situation; he is not, as it seems to me, bound by those rules of practice which are adopted by the Court, for those reasons which I have stated.*³³⁵

The extent to which justice involved consistency and conformity with established practices was not fully resolved. Judges would overturn established practices where they appeared to have no value for litigants, and justice and its values would be deployed to justify such intervention. Promptness and the avoidance of delay was a recurrent theme of justice discourse throughout the period.³³⁶ In *Boats v Edwards* (1779), Lord Mansfield invoked justice to discourage (or even prevent) the established legal practice of calling over to original documents on the grounds that, however common among barristers at the King's Bench, it was 'not warranted by any rule or principle of justice' and that therefore it was 'incumbent on the Court to make their proceedings as little dilatory, oppressive, and expensive, as possible.'³³⁷

Even here, however, justice as prompt and regular access to the courts was at best co-ordinate and indeed possibly subordinate to clearly established rules of law. There were

³³⁴ *D'eyncourt v Gregory* (1864) 34 Beav 36, 46; 55 ER 545

³³⁵ *Re Badger* (1819) 2 B. & Ald. 691, 692; 106 ER 517

³³⁶ *de Nieuwerkerk v Reynolds and Firebrace* (1829) 1 Kn 151, 167; 12 ER 278; *Hosking and Hosking v Terry and Stirling* (1862) 4 Moo PC 493; 15 ER 581

³³⁷ *Boats v Edwards* (1779) 1 Douglas 227, 227-8; 99 ER 149

significant differences between habitual practices and those practices so habitual as to be recognised as rules. Furthermore, prompt justice could often be required to accede to other justice claims.³³⁸ Courts, especially the Chancery Court, were notorious for delay and in part it seems that however much prompt resolution of dispute was valued, it was subject to other justice concerns that could contribute to such delay.³³⁹

Procedural case law related to the practices of central courts but also to practices of decision-makers away from the centre. Although frequently considering the application of particular legal rules, central courts, when reviewing decisions of others, saw themselves as overseeing the justice rather than merely the legality of such decision-makers.³⁴⁰ Central courts were respectful of but not deferential to local autonomy and regional practices. In 1789 Lord Kenyon refused to overturn established local jurisdictional arrangements between a borough court and the county Court of Quarter Sessions, saying, 'we should at least pause before we broke in upon the usage which has prevailed for near two centuries, and which has at least grown venerable from length of time'³⁴¹ For this reason, Crompton J would, when reviewing the practices of the Cambridge Quarter Sessions in 1861, suggest:

Upon the whole, ... the Sessions had jurisdiction to adjourn the hearing of this appeal. The jurisdiction is one which should be exercised with very great caution, and only when the interests of justice positively require it; but I think the jurisdiction exists ... As regards the mode of adjournment, I should say that the whole appeal ought to be reheard at the Session to which it is adjourned. The authorities, however, are strong to show that that is not a necessary condition of the adjournment: but that, in some cases, even when the hearing of the appeal has commenced, the final determination of it may be adjourned, by entering continuances to the next Sessions. It has been held that this may be done for the purpose of obtaining the opinion of a Judge of

³³⁸ *Dillon v Dillon* (1842) 3 Curt 86, 91; 163 ER 663; *Cast v Poyser* (1856) 3 Sm & G 369, 374; 65 ER 698

³³⁹ See, for example, *Lewis v Morgan* (n 552) at page 98 below

³⁴⁰ Although the central court reviewing decisions was usually the King's Bench, this was not always the case. Other courts sometimes be required to consider the legality of decisions made either through explicit powers they had (such as where recognisances had been estreated to the Exchequer) or because such decisions led to actions that were then subject to legal proceedings (e.g. those acting on the decisions were then sued). For this reason 'central courts' will be used to refer to the reviewers generically. Equally it was not just local *courts* who were the subject of review; prerogative powers and other legal challenges extended to the legality and justice of a range of other actors. For this reason, 'decision-makers' will be the general term of reference for those whose justice was under review.

³⁴¹ *Blankley v Winstanley* (1789) 3 Term Rep 279, 286; 100 ER 574

*assize. Why should it not be done in other cases, when the interests of justice make it advisable?*³⁴²

Consideration of the processes of decision-making raised many questions about the relationship between central and local processes. While court processes remained significantly localised before the rationalisations of the nineteenth century, courts at the centre tolerated localised substantive laws but were also willing to ensure that local processes for implementing those laws conformed to some centrally-generated notions of just dealing. In *Fisher v Lane* (1772), for example, the practice of the Mayorial Court of London regarding notice of proceedings triggered the intervention of the King's Bench on the grounds that '[c]ustoms of particular cities may deviate from the course of the common law, but a custom contrary to the first principles of justice can never be good'.³⁴³

As the nineteenth century progressed, such diffidence about intervening in local decisions and processes appears to have declined. Frequently the result was that local discretions or practices were made subject to central notions of how justice should be achieved.³⁴⁴ Again, such intervention was frequently based on distinctions between customary local practices and central expectations of justice. So it was that in 1801 procedures for calling and swearing juries at a court leet could be condemned as a 'custom' and therefore subject to 'the policy of the law, and the due administration of justice'.³⁴⁵

By the 1830s it was seemingly widely accepted in Westminster that processes of other tribunals and decision-makers were made subject to central expectations. Such decisions were to be exercised with circumspection. Central courts repeatedly denied any inclination to upset such local discretions while still intervening to ensure that such discretions did not impede centrally posited notions of just processes. There was a decline in acceptance of distinct local and understandings of justice. Therefore in *R v Justices of Lancashire* (1828), Parke J justified forcing the Lancashire Quarter Sessions to hear a case against their own notice rules while asserting that this was not the imposition of the discretion of the Court of King's Bench over that of the local court.³⁴⁶ Courts also became increasingly willing to invoke justice in evaluating the practices of

³⁴² *R v Guardians off the Poor of the Cambridge Union* (1861) 1 B&S 61, 68-9; 121 ER 637

³⁴³ *Fisher v Lane* (1772) 3 Wils 297, 302-3; 95 ER 1065

³⁴⁴ *R v Justices of West Riding of Yorkshire* (1833) B & Ad 667; 110 ER 937 (the powers of the Quarter Sessions to determine appeal procedures); *R v Antrobus* (1835) 6 Car & P 784; 172 ER 1462 (the power of the Sheriff of Chester to execute criminals) and see H. W. Arthurs, '*Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England*' (University of Toronto Press 1985)15-34; Cornish and Clark, *Law and Society* 33-5; King, *Crime and Law* 47-9

³⁴⁵ *Davidson v Moscrop* (1801) 2 East 56; 102 ER 289, 60-1

³⁴⁶ *R v Justices of Lancashire* (1828) 7 B & C 691; 108 ER 882

peculiar jurisdictions such as the Church and the Universities.³⁴⁷ This is perhaps not surprising: those senior judges who were increasingly unwilling to accept local peculiarity and sensibility were often either Whig supporters of the big reform project of the 1830s (e.g. Brougham and Denman) or, perhaps more circumspectly, Peelite Tories (e.g. Sir Frederick Pollock).³⁴⁸ By 1832 High Tories such as Kenyon, Tenterden and Eldon, with their preference for localised paternalism, had left the main judicial offices.³⁴⁹ Central courts were therefore increasingly open to the newer legal-political regime, one increasingly willing to oversee local practices to ensure consistency with Westminster concepts of justice. What exactly these Westminster concepts entailed was less clear, however.

This willingness to intervene in the decision-making of other bodies derived from a judicial sense that courts were best placed to determine the justice of processes and also institutions royally appointed to do so. Judges were also, however, conscious of the limits of their processes: the willingness to impose a particular vision of procedural justice was not unqualified and absolute. In 1869, for example, Sir Robert Phillimore declined to exercise the jurisdiction of the Court of Arches over a letter of request in respect of a question of heresy. Explaining his reluctance, he said:

If any good grounds were stated, or if it appeared from the nature of the case that the interests of justice would be promoted by my acceptance of these letters of request, I should certainly exercise my discretion in favour of accepting them. I have done so in cases where clerks have been charged with immorality, because there was a manifest advantage both to the parties and to the church that a court of law, accustomed to the oral examination of witnesses and to the investigation of evidence, and aided by the assistance of able counsel, should deal in the first instance with such cases. But the present letters of request are tendered to me in a matter of alleged heresy connected with some of the most awful mysteries of our

³⁴⁷ *R v Chancellor of the University of Cambridge* (1794) 6 Term Rep 89; 101 ER 451; *R v Lord Bishop of Gloucester* (1831) 2 B & Ald 158; 109 ER 1102; *Capel v Child* (1832) 2 Cr & J 558; 149 ER 235; *R v Archbishop of Canterbury* (1848) 11 QB 483; 116 ER 557

³⁴⁸ Edward Foss, *A Biographical Dictionary of the Judges of England: From the Conquest to the Present Time 1066-1870* (Murray 1870) 120, 198; Michael Lobban, 'Brougham, Henry Peter, First Baron Brougham and Vaux (1778-1868)' (*OUP*, 2008) <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/3581>> accessed 12 November 2013; JM Rigg, 'Pollock, Sir (Jonathan) Frederick, First Baronet (1783-1870)' (*ibid* 2004) <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/22479>> accessed 28 November 2013; Gareth H Jones and Vivienne Jones, 'Denman, Thomas, First Baron Denman (1779-1854)' (*OUP*, 2009) <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/7495>> accessed 21 November 2013

³⁴⁹ David Roberts, *Paternalism in Early Victorian England* (Croom Helm 1979); Hilton, *England* 318-9. The impact of paternalism and the importance of discretion to local concepts of justice will be explored more thoroughly subsequently.

*religion. Surely that is a case on which, of all others, the bishop ought to exercise his jurisdiction.*³⁵⁰

As will be seen, the central courts conceived a particular set of values as inherent to justice. The procedures that Phillimore noted, of examination, investigation and legal adjudication, were central to what justice was about. Achieving rightful (i.e. just) results by factually accurate decisions was key. Justice was, however, more complicated than this. First of all exactly how accuracy was achieved was not that clear. Secondly, other values were also frequently set against accuracy, whether justice or as something distinct to it: values such as consistency, equality, liberty, openness, finality, and the avoiding of expense or inconvenience.

What follows will be an attempt to trace many of these values in different areas of procedural justice. Although procedures varied from court to court, concepts of procedural justice were frequently shared and, where distinct, were identified as such. It is therefore useful to try and identify what was meant by justice when invoked in these courts so that a sense of the complexity of a 'just' process and the ambiguities inherent in its invocation can be understood.

Raising and Pleading of Issues

The business of pleading cases was central to the proper conduct of trial processes during the long eighteenth century.³⁵¹ Given this importance, it is perhaps not surprising that one area in which the courts relied significantly on justice terms to influence decisions was the practice of pleading.

Well into the nineteenth century, a significant emphasis, at times verging on the draconian, was placed on the precision and accuracy of the allegations contained in court documents.³⁵² This was often more than narrow technicality, however. Often oversight of the pleading of cases was linked to a concept of justice. Quite how rigid or inflexible the courts might be on such matters would depend, in part, on the nature of the tribunal determining the cases. The consistory court was willing to relax strict timetables for pleading in return for the justice of obtaining a full and accurate identification of trial issues.³⁵³ Other courts charged with identifying and resolving matters of dispute would

³⁵⁰ *Sheppard v Bennett* (1867-6) LR 2 A&E 335, 344

³⁵¹ Lobban, *Common Law* 61-7

³⁵² *Ibid* 71-8

³⁵³ *Middleton v Middleton* (1795) 2 Hag Ecc 134, 136; 162 ER 1038

often take rules of pleading more seriously, the rationale being that the exposure of the case by both parties ‘with accuracy and correctness’ was a well-established matter of ‘the plainest principles of justice’.³⁵⁴ To this end justice required close adherence to the rules of pleading, and particularly those rules specifying what could be pleaded generally or should be pleaded specifically.³⁵⁵

There was a particular need to plead precisely in order to identify the matters of legal dispute. Not only did this assist in accurate determinations, but in cases with a criminal or punitive aspect, in particular, there were also issues of right and liberty at play, particularly where vague or imprecise pleading created the dangers of the creation of new wrongs. In this sense, discourses on pleading procedure touched on matters of substantive, as well as procedural, justice. In *Francis v Steward* (1844)³⁵⁶, for example, the plaintiff in the Queen’s Bench challenged a citation against him from the Arches Court which alleged that he had ‘wilfully and contumaciously obstructed ... the making of a sufficient rule for providing funds’. The plaintiff argued that this did not show an offence cognizable by the court. It was argued for the defendant bishop that, while parishioners were entitled not to agree a church rate, to refuse to do so ‘wilfully and contumaciously’ made such refusal a spiritual offence.³⁵⁷

For Denman, a judge to whom precision and accuracy were of particular importance, this smacked of a troubling vagueness.³⁵⁸ ‘[T]he present plaintiff,’ he noted, ‘will incur spiritual censures though convicted of no other fact than that of a refusal to join in making a church rate.’³⁵⁹ Merely refusing to make a church rate could not be a crime because all parishioners had a discretion in that matter. While there might be all sorts of potentially criminal ways of refusing to make or preventing the making of a rate, ‘they are not the refusal of a church rate, nor evidence of such refusal; they are wholly independent of the mere refusal, and are capable of being distinctly stated.’³⁶⁰ All that showed the criminality of the act here was the allegation that it was ‘wilful and contumacious’. In concluding that the citation was invalid, Lord Denman enquired:

³⁵⁴ *Worley v Blunt* (1833) 9 Bing 635, 642-3; 131 ER 752 (per Alexander J citing, in part, *William v Glyn* (1668) 2 Saund 45; 85 ER 620)

³⁵⁵ per Lord Denman CJ in *Whittington v Boxall* (1843) 5 QB 139, 145; 114 ER 1201

³⁵⁶ *Francis v Steward* (1844) 5 QB 984; 114 ER 1519

³⁵⁷ *ibid* 994

³⁵⁸ Lobban, *Common Law* 219

³⁵⁹ *Francis v Steward* (n 356) 996

³⁶⁰ *ibid* 997

*Can any thing be more easy than to describe these facts, or more dangerous than to treat another as a criminal without informing him how he is supposed to have become so? Our own forms of indictment and declaration have been constantly held defective where, the facts averred falling short of the legal definition, an attempt has been made to eke it out by adverbs either vituperative or commendatory. The Courts refuse to infer guilt from them on the one hand, or a due course of legal proceeding within lawful jurisdiction on the other. Nor is this strictness imposed by technical rules: it grows out of the first principles of justice.*³⁶¹

These principles of justice related mostly but not exclusively to attempts to secure an accurate outcome to the proceedings: accurately stating the nature of the case provided a more solid basis for its determination. These were not, however, new concerns of the 1840s. Burn had been advising his readers to avoid including in indictments superfluous and distracting terms in indictments since the mid-eighteenth century.³⁶²

In addition to identifying the need for accuracy and precision, the resort to the concept of principles of justice also raised issues of the freedom of parties to elect the manner in which they would plead. Degrees of freedom were allowed in the interests of participation and challenge. This principle was most clearly invoked by Dr Lushington in *Dillon v Dillon* (1842), where he said, ‘according to the first principles of justice, a party charged with a particular offence has a right specifically to counterplead the acts charged against him.’³⁶³

Such freedom was not unrestrained, however. As cases progressed, there was always the temptation not only to answer allegations but also to introduce new evidence and raise new issues. Although this might be consistent with notions of justice as accuracy, such aims had to be set against other justice values. For example, in *Gayler v Fitzjohn* (1837), Lord Langdale MR criticized a Chancery Master’s decision to add new issues because:

it would, in ordinary cases, be contrary to the plain principles of justice, if he were allowed to do so. It would be unjust that parties, who come here in the fair expectation that a certain sum of money will be finally adjudicated to them, should have to encounter new matter ..., which they had no means of counter acting, and

³⁶¹ *ibid* 998

³⁶² Richard Burn, *The Justice of the Peace, and Parish Officer* (12th edn, T. Cadell 1772) vol 2, 459-60; this particular aspect of pleading practice will be considered more fully in Part 2.

³⁶³ *Dillon v Dillon* (1842) 3 Curt 86, 91; 163 ER 663

*for which they were wholly unprepared by anything in the state of the pleadings, or in the directions of the Court.*³⁶⁴

The justice of fully canvassing issues had therefore to be reconciled with the justice of fair notice. These values were not unrelated: proper notice enhanced truth (or lack of notice inhibited it) and this influenced attempts to reconcile notions of justice where parties were taken by surprise. In *Pearse v Pearse* (1840), for example, Cottenham LC refused to consider some of a party's claims where those claims had been known to that party but had not been put in issue by him. To do so, given such a lack of notification, was contrary to 'established rules of Courts of Equity, and inconsistent with the most obvious principles of justice.'³⁶⁵ Attempts to introduce new aspects into cases therefore required reconciliation of two values: the full identification of issues and the requirements of fair notice. Attempts to raise new claims or prove new issues which might enhance accuracy were therefore open to challenge on justice grounds.³⁶⁶

It was not just in relation to the defining of issues of dispute that the courts stressed the importance of precision and detail in drafting. In exercising appellate and review functions, justice also required a clear record of proceedings and the basis of such challenge.³⁶⁷ In fact King's Bench prerogative proceedings were in fact reviews of the lawfulness rather than the merits of any particular decision. It was therefore the accuracy of the record rather than the merits of the decision that was the focus of inquiry.³⁶⁸ So it was in *R v Tordoft* (1843) that the court faced the challenge of determining whether evidence had been given against a defendant in his presence. The Crown argued that this had been sufficiently recorded on the warrant of conviction in the case. There appeared, however, to be no clearly established form of recording such a fact. Lord Denman, bemoaning 'the inconvenience of departing from those rules of procedure which are founded on the principles of criminal justice', balanced the competing justice claims of technical accuracy, on the one hand, and discretionary, case-specific practices, on the other. 'No possible mischief,' he suggested, 'except the escape of one offender for a single defective conviction, could have arisen from requiring a plain statement in all summary convictions that the witnesses were examined in the prisoner's presence.'

³⁶⁴ *Gayler v Fitzjohn* (1837) 1 Keen 469, 473; 48 ER 387

³⁶⁵ *Pearse v Pearse* (1840) 7 Cl & F 279, 315; 7 ER 1073

³⁶⁶ *Walton v Potter and Horsfall* (1841) 3 Man & G 411, 444; 133 ER 1230; *Webster and Others v Power and Others* (1867-69) LR 2 PC 69

³⁶⁷ *R v The Inhabitants of Rhyddlan* (1850) 14 QB 327, 338, 117 ER 129

³⁶⁸ Cornish and Clark, *Law and Society* 25-6, 32, 35; Baker, *Legal History* 147

Practices of recording convictions were so different, however, that in each case the court was 'compelled to take the trouble of sifting the details of each conviction, to discover whether some words there do not import that essential fact.'³⁶⁹ The difficulty was that this particular magistrate's statement was formulaic rather than informative. It read, 'I have duly examined the proofs and allegations upon oath of both the said parties touching the matter of the said complaint; and, upon due consideration had thereof.' On a natural construction, such examination could not be presumed to be in the presence of the defendant and he therefore had to be discharged.³⁷⁰ In doing so, Denman supported a more justice of clear pleading practices, one which enhanced prospects of trial accuracy. For similar reasons, justice arguments could successfully be deployed in seeking the striking down of orders of inferior tribunals that were overly general and unspecific.³⁷¹

Lord Denman's complaints were in fact more than expressions of mere inconvenience; a court of review's role was to determine whether a proper process had been undertaken. The difficulty was that such courts felt bound by matters recorded rather than able to review decisions on their merits. This reflected a profoundly formalistic attitude at the core of judicial practice, one that was only gradually and partially displaced by relaxations of recording rules rather than more drastic innovations such as retrials and factual reviews of verdicts.

By the mid-century, however, values of strict fidelity to written records had become less justifiable in the face of broader, less formalistic and more fact-based conceptions of justice. This increasing suspicion of the pure loyalty to form found its expression in statutory reform at the same time. Thus it was that under the Evidence Act 1851, a difference between the case pleaded and the case proven would not prove fatal to civil proceedings and civil parties were to be permitted to testify in their own cases.³⁷² Additionally, the Common Law Procedure Act 1852³⁷³ introduced a more flexible system of pleading, one in which fewer failures of form were to be fatal to a case and in which more could be fixed by amendment.³⁷⁴ These were not simply

³⁶⁹ *R v Tordoft* (1844) 5 QB 933, 939; 114 ER 1500

³⁷⁰ *ibid* 940

³⁷¹ In *Quartermaine and Plews v Bittleston* (1853) 13 CB 133; 138 ER 1147, the plaintiffs' argument to that effect (at 152) was accepted by the court in ordering that an order of sale made by a commissioner in bankruptcy had not been valid (at 157)

³⁷² Evidence Act 1851 (14 & 15 Vict C 99), s 13

³⁷³ Common Law Procedure Act 1852 (15 & 16 Vict C 76)

³⁷⁴ Baker, *English Legal History* (4th edn) 111-3; Cornish and Clark, *Law and Society* 42. Cornish and Clark also note reforms within the court structures and identify a 'cultural exchange' between the common law and equitable jurisdictions, an exchange that constituted an increasing sharing of both procedures and of remedies.

innovations imposed on the judicial system from the outside. Rather, they were the work of an active minority within legal practice intent on developing a system of juristic practices more conformable to the spirit of this increasingly systematic and scientific age.³⁷⁵

There was, however, a stark lack of consensus in this shifting discourse, a fact that was exposed by the increased formality and openness of the deliberations on criminal matters by the full Court of Crown Cases Reserved. A minority of the judges unsuccessfully sought to free criminal appellate procedure from a rigid adherence to forms.³⁷⁶ This particularly manifested as a concern about the relationship between the indictment and determinations of guilt, one of the issues at the heart of the dispute in *R v Bird and Bird*.³⁷⁷ There, the concern of the majority was the indictment's role determining how the jury could understand the case. These judges rejected any suggestion that pleading in an indictment should displace the case as overseen by the trial judge. Retaining a preference for a criminal process less influenced by lawyers and their practices, these judges were unwilling to treat an indictment in the same way as documents pleaded in civil cases, as definitive of the issues in the case.³⁷⁸ For Erle J, in fact, a controlled sense of what criminal trials were about and how they should achieve just results, required that the indictment be read in such a limited way. It was 'important for public justice,' he said, 'to conduct trials for murder with unity of attention, to free the Judge from the technicality in which we are now involved, and the jury from referring the evidence to three alternatives, murder, assault, and acquittal.'³⁷⁹ The minority, on the other hand, saw the function of the indictment as a broad document of factual allegation from which any factually credible form of liability could be alleged and, ultimately, proven.³⁸⁰

Equally because the pleadings could define the nature of the substantive law applicable to a dispute, such documents could raise notions of justice that straddled procedural and substantive concerns. This was so in *R v Reed*³⁸¹ in 1854. There the defendant was prosecuted for larceny, having been sent by his employer, Newton, to pick up an order of coals in Newton's cart. Rather than delivering the whole quantity of coals straight back to Newton's house, however, he had delivered some to a second defendant, Peerless. This delivery to Peerless was the basis of the larceny prosecution.

³⁷⁵ Cornish and Clark, *Law and Society* 40-1; Hilton, *England* 605-7, 611

³⁷⁶ See *R v Mellor* (1858) Dears & B 468, 169 ER 1084 is considered at p 153 below.

³⁷⁷ *R v Bird and Bird* (n 20)

³⁷⁸ *R v Bird and Bird* 146, 153, 178, 179, 185, 188

³⁷⁹ *R v Bird and Bird* 161

³⁸⁰ *R v Bird and Bird* 173-4, 192-4, 198, 200

³⁸¹ *R v Reed* (1854) Dear 57; 169 ER 717

The defence case was that the coals had not been stolen from Newton when delivered to Peerless because Newton had not in fact at that point come into possession of them. Although it would have been possible to have prosecuted the crime as an embezzlement (the receiving and keeping of a master's goods as a servant) rather than as a larceny, this was not the way the crime had been alleged on the indictment and the defendants had successfully objected to any change to the indictment at trial. When convicted of theft of the coals, the defendants sought a review of the matter by the Court of Crown Cases Reserved, arguing that what they had done in law could not amount to the crime alleged.

The court's concern was to deal with the case as presented and to determine whether what had been alleged on the indictment could in law amount to a crime. As the crime could have been charged as an embezzlement, it could therefore, pursuant to the Criminal Procedure Act 1851, s 100, be subject to a conviction as larceny or larceny from a master in the alternative. However, it having been charged simply as a larceny in the first place, the Court had to resolve the issue with which it was presented.

Such a willingness to look beyond matters of technicality was not unrestricted, however. The case had been argued twice because Parke B had not been willing to accept that what had been alleged could not in law amount to a larceny. It had been suggested that prior case law provided precedent for holding the defendant liable. The remainder of the court were content to determine the issue without such precedent but Parke insisted on sight of the Black Book in which the case (*Spear's Case* of 1798) had been recorded. When he had seen it he was willing to concede the point, enabled to do so against what appears to be his personal view, in reliance on authority. While he had been instrumental in the simplification of pleadings processes in the 1830s, Parke had a reputation for loyalty to the requirements of form regardless of any merits of any particular case.³⁸² It is perhaps not surprising therefore that it was he who resisted to any looseness of practice in *Reed's* case.³⁸³

Such rule-driven judicial conservatism was certainly not unusual: it was deeply embedded into the justice discourse of the era. In fact, it was on the basis of rules of pleading and abstractions of substantive law that the majority based their decision. The difference is that judges in the majority, like Lord Cockburn, saw such rules as a means to a just end rather than just in themselves. In justifying his conclusion, he said:

³⁸² Cornish and Clark, *Law and Society* 41

³⁸³ *R v Reed* (n 381) 221

I cannot think that there would have been any reproach to the administration of justice in holding that the subtlety arising from the prosecutor having had no property in the subject of the larceny before its delivery to the prisoner who stole it, was sufficiently answered by the subtlety that when the prisoner had once so parted with the personal possession of it that a constructive possession by the prosecutor began, the servant who subsequently stole it should be liable to be punished, as if there had been a prior property and possession in the prosecutor, and that the servant should be adjudged liable to be punished for a crime instead of being allowed to say that he had only committed a breach of trust, for which he might be sued in a civil action.³⁸⁴

Lord Cockburn was therefore willing to confront strict legal interpretations arising from formalities of the record with equally abstract legal fictions. This was an age-old response to problems caused by dangers of substantive injustice caused by excessive rule fidelity.³⁸⁵ Such fictions were, however, to be made to work not for their own sake, however. Rather, he said:

In approaching the confines of different offences created by common law or by statute, nice distinctions must arise and must be dealt with as in the present case. It is satisfactory to think that the ends of justice are effectually gained by affirming the conviction, for the only objection to it is founded upon an argument that he ought to have been convicted of another offence of the same character, for which he would have been liable to the same punishment.³⁸⁶

This was neither the first nor the last occasion on which courts developed rules of law and procedure to achieve rightful and just results. What was perhaps more surprising was the extent to which Cockburn in the 1850s was prepared to be much more explicit about the right-answer justice this entailed.

Practices relating to the pleading and the formalism of court records were always likely to emphasize aspects of justice placing particular weight on the justice of predictability and fidelity to rules. However, as can be seen from these cases, such discourse was often and increasingly informed by other values. Frequently loyalty to formalities was justified for the sake of accurate determinations and to ensure full notice of (and therefore effective participation in) cases. These

³⁸⁴ Ibid 265

³⁸⁵ Baker, *Legal History* 201-2

³⁸⁶ *R v Reed* (n 381) 265

concerns, it will be seen, manifested in other practices too. They were particularly to influence attitudes to the justice of the trial itself and attitudes to appeals.³⁸⁷

Costs liabilities

Justice would be also frequently invoked in the context of decisions about the costs of litigation and the entitlement of parties to compensation for the trouble and inconvenience of litigation. As such the justice of costs decisions was the justice of fair and reasonable apportionment of expense and inconvenience. Advocates would frequently argue, and courts would regularly base issues of costs on such recompense as a justice principle.³⁸⁸ In fact the significant discretion in the making of most costs decisions meant that justice arguments could be used in making moral decisions of desert, whether to compensate those who were felt not to merit cost penalties³⁸⁹ or as a sanction against aggressive or unreasonable litigation.³⁹⁰

As ever, however, this justice of compensation had to be reconciled with other justice values. As a form of sanction (or least liability), costs orders required their own processes of notice and participation. In *R v Greene* (1843), for example, Lord Denman CJ questioned the extent to which it was just to make a costs order against a party not involved in the proceedings to which the costs order related without a special hearing to involve such parties.³⁹¹

Equally, many costs rules had been specified in legislation and so costs disputes could draw on justice principles as invitations towards particular statutory interpretations. Such justice claims failed to displace clear costs rules³⁹² but justice values could, as elsewhere, inform interpretations of ambiguous laws. This was the case in *Braithwaite v Bradford* in 1796,³⁹³ where an Inclosure Act had simply ordered that costs were to be paid on a success by one party or the other.³⁹⁴ As the plaintiff had succeeded on three of the ten matters in dispute,

³⁸⁷ See pp 161 and 177 below respectively

³⁸⁸ *Brook v Willett* (1795) 2 H Bl 435, 436; 126 ER 635; *Farley v Briant* (1835) 3 Ad & El 839, 864; 111 ER 632; *Spencer v Hamerton* (1836) 4 Ad & El 413, 416-7; 111 ER 843; *Stanton v Hatfield* (1836) 1 Keen 358, 345; 48 ER 344; *The Catherine* (1847) 3 W Rob 1, 5-6; 166 ER 863; *The Gauntlet* (1849) 3 W Rob 167, 169; 166 ER 925; *Wythes v Lee* (1855) 3 Drew 396, 403-4; 61 ER 954

³⁸⁹ *Hartopp v Hartopp* (1856) 21 Beav 259, 274; 52 ER 858

³⁹⁰ *Pattison v Graham* (1854) 2 Sm & G 207, 211-2; 65 ER 367

³⁹¹ *R v Greene* (1843) 1843) 4 QB 646, 649; (1843) 12 LJ QB 239; 114 ER 1042

³⁹² *Norris v Waldron* (1777) 2 Wm. Bl. 1199, 1200; 96 ER 707

³⁹³ *Braithwaite v Bradford* (1796) 6 Term Rep 599, 602; 101 ER 724

³⁹⁴ The act, 34 Geo 3, c 44 provided, 'if the verdict should be in favour of the commissioners' determination then the costs ... should be borne by the plaintiff or plaintiffs, and if against such determination, then by the proprietors at large'

Lord Kenyon CJ felt justified in reading ‘the costs up to that extent’ into the relevant provisions ‘according to the words and meaning of the Act of Parliament, and according to the justice of the case, and is contrary to no authority.’³⁹⁵

There were, however, limits as to the extent to which the courts were prepared to pursue nuanced, situation-sensitive approaches in the face of established rules and reasonably clear and literal interpretations. This approach also failed in *Durham v Marquis of Hertford* (1814), where the King’s Bench refused to follow Lord Kenyon’s principle. There the plaintiff had succeeded in obtaining a declaration of rights of common over 30 of the 91 disputed acres but his costs claim was dismissed on the basis that there had been one issue relating to all 91 acres, which he had not won.³⁹⁶

Decisions relating to costs and the reimbursement of parties entailed significant discretion that justice claims did little to resolve. They were also specific to each court. In fact the diversity was such that it could surprise even the most established practitioner moving from one court culture to another, as Lord Eldon found on his elevation to Chief Justice of the Common Pleas in 1799. In *Hall v Ody* (1799) he confronted an esoteric point of costs procedure, namely the refusal of the court to award lawyers’ costs out of the damages awarded in cases where the parties’ cross-claims had been set off against each other. The practice of the Common Pleas in not doing surprised Lord Eldon, ‘since it stands in direct contradiction to the practice of every other court as well as to the principles of justice’.³⁹⁷ What astounded Eldon’s sense of justice, however, was not seen quite so starkly by more established Common Pleas judges. Although both Heath J and Rook J were content to consider the adoption of practices of other courts in this respect, Rook J was far from certain that such a practice was wrong. In fact he perceived a different compensatory justice principle from that which had impressed Lord Eldon. Rather, he said, ‘it does not appear to me to be unfair as it stands at present. The attorney looks in the first instance to the personal security of his client, and if beyond that he can get any farther security into his hands, it is a mere casual advantage.’³⁹⁸

For all the distinctions between the courts, the reality of legal practice carried ideas and perceptions from court to court and particular ideas and justice values were therefore transposable from one to the other.³⁹⁹ From Lord Eldon’s perspective, informed by practice in

³⁹⁵ *Braithwaite v Bradford* (n 393)

³⁹⁶ *Durham v Marquis of Hertford* (1814) 3 M & S 323, 326; 105 ER 633

³⁹⁷ *Hall v Ody* (1799) 2 Bos & P 28, 29; 126 ER 1136

³⁹⁸ *ibid*

³⁹⁹ Sewell, *Logics* 339-40

other courts, there was a danger of under-compensating individual lawyers. For Rook J, a different value system enjoined a lawyer's duty to his client even before himself. Ultimately, the existing value structure seems to have prevailed: the issue was raised again in *Bourne v Benett* (1827) where the court, while noting the need for attorneys, declined to depart from its existing practice.⁴⁰⁰

Costs practices show a further aspect of the nature of justice as a rhetorical tool: while costs-related justice discussions were based substantially upon concerns to compensate, this value was not enough to provide clear and universal conclusions. There were two particular difficulties. First of all, established practices and existing rules led to different conclusions about what was just in different fora. Equally, compensatory justice principles, being principles of substantive justice, did not resolve questions about *how* such just results were to be achieved. Such concerns were only to be resolved by treating costs claims like any other claim of substantive entitlement and therefore required consideration of the justice of processes. In this respect, as *R v Greene* shows, one particular issue was the entitlement of those affected by results to have notice of, and effective participation in, any such determination.

Notice of Proceedings

In fact the issue of how to involve parties fully in decisions concerning their interests was one of the main areas in which justice discourse featured from 1770 to 1870. Both in their own practices but also in their oversight of the practices of inferior courts and decision makers, the central courts emphasised effective notice and participation as central to the concept of justice.⁴⁰¹ It was argued to be vital to justice that final decisions were only to be made where those affected had an opportunity to defend their interests⁴⁰² and therefore had been informed of the need to do so.⁴⁰³ On matters of procedure the courts would frequently associate the entitlement of parties to be heard with the principles of justice.⁴⁰⁴

This had been the issue in *Fisher v Lane*,⁴⁰⁵ where the customary jurisdiction of the Lord Mayor's Court of the City of London ('the Mayor's Court') to exercise 'foreign attachment' was under scrutiny. This was, in effect, a form of garnishing proceeding, a process by which enforcement

⁴⁰⁰ *Bourne v Benett* (1827) 4 Bing 423, 424; 130 ER 831

⁴⁰¹ That decisions would be overturned for want of notice had been established in previous cases such as *R v The Chancellor, Masters and Scholars of the University of Cambridge* (1722) 1 Strange 557, 93 ER 698 but reports of such cases did not record any relationship of this entitlement to any concept of justice.

⁴⁰² *Howarth v Smith* (1833) 6 Sim 161, 167; 58 ER 555

⁴⁰³ *Brighton Arcade Company v Dowling* (1867-8) LR 3 CP 175

⁴⁰⁴ *Clarke v Stocken* (1836) 2 Bing NC 651, 653; 132 ER 251; *R (on the Prosecution of Dinsdale) v The Saddlers' Company* (1863) 10 HL Cas 404, 413; 11 ER 1083

⁴⁰⁵ *Fisher v Lane* (1772) 3 Wils 297; 95 ER 1065

procedures could be taken by a third party to the case to whom a plaintiff owed money. This occurred where there was a separate, second action between the third party and the plaintiff. This third party could obtain the damages arising in the second action and owed by the plaintiff by seeking foreign attachment against the defendant in the first action.

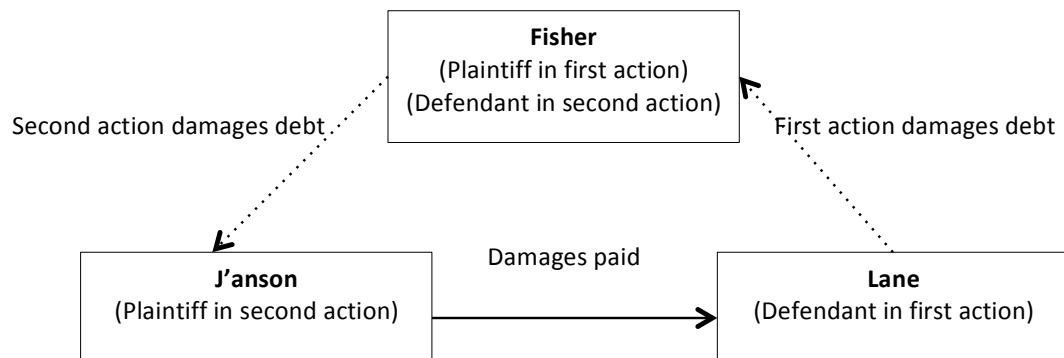


Figure 1: Foreign Attachment

In *Fisher*, the Plaintiff, Mrs Fisher, had brought an action against Lane, who raised the defence that the judgment debt had already been met, the money owing under the judgment having been paid to a plaintiff, one J'anson, in a second action *against* Fisher in the Mayor's Court (see Figure 1)

Foreign attachment was not a procedure unknown to the central courts, being a common feature of a number of local and colonial jurisdictions.⁴⁰⁶ However, in the Mayor's Court (and in other courts as shall be seen) this could raise issues of the adequacy of steps to involve plaintiffs like Fisher in these actions in which their interests were affected. Mrs Fisher had failed to appear at the Mayor's Court on four occasions but that court's Serjeant-at-Mace had deposed in the subsequent hearing before the King's Bench that it was not the custom of the Mayor's Court to give notice of such proceedings to defendants (i.e. to Fisher as defendant to the *J'anson v Fisher* action). To Lord Kenyon CJ, 'this custom not to summon or give notice to a defendant in a suit commenced against him [was] contrary to the first principles of justice.' This was not a matter of mere criticism. The judgment of the city court (and thus the defendant's plea of satisfaction of the debt) was therefore 'erroneous; it is said to be for the default of Mrs. Fisher's appearance;

⁴⁰⁶ John Locke, *The Law and Practice of Foreign Attachment in the Lord Mayor's Court, under the New Rules of Practice* (S. Sweet 1853) 1-3

she made no default, for it appears she never was summoned or had notice, which is contrary to the principles of justice,⁴⁰⁷ namely the informing of those affected by such exercises of power.

The customary practices of the Mayor's Court of London in relation to foreign attachments was a regular feature of such notice-based justice discourse. It featured again in *M'Daniel and another v Hughes* (1803).⁴⁰⁸ However, a mere failure to take particular steps was not enough. Not willing merely to accept broad justice-invoking arguments, Lord Ellenborough was concerned not with what had been done or not done but rather with whether a party had in fact had material notice.⁴⁰⁹ A judgment, he explained in *Buchanan v Rucker* (1808), would be enforceable if it 'appears on the face of it consistent with reason and justice; but it is contrary to the first principles of reason and justice that either in civil or criminal proceedings, a man should be condemned before he is heard.'⁴¹⁰

Failures of notice were not, therefore, simply arguments of formality. There was a normative justice claim in which what mattered was the actuality and efficacy of notice. Where procedures for providing notice were omitted but parties in fact had notice (and therefore could engage in a procedurally just process by active participation), failures of formalities would not require interventions from the superior courts. This principle was applied in *Cavan v Stewart* (1816), where the foreign attachment had taken place in respect of an action against the plaintiff in Jamaica. Counsel for the plaintiffs relied heavily on *Fisher v Lane* in seeking to void the Jamaican enforcement on the basis of principles of justice. Lord Ellenborough was inclined to agree with the principle. 'It is perfectly clear on every principle of justice,' he said, 'that you must either prove that the party was summoned, or at least that he was once on the island.'⁴¹¹

Proof of summons therefore provided the prime fulfilment of notice-based justice but so too, in a less obvious and perhaps more technical way, did residence on the island. By having been proven to be a resident, it was not necessary to prove actual notice. Here it is possible to detect lingering tensions between ends-focussed justice arguments (like the *actuality* of notice) and wider efficiency-based concerns, which adopted technical fictions through which justice values (like

⁴⁰⁷ *Fisher v Lane* (n 343 above) 303-4, 1068

⁴⁰⁸ *M'Daniel v Hughes* (1803) 3 East 367, 377, 102 ER 638

⁴⁰⁹ *ibid* 380, 643. Despite attempts at reform of their procedures in the 1850s (see Locke, *Foreign Attachment* 26-48, 97-112), these particular customary practices were still being condemned as contrary to 'the first principles of justice' in *London Corporation v Cox and Others* (1867) LR 2 HL 239, 269

⁴¹⁰ *Buchanan v Rucker* (1807) 1 Camp 63, 66; 170 ER 877

⁴¹¹ *Cavan v Stewart* (1816) 1 Stark 525, 529-30; 171 ER 551; in *Buchanan v Rucker* (1808) 9 East 192, 103 ER 546 (the non-suit application in respect of the trial reported at 170 ER 877 above), Lord Ellenborough had agreed, in principle, that a court could exercise its process over any person who had resided within that jurisdiction (but not against someone who had never done so)

formal validity) could be effected. Yet even in these technical cases the value of actual notice was important. In *Cavan*, for example, principles of deemed notice were pragmatically involved. The practice of the Jamaican court there had been to publicise such proceedings on the court door. Westminster courts were therefore seeking to balance justice in the form of actual notice and participation with other concerns of effective (and efficient) justice in the form of reliable procedures and outcomes.⁴¹²

This distinction between the requirements of formal notification and actual notice can also be seen in other areas where justice and notice were linked in argument. In *R v Gaskin* in 1799, for example, the King's Bench were asked to consider and review the decision to remove a parish clerk by a parish rector. The rector's return to the mandamus issued against him was held to be insufficient because there had been no clear statement on it that the clerk had in fact been given notice of the removal. In one sense this could be seen as a failure of pleading and the matter was addressed in this way by counsel for Dr Gaskin. The return had suggested that the clerk, Fulbrook, had been present and therefore:

*the facts returned must be taken to be true: for if false, the clerk may have his action for a false return; and if true, he ought not to be restored for a mere informality, because the instant he is restored Doctor Gaskin may again remove him in a more formal manner.*⁴¹³

Gaskin's counsel in fact had some weight of case law behind him. Cases of removal were far from new and there seemed to be an established practice of refusing a mandamus order to restore where the removal appeared, on the face of it to be justified. This had been so, it was argued, in the case in *R v Mayor of Axbridge* (1777),⁴¹⁴ *R v The Mayor of London (Wooldridge's case, 1785)*,⁴¹⁵ and *R v The Mayor of London* (1787)⁴¹⁶. Certainly there had been some unwillingness in the later part of the eighteenth century to reinstate parties simply because it was not clear on the records that they had been given sufficient notice of the proceedings against them.

These were more, however, than mere failures of form. Park, arguing for Gaskin, relied on statements from *Axbridge* to the effect that where the matter of complaint was 'a mere

⁴¹² In *Cavan v Stewart* (n 278), the court recognised the validity of such a practice but deemed it insufficient in the circumstances: at 530

⁴¹³ *R v Gaskin* (1799) 8 Term Rep 209, 210; 101 ER 1349

⁴¹⁴ *R v Mayor, Aldermen and Capital Burgesses of Axbridge* (1777) 2 Cowper 523, 98 ER 1220

⁴¹⁵ *R v Mayor and Aldermen of London, on the Prosecution of Thomas Wooldridge* (1785) 4 Doug 360, 99 ER 922

⁴¹⁶ *R v Mayor, Aldermen and Common Council of London* (1787) 2 Term Rep 177; 100 ER 96

informality' the court should not intervene 'because the instant he is restored Doctor Gaskin may remove him again in a more formal manner'.⁴¹⁷ Park's argument had oversimplified the cases, however. Rather than dictating that failures of formality were insufficient reason for removal, as Park had argued, his authorities showed an approach by the courts that was less rigid and more attentive to requirements that could be equated with justice. In *R v The Mayor of London* the King's Bench had declined to exercise its discretion to overturn the removal of a clerk of the City of London because it had found the clerk's conduct to be 'extremely reprehensible.'⁴¹⁸ In *Axbridge*, counsel for the clerk had conceded that there was cause for him to have been removed.⁴¹⁹ In *Wooldridge's case*, the failures of form did not relate to the absence of notice so the court could look beyond defects in the return to concentrate on the merits of Wooldridge's removal. These were significant; Wooldridge had been removed as a member of the London Corporation because he had not been capable of fulfilling his duties due to his imprisonment for over a year.⁴²⁰

It was therefore more than mere issues of formality that had influenced the courts on these previous occasions. Nor did precedent prevail in any simple form. The justice of notice and participation strongly influenced the result. Lord Kenyon expressed alarm at the point being advanced on behalf of the defendant, saying, 'if we were to hold this return to be sufficient, we should decide contrary to one of the first principles of justice,'⁴²¹ namely that all parties should be heard. Kenyon did not reject existing case law but distinguished it on two grounds. In some cases there had been sufficient reason to remove those making complaint; in others there had been sufficient notice. What mattered even more than the merits of the removal in the first place was that such merits had been the subject of just processes of investigation and this required sufficient notice and opportunity to participate. 'I have no doubt but that Doctor Gaskin has acted on this occasion from the best motives;' he said, 'and notwithstanding our decision, he will be perfectly justified in renewing his accusation against this person, and in removing him from his office in a more formal manner if the charge is true.'⁴²²

By the late 1820s de Grey CJ's statement in *Fisher v Lane* had become a firmly entrenched legal principle invoking such principles of justice in support of requirements that decision makers

⁴¹⁷ *R v Gaskin* 210

⁴¹⁸ *R v Mayor of London* (1777) 182

⁴¹⁹ *R v Mayor of Axbridge* 523

⁴²⁰ *Wooldridge's Case* 386-7

⁴²¹ *R v Gaskin* 210

⁴²² *ibid*

provide sufficient notification of their processes of determination.⁴²³ It would also influence the willingness of the Courts to recognise and enforce foreign judgments. The practice of central courts when dealing with judgments elsewhere depended not on firm rules but on principles of reciprocity.⁴²⁴ Courts were therefore concerned at the justice in these foreign courts but also with ensuring that they did not condemn practices that were replicated in English procedures or which had royal authority. So, for example, the Common Pleas trod carefully in *Douglas v Forrest* (1828). There, Serjeant Wilde, relying on *Fisher v Lane*, argued against recognition of a Scottish decret on the grounds that:

*The judgments of foreign courts ... can only be supported where there is nothing absurd or unjust on the face of them ... [N]othing can be conceived more absurd or unjust than this Scotch decret appears to be on the face of it. To decide in the absence of one of the parties, and without notice to him of any cause depending, is contrary to the first principles of justice.*⁴²⁵

The Scottish court had based its jurisdiction to enforce against Hunter, a defendant in Scotland, on the fact that he was a Scottish national with property in Scotland. As such, as a matter of statute⁴²⁶, the proclamation of a judgment against him at the market-cross of Edinburgh and on the Leith pier was sufficient notification of the claim. Best CJ accepted the principle of Wilde's argument but, conscious of the implications of doing so, did not feel able to apply it in this particular case, saying, '[I]f these decrees are repugnant to the principles of universal justice, this Court ought not to give effect to them; but ... [i]f we held that they were not consistent with the principles of justice, we should condemn the proceedings of some of our own courts.'⁴²⁷

He contrasted the rules under the Scottish law and those under the Mayor's Court of the City of London. Whereas Scottish law would not fully transfer ownership of property seized under its

⁴²³ *Douglas v Forrest* (1828) 4 Bing 686, 695-6; 130 ER 933; *Bruce v Wait and James* (1840) 1 Man & G 1, 40; 133 ER 222

⁴²⁴ Reciprocity was a significant justice value, particularly in the admiralty courts where prize law principles were heavily dependent on mutual respect between jurisdictions. See, for example, *The Santa Cruz* (1798) 1 C Rob 49, 57; 165 ER 92; *The Gratitude* (1801) 3 C Rob 240, 271; 165 ER 450; *The Carlotta* (1803) 5 C Rob 54, 58; 165 ER 695; *The Huntress* (1805) 6 C Rob 104, 110; 165 ER 866; *The Acteon* (1810) Edw 254, 255; 165 ER 1100; *The Buenos Ayres* (1811) 1 Dods 28, 34; 165 ER 1221; *The Snipe and Others* (1812) Edw 381, 414-5; 165 ER 1145. The admiralty courts seemed to have continued to rely on principles of justice as reciprocity to develop an international jurisdiction even in the ensuing periods of peace *The Girolama* (1834) 3 Hag Adm 169, 185; 166 ER 368; *The Golubchick* (1840) 1 W Rob 143, 147; 166 ER 526. Space does not, however, permit detailed examination of the particular justice culture of the admiralty courts.

⁴²⁵ *Douglas v Forrest* (1828) 4 Bing 686, 695-6; 130 ER 933

⁴²⁶ 54 Geo 3, c 137

⁴²⁷ *Douglas v Forrest* (n 425) 700-1

procedures for 40 years, the London court would do so within a year.⁴²⁸ Equally, there had not actually been any prejudice to Hunter from his absence and lack of notification. Before he had left Scotland, he had acknowledged the debt so enforcement was no more than giving effect to that obligation.⁴²⁹ There were therefore good reasons (above and beyond mere consistency and reciprocity) why the English court should not dismiss the Scottish procedure as contrary to justice. Additionally, however, it was significant that the Scottish procedures had Parliamentary sanction. ‘Can we say,’ Best CJ inquired, ‘that a practice which the legislature of the United Kingdom has recognized and extended to other cases is contrary to the principles of justice?’⁴³⁰

The courts were therefore caught between the more absolute requirements of notice and participation, on the one hand, and the practical realities of a trans-global empire and international commerce, on the other. Such realities gave rise to their own concerns such as access to and enforcement of legal remedies; justice required that laws be effective, an aspiration that could put justice’s other more idealistic aspirations under considerable strain.

The issue arose again in *Becquet v MacCarthy* (1831), where Scarlett attempted to persuade the court not to enforce a Mauritian order. Again, the order had been obtained in the absence of the defendant and again the law of the country allowed for such a process. Under Mauritian law, proceedings could be brought against an absent defendant whose interests would be represented by a court official. Scarlett relied on Lord Ellenborough’s dictum in *Buchanan v Rucker*⁴³¹ to argue that ‘in order to make good that practice, it should be shown that that officer is compelled to hold communication with the absent party.’⁴³² Lord Tenterden was not willing to presume injustice lightly, however, where it was based on established laws applying in a foreign jurisdiction and showing, so far as such things were possible from a distance, a procedure for the defendant’s interests to be protected. In refusing to set aside the order he said, ‘we cannot take upon ourselves to say that the law is so contrary to natural justice as to render the judgment void in a case where the process was so served.’⁴³³ The reciprocity of justice therefore required courts not to hold other jurisdictions to too high a standard.

The justice of fair notice grew in pace and significance along with the growth of statutory powers. In fact an increasing tendency of Parliament to delegate powers left a wake of cases in which the courts had to determine how such powers were to be exercised justly.

⁴²⁸ *ibid* 702

⁴²⁹ *ibid*

⁴³⁰ *ibid*

⁴³¹ *Buchanan v Rucker* (n 410)

⁴³² *Becquet v MacCarthy* (1831) 2 B & Ad 951, 957; 109 ER 1396

⁴³³ *ibid* 959

In *Capel v Child* (1832)⁴³⁴, it was, again, the exercise of authority by a member of the clergy that was the subject of review when the Bishop of London issued a requisition under the statute 57 Geo 3, c 99, s 50. The requisition had, in effect, condemned the plaintiff, a vicar, as negligent and the performance of his services as inadequate and required him to appoint a curate, which the plaintiff refused to do. The bishop had therefore appointed sequestrators to seize the proceeds of the plaintiff's living. Lord Lyndhurst accepted that while the bishop had the power to act as he had,⁴³⁵ in so doing so he was acting judicially:

*On consideration, then, it appears to me that, if the requisition of the bishop is to be considered a judgment, it is against every principle of justice, that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the judge to proceed to pronounce the judgment ... It is in form a judgment; it is in effect and consequence a judgment. It appears to me, therefore, considering the principles of justice, that this construction of the act could hardly be more necessary, if it had been absolutely required by the language of the act that a previous summons should be issued.*⁴³⁶

Other nineteenth century statutory innovations put further strain upon existing principles of notice and participation. Interlocutory hearings, which might impose sanctions or disadvantages, could often be sought without notification to the other side. There was therefore a danger that a party could be subject to sanctions without any notice of, or opportunity to participate in, such determinations. Again justice claims had to be reconciled with countervailing concerns of efficiency and effectiveness. In *Kinning's Case* (1847),⁴³⁷ the issue was the imprisonment of a judgment debtor following his failure to pay an instalment of a judgment debt under The Small Debts Act 1845.⁴³⁸ The judgement creditor had made an application for imprisonment without giving any notice to the debtor.

The matter divided the Queen's Bench. Coleridge J and Patteson J both condemned such 'without notice' procedure on the grounds of justice, particularly the justice of ensuring accurate outcomes. Patteson J argued, 'In such a case I do not think justice can be done

⁴³⁴ *Capel v Child* (1832) 2 Cr & J 558; 149 ER 235

⁴³⁵ *ibid* 572-3. Section 50 of Act empowered a bishop to act 'whenever it shall appear to the satisfaction of any bishop, either of his own knowledge, or upon proof by affidavit laid before him ...'

⁴³⁶ *ibid* 574

⁴³⁷ *Kinning's Case* (1847) 10 QB 730, 116 ER 277

⁴³⁸ 8 & 9 Vict, c 127

unless the debtor is heard and all the circumstances made known.⁴³⁹ Coleridge J agreed, saying 'An ex parte statement often appears to be beyond all possible doubt; then the other side is heard, and the truth is clear the other way ... [I]t is our duty to take care that the principles we proceed on are principles of justice.' Coleridge was not indifferent to countervailing concerns, not least of all expense. He recognised that hearings might cause inconvenience and expense but concluded that principles of notice, participation and challenge should prevail. 'Until I find something more than the silence of the Legislature on a matter of this kind,' he said, 'I can hardly suppose it was intended to set aside these principles.'⁴⁴⁰ For these judges, it was the necessity of making decisions on the best information that informed the need for notice.

Concerns other than good information pointed in the other direction, however. The danger of an 'enormous multiplication of petty process, rendering the aid of an attorney necessary at every turn of every trifling cause, and letting in the danger of endless vexation and expense', weighed heavily on Denman CJ's mind. Such a danger was a greater evil than any loss of a debtor's right to challenge proceedings in such a situation.⁴⁴¹ Erle J was more concerned about the effective enforcement of judicial proceedings. To give notice might create the danger of absconding creditors. Meeting this concern could outweigh any concerns about the loss of rights to challenge, he concluded, because there was judicial involvement in the process and it was subject to time limits and review.⁴⁴² In this sense, Erle was placing faith in judicial oversight of decisions rather than their evidential basis.

Kinning's case was brought before the Common Pleas the following day on a writ of habeus corpus.⁴⁴³ This time the judges were unanimous in deciding that the original commitment should have been made on notice and that Kinning should therefore be discharged. For Wilde CJ, like Coleridge J and Pattison J, this was a matter of the justice of accurate and justifiable results:

What is to regulate the judge's discretion in exercising the power to commit? ... Many circumstances might arise to occasion the disobedience of the order ... of all these matters of excuse, the creditor may be ignorant; but they are essential to be inquired into, to regulate the discretion of the judge. When, therefore, the statute distinctly

⁴³⁹ *Kinning's case* (n 437) 740

⁴⁴⁰ *ibid* 745

⁴⁴¹ *ibid* 738

⁴⁴² *ibid* 746-7

⁴⁴³ *Ex parte Thomas Kinning* (1847) 4 CB 507, 136 ER 605

*points to an inquiry of some sort, it seems to follow that the mode of inquiry is to be regulated by general principles, and that the party so deeply interested in the result, should be heard. There are certainly no words in the act pointing to an exclusion of the party from being heard. Common justice requires that the party most interested, and possessing the best means of knowledge, should be examined. The party should have notice of the steps intended to be taken against him.*⁴⁴⁴

For Coltman J, too, it was also a matter of the protection of liberties. As detaining the debtor was simply penal and would not secure the debt ‘there should be no deviation from the ordinary principles which regulate the administration of justice; and that, ... the judge ... ought to be made acquainted with all the circumstances of the case, which can only be done by an examination of the party himself.’⁴⁴⁵ Maule J agreed noting the penal nature of the order and saying, ‘The party is charged with misconduct admitting of aggravating or mitigating circumstances. Upon every principle of law and justice, it is right that the party should have an opportunity of being heard before this punishment is inflicted upon him.’⁴⁴⁶

Across the two courts and the seven judges, therefore, it was possible for a number of different justice values to be brought to bear, sometimes implicitly but, in this case, mostly explicitly. At the heart of the disagreement was the possibility of seeing the nature of the application in different terms. For Denman CJ and Erle J, this was simply an interlocutory hearing that happened to carry (reviewable) penal sanctions. Looked at in this way it was simpler to see the case in terms of effective and efficient enforcement of outcomes and the saving of expense. For Coleridge J and Patteson J and for the three judges of the Common Pleas, this was a proceeding with a penal sanction and therefore the exercise of any such power had to be accurate and based on as full a hearing of facts as possible. Equally, however, a party against whom a penal sanction was to be imposed had some expectation to be heard before any such sanction would be applied.

The nature of the case mattered in such deliberations. In *The Hammersmith Rent-Charge Case* (1849),⁴⁴⁷ the Court of Exchequer refused to set aside an application to summon a jury to determine rent arrears under the Tithe Commutation Act 1836⁴⁴⁸ on the grounds that such a process did not require notice to the party against whom the case would be heard. Parke B based his judgment on a textual comparison of the 1836 Act and the Act that had been relied upon in

⁴⁴⁴ *ibid* 524-5

⁴⁴⁵ *ibid* 526

⁴⁴⁶ *ibid* 527

⁴⁴⁷ *Re Hammersmith Rent-Charge* (1849) 4 Ex 87, 154 ER 1136

⁴⁴⁸ 6 & 7 Will 4, c 71

Capel v Child.⁴⁴⁹ He concluded that *Hammersmith* was a stronger case (linguistically) for notice. The other judges, however, were content to conclude that no notice was required.⁴⁵⁰ Platt B did not see the order as ‘an execution’ that therefore required notice. Alderson B concluded that not being a matter of ‘substantial justice’ but rather a mere matter of ‘form’, to require such an application to be conducted on notice would in nearly all cases constitute such additional expense to be ‘an absolute denial of justice’.⁴⁵¹ Conversely there would be no risk of injustice to the other party because the actual notice procedures (delivering a copy of the writ ten days before execution) ‘enables him either to appear to see justice done by the sheriff, or, if necessary, to apply to set aside the Judge’s order. No injustice can therefore be done to the party ... although made ex parte ... He cannot be punished without the opportunity of being heard.’⁴⁵²

Pollock CB in fact took matters a stage further. Not only did he not feel the need to require notice in the circumstances of the case, he further questioned the interpretation of the relevant act in *Capel v Child* concluding that it should be limited in its application to the particular statute upon which it decided ‘but not one degree further.’⁴⁵³

Judges were not willing therefore simply to impose notice requirements. Rather it was necessary to determine the value of such notice. There had to be substantial interests of justice in the granting of notice; it had potentially to make a difference to the justice of the outcome as a whole. This question was something, as Pollock showed, over which judges could disagree because the quantity of notice was made to depend on opinions about the nature (and therefore, implicitly the value) of the deliberations and the impact of such decisions, all of which had to be set against countervailing concerns about speed, cost and efficiency. Furthermore, notice was not of value in itself but justice enhancing to the extent that it allowed engagement with rights of participation and therefore better access to evidence and more accurate verdicts. In *ex parte Story* (1852), for example, the King’s Bench was unwilling to set aside a judgement entered without notice by the Consistorial Court where the husband party had notice of the action itself. Maule J recognised that prohibition could follow for proceedings conducted ‘in a manner that is opposed to the principles of justice’, but concluded that in this case he did not ‘see that natural

⁴⁴⁹ *Capel v Child* (n 434)

⁴⁵⁰ *Re Hammersmith Rent-Charge* (n 447) 91, 1137

⁴⁵¹ *ibid* 92-3

⁴⁵² *ibid* 93-4

⁴⁵³ *ibid* 100-1

justice requires anything of the sort ... It may be, and I think it appears, that he had sufficient opportunity of defending himself.⁴⁵⁴

In fact core principles of effective and useful notice established before *Hammersmith* held good into the 1850s and in ways that show something of the role of justice discourse. By 1850, the principle that parties should be granted notice if likely to suffer adverse consequences from a decision had become a key feature of a 'just' process. In *Abley v Dale* (1850),⁴⁵⁵ enforcement action was taken against a defendant who had defaulted on a deferred judgment debt. So established were the principles, that justice arguments played much less of a part than they had previously in establishing the extent of any such obligation. The matter was not deemed controversial or novel. While Jervis CJ did make reference to 'broad principles of natural justice,' his opening observation had been that this was simply a matter of applying *ex parte Kinning* and *Kinning v Buchanan*.⁴⁵⁶ The other three judges did not feel the need to invoke justice at all given that the case law provided a clear set of principles upon which to proceed. Maule J cited Bentley's case⁴⁵⁷; Williams J and Talfourd J both adopted the principles of *ex parte Kinning* without further discussion.⁴⁵⁸

In *Bonaker v Evans* (1850),⁴⁵⁹ on the other hand, justice arguments were to resurface. Here notice had not been given for proceedings for the sequestration of assets of a vicar who had been reported for failing to reside in his parish. Parke B, in the Exchequer Chamber, took the opportunity to reiterate the principles upon which he had been overruled in *Hammersmith*⁴⁶⁰ and to justify the requirements of notice in punitive proceedings. Because the relevant legislation was less clearly related to judicial proceedings than in *Abley*,⁴⁶¹ there was some need to resort to principles of justice in support of the interpretations advanced. It was not, however, a matter of such controversy as it had been a few years earlier. In fact, the judges could rely not only on a series of cases settling principles of notice but, more significantly, a series of cases regulating the

⁴⁵⁴ *ex parte Story* (1852) 12 CB 767, 776-7; 138 ER 1106. Mr Story unsuccessfully sought a prohibition of the order in the Exchequer again on the grounds that he had not had sufficient notice: *Ex parte Story* (1852) 8 Ex 195; 155 ER 1317

⁴⁵⁵ *Abley v Dale* (1850) 10 CB 62; 138 ER 26

⁴⁵⁶ *ibid* 70-1

⁴⁵⁷ *R v University of Cambridge* (n 401) at *Abley v Dale* 71-2

⁴⁵⁸ *Abley v Dale* both at 72

⁴⁵⁹ *Bonaker v Evans* (1850) 16 QB 162, 117 ER 840

⁴⁶⁰ *Re Hammersmith Rent-Charge* (n 447)

⁴⁶¹ The Pluralities Act 1838, 1 & 2 Vict, c 106, s 54 invested a power to sequester on the relevant bishop. The statute in *Abley* was s 99 of the County Courts (England) 1846

powers of clerical officers⁴⁶², what were then to be summarized as reflecting ‘this great principle of justice, that none is to be condemned unheard’.⁴⁶³

At the same time, by the 1860s, it was also settled that *ex parte* hearings could be accommodated within a judicial system without necessarily undermining justice. Bankruptcy proceedings, for example, empowered the settlement of such debts under orders by commissioners, and here the *ex parte* nature of such proceedings was clearly settled on the basis of efficiency and cost reduction claims that were set against those of participative justice. What mattered in such cases was whether substantive justice interests of effective participation and challenge in such cases, in pursuit of accurate outcomes, were overborne by these countervailing values of efficiency and effectiveness.⁴⁶⁴

Furthermore, notice was not simply a matter of giving any warning about proceedings. There were also cases in which the sufficiency of such warning was an issue. In *The Matter of William Blues* (1855)⁴⁶⁵, for example, a person convicted at a Petty Sessions hearing had failed to notify the Quarter Sessions of his intention to appeal in accordance with that Sessions’ standing orders.⁴⁶⁶ The Queen’s Bench overturned an order for his committal on this basis but also ordered the court to continue hearing his appeal. The Queen’s Bench considered the defendant’s failure to provide notice for the appeal to be sufficient reason for the hearing to be respited (but not rejecting the hearing outright). ‘I am of opinion,’ Campbell CJ said:

*that it is necessary that notice should be given to the other party before the appeal can be heard. If ... he in no manner gives information to the opposite side, so that they may be prepared to oppose his appeal, I do not think that he is entitled to have it heard. According to the principles of natural justice and common sense, a person convicted must not appear to acquiesce in the conviction, and then reverse it on appeal behind the back of the other side, that other side knowing nothing whatever, and having no reason to suppose that there would be any appeal.*⁴⁶⁷

⁴⁶² Including *R v University of Cambridge* (n 401), *R v Gaskin* (n 413) and *Capel v Child* (n 434)

⁴⁶³ *Bonaker v Evans* (n 459) 171-3

⁴⁶⁴ *ex parte Barlow as approved in Quartermaine and Plews v Bittleston* (1853) 13 CB 133, 138 ER 1147 and *Graham, Assignees of John Barugh, a Bankrupt v Furber* (1853) 14 CB 134, 139 ER 56 where judges of the Common Pleas relied on *ex parte Barlow* to reject a suggestion by Mr Commissioner Holroyd in *In re Plimmer, Ex parte Speller* (27 July 1853) that such proceedings should be on notice given the authority of cases such as *Capel v Child* (n 434) and *Bonaker v Evans* (n 459)

⁴⁶⁵ In *the Matter of William Blues* (1855) 5 El & Bl 291, 119 ER 490

⁴⁶⁶ The use of Standing Orders by Quarter Sessions is explored more fully in chapter 5

⁴⁶⁷ *ibid* 299-30, 493; see also *R v Sussex Justices* (1862) 2 B & S 664; 121 ER 1218

By the 1860s, therefore, there was a well-established case law tradition that notice should be given to allow parties to participate effectively in the making of decisions where their personal interests were involved. From the 1830s most of the cases had been decided in relation to statutory provisions that empowered decision-making by a range of institutions. The courts had, in interpreting these provisions, brought common law traditions formed under prerogative writ procedures to a range of cases that explored the implications of statutory extensions or consolidations of state power. They had also developed a justice-based discourse that was increasingly explicit about the link between notice and accurate outcomes.

These trends were also reflected in *Cooper v Wandsworth Board of Works* (1863).⁴⁶⁸ There the defendants had demolished the plaintiff's building due to his own breach of notification obligations under the Metropolis Local Management Act 1855.⁴⁶⁹ The defendants had themselves then failed to notify him of their own intentions to take punitive action. The plaintiffs argued that entitlements to have notice of decision-making processes and to participate in them amounted to a 'sound and universally-applicable principle of natural justice.'⁴⁷⁰ The defendants argued that the Act had not made any specific provision for any such hearing but had rather given the Board 'an arbitrary power ... which is necessarily to be exercised without any control.' Entitlements to notice and participation, they argued, would only apply where a 'judicial discretion is to be exercised.' There was no entitlement to a hearing where a statute expressly or implicitly removed any such entitlement.⁴⁷¹

It was on this basis that the defendant argued that the decision in question should be classified in a way that removed the need for notice. Erle CJ rejected this argument in ways that related mostly, but not only, to the justice of accurate decisions. The basis that decision, and therefore justice, would be enhanced by requiring such decisions to be made on a participative basis:

I cannot conceive any harm that could happen to the district board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes

⁴⁶⁸ *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180, 143 ER 414

⁴⁶⁹ 18 & 19 Vict c 120, s 76

⁴⁷⁰ *Cooper v Wandsworth* (n 468) 184

⁴⁷¹ *ibid* 186

*of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss.*⁴⁷²

This also ensured fidelity to what had now become established legal principles. The defendant's argument that the statute had implicitly removed any obligation to hear the plaintiff was to be read subject to established common law principles:

*I fully agree that the legislature intended to give the district board very large powers indeed ... It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding, and that a district board ordering a house to be pulled down cannot be said to be doing a judicial act. I do not quite agree with that; neither do I undertake to rest my judgment solely upon the ground that the district board is a court exercising judicial discretion upon the point: but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down.*⁴⁷³

Other judges paid greater heed to the judicial/ministerial distinction. Willes J was inclined to conclude that the Board was a tribunal that, accordingly, was 'bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice.'⁴⁷⁴ In fact, on a close reading of the Act, including the facts that had to be considered in exercising its powers and the existence of appeals processes, the Board, Willes thought, was clearly judicial in nature.⁴⁷⁵

Although both Willes J and Byles J both saw the proceedings as akin to criminal prosecution,⁴⁷⁶ the Board had acted wrongfully, whether acting ministerially or judicially given the way the Act was drafted.⁴⁷⁷ As Byles put it, 'they have acted against the whole current of authorities, and have omitted to do that which justice requires, and contravened the words of the statute.'⁴⁷⁸ Keating J gave the last judgment. He was less concerned about the detail of the statute and made no reference to justice but his reasoning was based on a sense of participation in hearings as

⁴⁷² *ibid* 188-9

⁴⁷³ *ibid* 189

⁴⁷⁴ *ibid* 190

⁴⁷⁵ *ibid* 191-2

⁴⁷⁶ *ibid*. Willes J: 'a criminal court of high jurisdiction' at 191; Byles J: 'they had to determine the offence, and they had to apportion the punishment' at 194

⁴⁷⁷ *ibid* 194

⁴⁷⁸ *ibid* 195

aimed primarily at securing accurate and appropriate outcomes. Had a hearing taken place which showed that there had been no breach of the relevant statutory provisions (other than notification), clearly enforcement action would not have taken place. It was therefore clear, he suggested, that a hearing should have been conducted and involved the plaintiff.⁴⁷⁹

Cooper v Wandsworth established, therefore, a set of principles which would be applied in developing principles of what would come increasingly to be called 'natural justice.' In some senses the case did not resolve or develop principles any further. There was in fact no clear decision on whether notice was required only in cases of 'judicial' proceedings or in some way that depended less absolutely on the nature of the process and more on the interests or rights being challenged. Erle CJ and Willes J based their decision on the judicial nature of proceedings. Byles J said that the point did not matter (but decided the proceedings were judicial anyway) and Keating based his decision on the practical value of participative hearings in reaching appropriate outcomes.

What did seem to matter was the nature of the decision and, for the majority of the judges, the justice as notice and participation informed their deliberations. Such justice was clearly related in their minds to the accurate determination of issues. Both Erle CJ and Keating J considered how the plaintiff might have justified his actions, had a hearing taken place, to be significant.⁴⁸⁰ Byles J also noted that a hearing might have been necessary to determine if there was 'anything to say against the demolition.'⁴⁸¹ Only Willes J, however, referred specifically to the 'principles of justice' in justifying his conclusions despite the fact that, of all the judgments, his had the least to do with the fulfilment of any particular justice principles. For him this was a question of legal interpretation; whether the Act required a hearing on its face. His reference to the justice principle was in fact no more than an invocation of the common law principles which should underpin that determination, an echo of the invocation in *Fisher* and *Capel* of the justice concept that had established the rule in the first place. It was in this way that justice discourses worked, first by justifying the establishment of values and then by constituting their re-affirming justifications.

Throughout the period from 1770 into the 1860s, therefore, the courts explored the requirements of effective notice by use of a justice discourse. Justice was frequently and meaningfully used to explain why notice was required for deliberations: it was regularly stated that justice required that parties interested in an outcome should have notice of it. This principle

⁴⁷⁹ *ibid* 197

⁴⁸⁰ *ibid* 188

⁴⁸¹ *ibid* 194

was not absolute. It had to share normative space with concerns about effective and efficient processes: notice threatened injustices of cost and delay. It was, however, a principle to which great weight was attached. This was not for its own sake; as has been seen what concerned the courts was whether a decision was to be made that has such an impact upon a person to require that he or she be given sufficient opportunities to participate. As shall be seen there were other participation concerns that the courts were keen to ensure. These were concerns that, certainly by the mid-century, came to synthesise accuracy concerns with a growing concern about controlling the exercise of burgeoning state power against individual interests.

Participation

The justice of notification was that such notice would allow parties to participate fully in the cases against them. Notice was the first step but debates about justice and its constituent values could also occur even where parties knew about the proceedings but were not able to engage in them fully for some other reason.⁴⁸² Such an opportunity was important because it provided parties with equal chances to present their cases and have them heard. It was also the means of ensuring that authority was appropriately and accurately exercised. That parties should have such a chance was a matter of the interests of justice.⁴⁸³ There was more than simply indulging litigants to this: justice required the resolution of disputes: in some rare cases, the interests of justice would be invoked to require participation by parties even where they seemed no longer willing to take part.⁴⁸⁴

Key to these justice claims was the ability to hear and challenge the case of the other side.⁴⁸⁵ Lord Kenyon CJ's statement in *R v Justices of Surrey*,⁴⁸⁶ is revealing. There he said, 'It is necessary to the administration of justice that every person, who is accused of a crime, should have an opportunity of being heard in his defence against the charge of which he is accused.'⁴⁸⁷ Such a right of challenge was not necessary simply for the determination of the issue of the guilt; it would be possible to prove the commission of an offence without any such right. However for what was administered to be *justice* (as opposed to simply 'the law' or 'punishment'), it was

⁴⁸² *The East India Company v Campion and others* (1837) 11 Bli NS 158; 6 ER 291

⁴⁸³ *ex parte Sewell* (1853) 3 De GM & G 508, 512-3; 43 ER 199; the same principle was noted by Erle CJ in *Durie v Hopwood* (1860) 7 CB NS 835, 836; 141 ER 1044 and by Montague Smith J in *Levy and Another v Rice* (1869-70) LR 5 CP 119, 121-2

⁴⁸⁴ For example in *Gray v Gray* (1861) 2 Sw & Tr 263, 265; 164 ER 996 where the Judge Ordinary refused to let a wife withdraw what was alleged to be a sham a nullity petition. It may have been that costs concerns motivated the courts.

⁴⁸⁵ *Watts v Eglinton* (1846) 1 Coop t Cott 25, 38; 47 ER 726; *M'Mahon v Burchell and Capel* (1846) 1 Coop t Cott 457, 531; 47 ER 944; *Bahadur and Bahadur v Mudaly* (1855) 6 Moo Ind App 232, 244; 19 ER 86

⁴⁸⁶ *R v Justices of Surrey* (1794) 6 Term Rep 76; 101 ER 445

⁴⁸⁷ *Ibid* 78-9

necessary that certain processes and safeguards were put in place to allow a defendant challenges to the case of the Crown.

The extent of such obligations to allow participation frequently depended on exactly what was required at common law or specified by statute, but the courts would ensure that participation was effective and meaningful within such constraints. So where a statute might require a 'hearing', justice required not simply consideration of the issues but an effective opportunity to participate in discussion of the decision.⁴⁸⁸

As has been seen with notice, such values frequently had to be set alongside values generally extrinsic to procedural justice such as commercial practicality and the protection of substantive commercial rights. Such values could, however, be encompassed within a broader sense of legal justice. Such tensions can be seen in *Greaves v Stokes* and in *Gurney v Hardenberg*, both of which were decided at the Common Pleas in 1809. In both cases, a plaintiff had given credit to defendants who were outside the country. In each case the respective plaintiff brought an action on the debt, issuing a *distringas*,⁴⁸⁹ theoretically to secure the attendance of the respective defendant but probably in fact simply to obtain recompense. The *distringas* would, if the defendant failed to appear, lead to forfeiture of the defendant's goods. In some senses the moral claims of the defendant were stronger in *Gurney* because, unknown to the plaintiff, the defendant was detained in France and was acting through his wife as agent. The wife had subsequently died and the defendant had no agent to act for him in England. In *Greaves*, however, the defendant was at sea and this was something of which the plaintiff had been aware. The court did not, however, base its decisions on mere sympathy. Given that the plaintiff in *Greaves* had been clearly shown to have been aware of the absence of the defendant from the country, the court did not hesitate to set aside the *distringas* and order the restoration of the goods to Mrs Stokes.⁴⁹⁰

⁴⁸⁸ *R v The Archbishop of Canterbury* (1859) 1 El & El 545, 559; 120 ER 1014; Lord Campbell CJ said of an appeal to the Archbishop, 'It is one of the first principles of justice, that no man should be condemned without being heard ... Without any communication with him, his judge decides against him. That was not a hearing. The appellant should have had an opportunity of arguing, before the Archbishop, that the Bishop's decision was not correct upon the facts.'

⁴⁸⁹ The writ of *distringas* was a procedure to secure the attendance of a person at court by enabling the person's goods to be seized. It could also, in extreme cases, be used to proceed to outlawry of the person: John Frederick Archbold and Thomas Chitty, *The Practice of the Court of King's Bench in Personal Actions, and Ejectment* (J. Butterworth & Son 1819) 297-8. It was a practice of the King's Bench that was subject to rationalisation by the statute 2 Will 4, c 38, ss 3-4 and repealed by the Common Law Procedure Act 1852, s24

⁴⁹⁰ *Greaves v Stokes* (1809) 1 Taunt 485, 486; 127 ER 922

Mrs Hardenburg was not so fortunate; the judges were inclined to grant the plaintiff's application on commercial grounds. 'What,' Sir James Mansfield CJ wondered, 'is the creditor to do if he cannot use this process?'⁴⁹¹ Blame certainly played its part. While the circumstances of Mr and Mrs Stokes were sufficient to justify the particular decision in respect of them, in *Gurney v Hardenburg*, it was deemed to be the defendant's fault that he had not created a new agent in England upon his wife's death.⁴⁹² Chambre J was a little less unsympathetic and more concerned about the implications of such a bald rule. 'It is strange,' he observed, 'that such a practice should have so long prevailed in this court, since however it is established, it must prevail now, but it appears to me repugnant to the principles of law and the principles of justice.'⁴⁹³ In these early participation cases, therefore, it can be seen that established rules and notions of desert played a greater role than a concern about reaching accurate conclusions.

Collateral concerns might limit the power of individuals properly to argue their case. In principle, courts would not restrict this right without good reason. For example, in *Taylor v Fairlie* (1833) the House of Lords accepted an argument on behalf of a bankrupt that he should not be required to make payment as security for his costs of proceeding. Although bankrupts were recognised as being subject to many disabilities, 'in no statute' it was argued, 'is there to be found anything which, directly or remotely, encroaches upon their right of effectually defending themselves in proceedings directed against their persons ... neither can we discover any rule in common law by which any such disability is established, and the principles of justice are directly opposed to the existence of such disability'.⁴⁹⁴ This was an argument the court accepted.

Beyond the raw issue of whether a party was able to participate at all, justice arguments would also be invoked when a party was placed at a disadvantage relative to other parties, particularly where a decision maker heard one party in preference to another. It was this that invalidated the determinations of the Quarter Sessions in *R v Tordoft* (1844) and rendered them unjust.⁴⁹⁵ It also provided a successful basis of challenge in *Harvey v Shelton* (1844) where an arbitration agreement was challenged on the ground that the arbitrator had met one of the two parties in

⁴⁹¹ *Gurney v Hardenberg* (1809) 1 Taunt 487, 488; 127 ER 923

⁴⁹² *ibid* 488

⁴⁹³ *ibid* 488-9

⁴⁹⁴ *Taylor v Fairlie* (1833) 1 Cl & F 355, 360; 6 ER 950: this was in fact an appeal from Scotland so the issue related to 'caution for the expenses of process' but being resolved in the House of Lords, it is not inappropriate to consider it as part of the discourse that impacted upon English courts and legal practices; a similar principle was adopted in *George v The Queen and Shaw* (1866) 4 Moo PC NS 287, 294, 16 ER 325; (1865-67) LR 1 PC 389

⁴⁹⁵ *R v Tordoft* (n 369)

the absence of another. This was, Lord Langdale MR concluded, 'contrary to the first principles of justice' and on that basis the order was set aside.⁴⁹⁶

There were two elements to his conclusion. First of all, by meeting privately, one party had been deprived of the opportunities to challenge the case presented there. This undermined the accuracy and therefore the validity of the arbitration as a whole. Secondly, being an arbitration, it was a determination of the courts of law and therefore it had to be, and to be seen to be, impartial. Both of these justice values were reflected in Lord Langdale's reasoning:

*It is so ordinary a principle in the administration of justice, that no party to a cause can be allowed to use any means whatsoever to influence the mind of the Judge, which means are not known to and capable of being met and resisted by the other party, that it is impossible, for a moment, not to see, that this was an extremely indiscreet mode of proceeding, to say the very least of it. It is contrary to every principle to allow of such a thing, and I wholly deny the difference which is alleged to exist between mercantile arbitrations and legal arbitrations. The first principles of justice must be equally applied in every case. Except in the few cases where exceptions are unavoidable, both sides must be heard, and each in the presence of the other. In every case in which matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice, in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side ... This is not a matter of mere private consideration between two adverse parties, but a matter concerning the due administration of justice, in which all persons who may ever chance to be litigant, in Courts of Justice or before arbitrators, have the strongest interest in maintaining that the principles of justice shall be carefully adhered to in every case.*⁴⁹⁷

The requirement of effective participation therefore not only required that parties be heard in each other's presence but they required, by extension, that the tribunal receive such evidence together. So it was that in *Plews v Middleton* (1845), an arbitration in which arbitrators received evidence separately, was described as 'a departure, not merely from

⁴⁹⁶ *Harvey v Shelton* (1844) 7 Beav 455, 459; 49 ER 1141

⁴⁹⁷ *ibid*

established courses of procedure, but from natural justice' and 'a proceeding contrary to the first principles of justice.'⁴⁹⁸ A similar approach was adopted in *re Brock, Delcomyn & Bedart* (1864).⁴⁹⁹ There an arbitration decision was based on evidence shown to the neutral umpire by one party's arbitrator but of which the other side's arbitrator had no knowledge. The judgment was struck down on the basis that it was 'manifestly deciding against the plainest principles of justice and equity.'⁵⁰⁰

Not every decision required decision makers to allow persons to participate. As with notice cases, justice as participation was found not to be necessary in two types of cases: first, where the subject matter of the decision was not such that justice was deemed to apply, and secondly where the justice claims of challenge and confrontation were not sufficiently strong to overcome countervailing reasons for proceeding without participation.

The first of those types, situations where there was not deemed to be a justice-based need for participation, can be seen in *R (on the prosecution of Wray) v Darlington School Governors* (1844), where the Court of Exchequer refused to apply the principles of cases like *R v Gaskin*.⁵⁰¹ This was because the office in question (schoolmaster of a charitable school) was 'determinable at the sound discretion of the governors whenever such discretion is expressed', and therefore 'not a freehold but an office ad libitum only.'⁵⁰²

In the second type of situation, the courts required more than technical merit in the non-participation argument to be convinced that an injustice had occurred due to its denial. This was especially so where the party in question had been aware of proceedings and where statutory procedures had dispensed with full requirements of attendance. Claims of breaches of principles of justice would not succeed merely on proof of a failure to serve notice, as was shown in *Reynolds v Fenton* (1846), unless a party showed that there was, as a result, no means of being present at trial.⁵⁰³ Equally, there were many established rules or practices that might sanction procedures that did not necessarily involve defendants as fully as the most expansive justice arguments might require. In such cases the claims of the injustice of non-participation did not

⁴⁹⁸ *Plews v Middleton* (1845) 6 QB 845, 852; 115 ER 319

⁴⁹⁹ *re Brock, Delcomyn & Bedart* (1864) 16 CB NS 403, 143 ER 1184

⁵⁰⁰ *ibid* 419

⁵⁰¹ *R v Gaskin* (n 413)

⁵⁰² *R (on the prosecution of Wray) v Darlington School Governors* (1844) 6 QB 682, 698; 115 ER 257

⁵⁰³ *Reynolds v Fenton* (1846) 3 CB 187, 192-3; 136 ER 75

overcome countervailing justice concerns related to the authority and finality of adjudications, fidelity to rules and rulings and the effective enforcement of claims.⁵⁰⁴

Although accuracy of determination informed many of the justice arguments in notice and participation cases, the aim of such cases in reviewing procedures was not to secure the right verdict on the substantive dispute. Rather the question was whether the processes followed were shown to have validity. Certainly, judicial reasoning was based on the normative logic that such processes were likely to lead to accurate and appropriate outcomes overall but, based as they were on prerogative writ procedures of review, courts avoided making merits-based determinations of cases brought before them. This can be seen from *ex parte Ramshay* (1852),⁵⁰⁵ a case concerning the removal of William Ramshay, a County Court Judge, by the Chancellor of the Duchy of Lancaster. Ramshay brought a quo warranto writ action, against the judge appointed in his place. In dismissing his action, Campbell CJ noted that, while under the relevant statute⁵⁰⁶ the Queen's Bench could exercise its jurisdiction over the decision to remove, this was limited to consideration of the lawfulness of the removal rather its merits:

The Chancellor has authority to remove a Judge of a County Court only on the implied condition prescribed by the principles of eternal justice, that he hears the party accused: he cannot legally act upon such an occasion without some evidence being adduced to support the charges; and he has no authority to remove for matters unconnected with inability or misbehaviour in the office of County Court Judge. Where the party complained against has had a fair opportunity of being heard, where the charges, if true, amount to inability or misbehaviour, and where evidence has been given in support of them, we think we cannot inquire into the amount of evidence or the balance of evidence, the Chancellor, acting within his jurisdiction, being the constituted judge upon this subject.⁵⁰⁷

The court was accordingly unwilling to consider the matters raised in Ramshay's affidavit relating to his good conduct as a Judge, his ability nor even his justifications for the acts that were the basis of his removal. The difficulty Ramshay faced before the Queen's Bench was that his affidavit had failed instead to show that he had received no notice of the charges, or had not had a fair

⁵⁰⁴ See, for example, *R v Baines* (1840) 12 Ad & El 210, 229; 113 ER 792

⁵⁰⁵ *ex parte Ramshay* (1852) 18 QB 173; 118 ER 65

⁵⁰⁶ The County Courts (England) Act, 9 & 10 Vict c 95, s 18

⁵⁰⁷ *ex parte Ramshay* (n 505) 190

opportunity of being heard in respect of them. The court was therefore inclined to presume the regularity of the order of removal without descending into the merits of the case.⁵⁰⁸

Notice and participation were therefore areas in which justice principles were invoked regularly and were increasingly from the 1830s onwards, linked to the accuracy of decision-making processes. This was not just so in criminal proceedings but became increasingly significant in all areas where courts had control over the justice of processes. This tendency to see truth-based justice in terms of active participation and debate and argument by parties rather than the authoritative decisions of decision-making, matched reforms in other aspects of legal procedure, not least of all the reforms under the Prisoner's Counsel Act 1836. In this sense the justice-inspired discourse of the central courts reflected wider social trends; trends from paternalistic, mercantilist exercises of authority to processes that relied on the active participation and self-interested promotion of alternative truths by interested parties, changes that have been associated with wider social trends towards laissez-faire conceptions of governance.⁵⁰⁹ Both models conceived justice as achieving rightful outcomes by securing the best information but each saw the best means of doing so end differently. This conflict over means of attaining accuracy can also be seen in the justice discourse that influenced the rules of evidence applied by the courts, the conduct of trials and other reviews.

Discovery and Disclosure

Concerns about justice as accuracy were significant in the discourse on rules concerning the disclosure of each party's case and discovery of the evidence they would rely upon. Such processes were pursued for two main justice-related concerns: first, the justice of securing the best available evidence and, secondly, the justice of providing other parties with means of challenging and probing it.⁵¹⁰ This discourse was occasionally explicitly linked to 'interests of truth and justice.'⁵¹¹ In this sense disclosure and discovery rules could elide (at least in their justice content) with rules relating to the pleading and definition of the case.⁵¹²

The value of the practice could be more general, in fact. In *Wright v Nutt* (1788) the Court of Chancery was willing to grant an injunction against the plaintiff in a common law claim because of a lack of clear information about the nature of the case. It was not clear whether Nutt was

⁵⁰⁸ *ibid* 191

⁵⁰⁹ Damaska, *Faces of Justice* 71; Cairns, *Advocacy* 67, 124-5; Mulcahy, *Legal Architecture* 71

⁵¹⁰ See, for example, *Jones v Lewis* (1825) 2 Sim & St 242, 243; 57 ER 339; *In re Breech-Loading Armoury Company v In re Merchants' Company* (1867) LR 4 Eq 453

⁵¹¹ *Price v Harrison* (1860) 8 CB NS 617, 633; 141 ER 1308; *Davey v Pemberton* (1862) 11 CB NS 628, 629; 142 ER 942

⁵¹² See p 66 above

bringing the action in his own capacity or as attorney or agent for a creditor, Pinkney. Nor was it clear whether Pinkney had already exercised his own entitlement to gain compensation out of funds in America. This lack of clarity was sufficient to justify an injunction to prevent execution of the common law action, Lord Kenyon suggesting it was not 'essential to the interest of justice, that the parties should know from Pinkney, whether he has proceeded bonâ fide, as far as he can, to receive payment of this demand out of that fund.'⁵¹³

The tension in disclosure cases was frequently between securing the best and most useful evidence, on the one hand, and the burdens imposed by broad and unfettered processes, on the other. Courts would use justice to deny broad requests for discovery of a person's interests⁵¹⁴ or to impose limits on the extent of processes of inquiry that were undertaken.⁵¹⁵

In resolving such conflicts of values, the courts frequently had regard to wider notions of justice. In *R v Tower* (1815), for example, a tenant sought inspection of manorial court rolls to support his claim for copyhold rights against his landlord (who was also the custodian of those rolls). In making an order in the tenant's favour, Lord Ellenborough CJ, relied not simply on the need for the evidence but the moral implications of an interested party holding back relevant information of a public nature in their possession. '[S]hall he,' Lord Ellenborough inquired, 'who is a trustee and guardian of the evidence of the tenants' rights, lock it up from them, and in a matter too where his own interest is in question? I do not see upon what principle of justice that is to be done.'⁵¹⁶

The courts were therefore prepared to countenance procedures for securing good evidence not simply for the justice of accurate determinations but also to achieve a wider range of moral justice. Such concerns could, however, militate the other way. In *Miles v Dawson* (1795), it had been argued by Thomas Erskine that if a witness were not compelled to produce relevant documents by subpoena, 'it would be the grossest injustice ... to deprive the plaintiffs of the evidence because it happened to be in the hands of a

⁵¹³ *Wright v Nutt* (1788) 1 H Bl 136, 154-5; 126 ER 83: this was the first recorded instance of the use of an 'interests of justice' phrase in the law reports. It was also one of a number of cases relating to the complicated litigation surrounding the estate of Sir James Wright following his flight from Georgia during the Revolutionary War

⁵¹⁴ See, for example, Coleridge J's denial of a broad duty of a surety to reveal financial details (in the absence of any specific provision requiring this) to a Tax Commissioner in *Gwynne v Burnell* (1840) 6 Bing NC 453; (1840) 7 Cl & F 572; (1840) 1 Scott NR 711; 7 ER 1188 at 608-9 (7 Cl & F), 1201 (ER)

⁵¹⁵ *In re Breech-Loading Armoury Company v In re Merchants' Company* (n 510) (restrictions being placed on the power of a Special Examiner in winding up proceedings)

⁵¹⁶ *R v Tower* (1815) 4 M. & S. 162, 162-3; 105 ER 795

third person.’ Lord Kenyon, however, did not agree. To require a person to produce ‘every paper which he has in his hands ... unless the production of them involves him in a crime,’ could impose burdens on a witness ‘to ... make him produce his deeds, which might involve himself and thousands in ruin’ would be ‘contrary to every principle of justice.’⁵¹⁷

Different courts had developed their own systems and processes to ensure the reliability of evidence by processes of discovery and interrogation. One such was the Commission system used in Chancery courts, which allowed evidence relevant to cases to be secured abroad. Such practices and innovations were not, however, entirely self-contained. Common law courts had adopted and adapted many such discovery practices of the courts of equity. It was possible, by the early nineteenth century, in a common law action to seek such a commission to examine foreign witnesses by application in the King’s Bench or in Chancery. The practices of the two courts had, however, diverged again and the differences in approach could have an impact on the nature of the justice delivered.

In *Butler v Berkley* (1818),⁵¹⁸ the plaintiff had faced such a choice. Seeking a commission in the common law court would have meant that the defendant would have been provided with information about the questions to be asked. The plaintiff had therefore opted for a bill in Chancery where no such rule was in effect. The defendant therefore sought an order for discovery of the questions from the Chancellor on the grounds that without such information, the defendant’s challenge in the case would be undermined. As the common law courts recognised such a right, ‘what reason can be assigned,’ counsel for the defendant inquired, ‘for relieving [the plaintiff] from an obligation imposed by obvious principles of justice.’⁵¹⁹ Lord Eldon’s answer was straightforward; the common law courts had simply misunderstood the nature of the equitable practice they had adopted. Not one to depart from established rules or to adopt Lord Hardwicke’s approach to justice-based legal innovation, Lord Eldon was unimpressed by claims that the information was needed for the proper evaluation of the case or that there was any potential injustice resulting from the plaintiff’s apparent forum-shopping. Although he recognised that while ‘there is no practice which will not yield to special circumstances’, he

⁵¹⁷ *Miles v Dawson* (1795) Peake Add Cas 54, 58; 170 ER 192

⁵¹⁸ *Butler v Bulkeley* (1818) 2 Swans 373; 36 ER 658

⁵¹⁹ *ibid* 373, 658

concluded that there was insufficient evidence in this particular case for the development of rules either to achieve more just outcomes or to achieve parity of practice with other courts.⁵²⁰

To safeguard the Commission process, and to ensure the accuracy of the evidence obtained as a result, the documents of the Commission, an Answer and related affidavits, had to be properly sealed. They would only, under the rules of the Chancery court, be filed if received unopened. However this protection of truthful and accurate verdicts in this way could cause conflicts with a countervailing justice concern, also related to the attainment of accurate verdicts as can be seen in *Hill v Turner* (1813).⁵²¹ There, the defendant's solicitor mistakenly opened the answer and affidavits. They were then read by solicitors for both parties in the plaintiff's presence. The plaintiff nonetheless challenged the admissibility of the evidence contained in the documents. It was therefore necessary for the defendants to convince the court that the application to file the documents did 'not violate any Rule, impede any Principle of Justice, or practice any Imposition on the Court.'⁵²²

The court was willing to overlook failures of formalities in the circumstances. The Vice Chancellor, Sir Thomas Plumer, saw the rationale of these requirements as, he said, preventing 'any Danger of Alteration by requiring the Oath of the Messenger, identifying the Instrument, as that which he received from the Commissioners, and as being in the same State, in which he received it.'⁵²³ It was only the last part of the oath asserting this that was lacking due to the failures and this was due to errors on the part of those commissioned to take the evidence abroad. Although the opening of such a commission before trial could be (and had previously been) sufficient reason to render their contents inadmissible, Sir Thomas concluded that in this case, 'it is difficult to say, as it would not be conducive to Justice, that such an Accident, thus explained, and not producing any bad Effect, shall not be set right.'⁵²⁴ Justice therefore if not providing and defining the clear basis for decision making, served to guide decision makers in the application of rules and practices which were intended to support justice values of this sort.

It could also foster flexibility in pursuing these ends. Processes of discovery were one of the many areas rationalised and simplified during the mid-nineteenth century. The Common Law Procedure Act 1854 created a system for discovery in the common law courts that removed the

⁵²⁰ *ibid* 374, 659; Lord Eldon was equally dismissive of attempts to convince him on the basis of principles of justice to adopt common law innovations of what had formerly been Chancery discovery practices in *The Princess of Wales v The Earl of Liverpool and Count Munster* (1818) 1 Wils Ch 113, 119-20; 37 ER 51, 53-4

⁵²¹ *Cox v Newman* (1813) 2 V. & B. 168; 35 ER 283

⁵²² *ibid* 170, 283

⁵²³ *ibid* 170, 284

⁵²⁴ *ibid* 170-1, 284

need for resort to Chancery for bills of discovery.⁵²⁵ This reform was one of many that had the support of (at least sectors of) the judiciary. In *Bartlett v Lewis* (1862), Erle J justified the general principle on the grounds that ‘the interests of truth and justice must be allowed to prevail.’⁵²⁶ In *Stern v Savastopulo* (1863) he called the Act, a ‘most salutary enactment’ which had ‘furthered the interests of justice.’⁵²⁷ Again, this was not, however, simply a belief that as much evidence as possible enhanced justice. Erle went on to note the limits of such a procedure, saying:

*[I]nterrogatories are not to be granted in every case,—the court must convince itself that the step will conduce to the furtherance of justice and the promotion of truth. [In most of the cases which have arisen ... a definite fact was to be inquired into which was material to the case or defence of the opposite party; and in each of them the court held that the interrogatories might be put though the answers might tend to disclose the party's own case, or even expose him to the peril of an indictment; in which latter case he might protect himself by declining to answer.]*⁵²⁸

Noting that courts now had a ‘general discretion’ and that interrogatories of a merely ‘fishing character’ were not to be allowed, he declined to enforce them in the case before him because:

*the unprecedented nature of these interrogatories, the nature of the action, and the absence of any special circumstances to warrant them, seem to me to afford abundantly sufficient grounds for holding that they overstep the boundary line. I do not mean to say that in no case will the court allow interrogatories in an action of slander. But, before I will consent to allow them, I must be satisfied that there are very peculiar circumstances of grievance and oppression to justify so novel a proceeding.*⁵²⁹

Erle CJ was not inclined to make orders simply for the sake of truthful outcomes. These concerns were clearly linked to his understanding of what justice required but this was a conditional justice aspiration. Other normative justice concerns, would limit the extent of such information gathering. Erle’s statement shows concern for the value of the information gained to set against concerns for privacy, liberty and perhaps cost and expense. These things furthered justice

⁵²⁵ Common Law Procedure Act 1854 (1854 c 125), ss 51, 52

⁵²⁶ *Bartlett v Lewis* (1862) 12 CB NS 249, 260; 142 ER 1139: this general principle was recognised to be constrained by privileges against self-incrimination.

⁵²⁷ *Stern v Sevastopulo* (1863) 14 CB NS 737, 741; 143 ER 634

⁵²⁸ *ibid* 741-2

⁵²⁹ *ibid* 742

alongside promoting of the truth. In Erle's mind, justice was more than merely getting the facts and making the right decision with them.⁵³⁰

This was not the universal view of the judiciary, however. In *The Mary* (1868)⁵³¹, a case concerning the status of a ship commissioned by the Confederate States during the American Civil War, Sir Robert Phillimore had to interpret s 17 of the Admiralty Court Jurisdiction Act,⁵³² which granted the Admiralty Court, 'all such powers as are possessed by any of the superior Courts of Common Law or any judge thereof, to compel either party in any cause or matter to answer interrogatories.' Concluding that there was no consistent practice among the common law courts, he concluded that 'the interests of justice require me to mould, as far as I am able, the practice of this Court, rather in conformity with the practice of the Courts of Equity than of Common Law.'⁵³³

Although willing to recognize that those questioned under such a procedure had a right to refuse to answer incriminating questions,⁵³⁴ Phillimore's sense of what the interests of justice required when interrogatories were issued was 'ought to be such as tend bonâ fide to support the case of the plaintiff, and to favour a complete inquiry into the truth of the issue which the Court has to decide.'⁵³⁵ This was in fact a difference of emphasis rather than a profoundly different attitude to evidence-based justice. In all of the courts there was agreement that relevant questions could be asked and that persons could decline to answer to avoid incriminating themselves.⁵³⁶ Equally, it was recognised that there could be grounds for refusing to answer questions which were superfluous or where the person questioned could not provide an answer.⁵³⁷ This accords with Erle CJ's qualified sense of justice expressed in *Sterne*.⁵³⁸ If there was a difference, it was a greater willingness to entertain a broad, but not unqualified, range of questions in Admiralty and Equity courts. Here again a justice discourse led to different outcomes in different courts with

⁵³⁰ Erle J regularly spoke of 'truth and justice' in his judgments (*Price v Harrison* (1860) 8 CB NS 617, 633; 141 ER 1308; *Davey v Pemberton* (1862) 11 CB NS 628, 629; 142 ER 942; *Attorney-General v Sillem* (1863) 2 Hurl & C 431, 629; 159 ER 178; *Kingsford v Great Western Railway Company* (1864) 16 CB NS 761, 768; 143 ER 1325; *R v Rowton* (1865) Le & Ca 520, 533; 169 ER 1497). It is far from clear given the contexts of many of these cases that he was treating the two as fundamentally different but, as this judgment shows, nor were they, in his mind, quite the same.

⁵³¹ *The Mary (otherwise The Alexandria)* (1867-69) LR 2 A&E 319

⁵³² 24 Vic c 10

⁵³³ *The Mary* (n 531) 322

⁵³⁴ The defendant, Prioleau, having purchased war materiel during an ongoing conflict was potentially guilty of an offence under the Foreign Enlistment Act.

⁵³⁵ *The Mary* (n 531) 322

⁵³⁶ This was not a universal view of the judiciary, however: in *M'Fadzen v Liverpool Corporation* (1866-7) LR 3 Ex 279, Martin B had considered the capacity to inquire as to criminal conduct to be excessive even though those questioned could decline to answer such questions.

⁵³⁷ *The Mary* (n 531) 323

⁵³⁸ *Sterne v Sevastopulo* (n 527)

their own procedural contexts. It was not, however, a different conception of justice in each court. Phillimore's comment illustrates this. It was a single concept of the 'interests of justice' that required 'practice' of courts to be adapted.

The justice concepts related to discovery strongly related to justice as accuracy, therefore, but this was not an overwhelming value; there were other ingredients to just decisions among those identified by Erle CJ. In *Kingsford v Great Western Railway* (1864), such a broader sense of justice also led Erle CJ to conclude that the defendants, as a company, had as much right to protection as an individual, saying, 'The very obvious intention of the legislature was, in furtherance of the interests of truth and justice, to give *all* suitors the benefit of discovery.'⁵³⁹ This sort of even-handed and impartial treatment could, itself, be a key aspect to the procedural justice discourse during the period.

Rules Promoting Independence, Impartiality and Openness

Impartiality was actively promoted through judicial control of the staffing of the courts and the appointment of its officers⁵⁴⁰ as well as ensuring that the independence of judges would be preserved by conferring upon them a degree of immunity for their actions.⁵⁴¹ It was also invoked in making positive statements about even-handed consideration of cases.⁵⁴²

It was also said to be an 'essential principle of justice that the members of a tribunal must not be interested in the subject they are to decide'.⁵⁴³ This principle also applied in limiting the evidence of interested witnesses; a logic that conflicted with free proof notions of justice. This was the case in *R v Governors and Directors of the Poor of St Mary Magdalen Bermondsey* (1802) where changes by statute law had made governors and directors of a poor union liable to pay costs in a poor rate appeal. This made them liable to challenge as interested witnesses. It was argued in favour of upholding the refusal of the Surrey Quarter Sessions to hear the respondent's witness that such refusal had been proper because 'by the general rules of law no party to a cause can be also a witness, it being contrary to the first principles of justice independent of any pecuniary

⁵³⁹ *Kingsford v Great Western Railway Company* (1864) 16 CB NS 761, 768; 143 ER 1325; Williams J likewise (at 769) thought that it would be an 'injustice' that a corporation could not benefit from the protection that individuals could.

⁵⁴⁰ *R v Justices of Essex* (1816) 5 M & S 513; 105 ER 1139 (justices to hear poor law appeals); *Ex Parte Pinke* (1817) 2 Mer 452; 35 ER 1013 (solicitor to act under commission of lunacy); *Hughes v Statham* (1825) 4 B & C 187; 107 ER 1029; *Harding v Pollock* (1829) 6 Bing 1829; 130 ER 1189

⁵⁴¹ *Taaffe v Downes* (1840) 3 Moo PC 28; 13 ER 12 (a case decided in 1815)

⁵⁴² *Attorney-General for New South Wales v Bertrand* (1865-67) LR 1 PC 520, 534; (1867) 4 Moo PC NS 460, 480; 16 ER 391

⁵⁴³ *R v The Great Western Railway Company. (In the Matter of the Burnham Rates)* (1849) 13 QB 327, 116 ER 1288

interest.⁵⁴⁴ Although this was a fusion of law- and justice-based explanations typical of the times, the defence did not rely on other cases to support his point and nor did Lord Ellenborough CJ do so in reaching his judgment.

Such principles of law were seemingly self evident and synonymous with the justice principles of impartiality and disinterest. Rather Ellenborough focused his attention on the statute law that imposed the costs obligations on the governors. Being liable not only for costs in their corporate capacity but also, according to the statute and the general practices of the Quarter Sessions, personally, they were in fact as well as in law interested parties. This made them partial (and thus not competent) witnesses.⁵⁴⁵ Therefore although not explicitly endorsed in Ellenborough's judgment, Lewes' principles of justice were being endorsed in determining that a party facing the risk of personal liability was sufficiently interested to be disqualified from testifying. In this sense strict (and slightly formalistic) rules on impartiality, which were only loosely associated with the credibility of evidence, were being applied at the expense of obtaining the most comprehensive evidence.

It is not surprising that in these discussions about the impartial adjudication, 'the administration of justice' was a regularly invoked term. Although frequently simply a general reference to the process itself, frequently such invocations carried a particular normative content. In discourses about partiality, the selection and use of the term 'justice' in the description of the activity of 'administration' described involved the quality of the activity in ways that other terms (such as 'the law') would not.⁵⁴⁶ For example in *R v Wooler* (1817) the issue of the impartiality of justice arose from a London coroner's practice of choosing jurors from the Sheriff's books rather than selecting them randomly. Wooler, defending himself in person, argued that:

*It was of the utmost importance, that the administration of justice should be free from every ground of suspicion ... [W]here the Crown and a subject are the litigant parties, it is of the utmost moment that the jury should not be arbitrarily selected by a public officer deriving his appointment indirectly from the Crown.*⁵⁴⁷

Lord Ellenborough accepted Wooler's essential point:

⁵⁴⁴ *R v Governors and Directors of the Poor of St Mary Magdalen Bermondsey* (1802) 3 East 7, 10; 102 ER 498, 500

⁵⁴⁵ *ibid* 13-4, 500-1

⁵⁴⁶ de Bolla describes this understanding of meanings of concepts through the way words are linked as the 'hinge' function of such words: De Bolla, *Architecture of Concepts* 74-7

⁵⁴⁷ *R v Wooler* (1817) 6 M & S 366, 105 ER 1280 (n) 201

*I entirely agree ... that the administration of justice ought not only to be pure, but unsuspected; and if... it had been made appear that in any one respect blame could be imputed to the officer of the Court, I should readily have enforced any application for his punishment, or for vacating any acts done by him in the corrupt exercise of his functions.*⁵⁴⁸

What was at the heart of such concerns was both the actuality and the perception of the process as just because impartial. This did not help Wooler, however. Ellenborough was not willing to set aside this particular practice of selection of jurors. Such a decision required, however, reassurance. Lord Ellenborough went on to say:

*I cannot conclude without saying, that it is most gratifying to the Court, and most important to the public, to know that the duties of officers connected with the administration of justice, are discharged with so much integrity and such laborious industry.*⁵⁴⁹

Attention was not simply focused on jury functions; it could also apply to judicial practices and in such cases, impartiality was also linked in this way to respect for the rules and processes of the law. In *The Le Louis* (1817), for example, Sir William Scott, struck by 'incongruities, arising ... from inattention somewhere, not only to the common forms of law, but to the rational principles on which they are founded', was driven to remind the judge of the Vice-Admiralty Court in Sierra Leone of the importance of 'the correct and equal administration of justice to all parties who might come before him'.⁵⁵⁰ Justice as administered therefore carried qualities that would not so comfortably be associated with the administration of law.

Nor was it only adjudicators who were required under claims of justice to be impartial. Those acting on behalf of the courts, particularly legal advisors, were also expected to reflect these standards of impartiality and probity. In *Lewis v Morgan* (1795), Lord MacDonald CB drew on the principles of *Newman v Payne*⁵⁵¹ that were, he said:

[P]ronounced upon the general principles of justice, arising from the relations between the parties. From the principles acted on in these cases, from the character of an attorney, as an officer of the Court, having a share in the administration of its justice, in whom the client must not only from choice but from necessity place

⁵⁴⁸ Ibid

⁵⁴⁹ Ibid

⁵⁵⁰ *The Le Louis (Forest)* (1817) 2 Dods 210; 165 ER 1464, 239-40

⁵⁵¹ *Newman v Payne* (1793) 2 Ves Jr 199; 30 ER 593

*confidence; the Court will require an account of the conduct of that officer, where they see any grounds of suspicion. An attorney is accountable to the Court, as well as to the party.*⁵⁵²

Justice and its proper administration therefore relied on the impartiality not only of tribunal but also upon the impartiality and evident moral integrity of its officers too.⁵⁵³

This was a matter of both reality and impression. By the 1770s the reification of a concept of ‘the administration of justice,’ and especially the ‘administration of public justice,’ had informed a body of case law under the quo warranto procedure that sought to maintain the moral integrity of the courts. In *R v Watson*, a resolution of the Corporation of Yarmouth to reward their Mayor, Watson, for his service to public justice, was successfully prosecuted as a libel on the administration of justice because he had been convicted of malicious prosecution on the very matter to which the resolution related. The image of the administration of justice was central to the case. Erskine had brought the prosecution as a ‘high contempt for the administration of public justice’ and Bearstow, in defending, had felt the need to show that the corporation’s acts could not ‘be considered as being intended by the defendants to reflect on the administration of public justice; for the sum which had been voted to Watson was voted to him from a principle of compassion.’⁵⁵⁴ The court acceded to Erskine’s claim and awarded damages against the corporation.

Concerns about impartiality also raised questions about the extent to which courts should be open to public scrutiny. Trials, and particularly trials by juries, were becoming increasingly matters of public interest in the eighteenth century. An increasingly vibrant print culture was able to disseminate information, including the details of trials, at a much greater rate. This was becoming increasingly political. Both during Wilkite agitations in the 1760s and 70s and in the charged atmosphere of the 1790s and early decades of the nineteenth century, trials often had political and national consequences that made them newsworthy in ways that many senior judges found problematic.⁵⁵⁵

⁵⁵² *Lewis v Morgan* (1795) 3 Anst 769, 774; 145 ER 1034, 1035.

⁵⁵³ Such as in *Bennett, Ex Parte* (1805) 10 Ves Jr 381; 32 ER 893, where the court had to determine whether the solicitor to a commission in bankruptcy could purchase the bankrupt’s property

⁵⁵⁴ *R v Watson* (1788) 2 Term Rep 199; 100 ER 108, 200

⁵⁵⁵ Asa Briggs, *Age of Improvement, 1783-1867* (Longman 1959) 117-9; James Oldham, ‘Law Reporting in the London Newspapers, 1756-1786’ (1987) 31 *American Journal of Legal History* 177, 178-9; Wilfrid R. Prest, ‘The Experience of Litigation in Eighteenth-Century England’ in David Lemmings (ed), *Law and Government in England in the Long Eighteenth Century: From Consent to Command* (Palgrave Macmillan 2011) 151

The impartiality of trial processes was claimed by Wilkites and their Foxite successors to be protected by external scrutiny. To be just, therefore, they had to be open as well as fair.⁵⁵⁶ This was not, however, the view that found favour with the majority of judges during the last tumultuous decades of the long eighteenth century and this resistance, too, was animated, or at least rationalised, by justice-related concerns about impartial adjudication.

In *R v Joliffe* (1791), the defendant had been charged with having publicised information to influence a jury verdict while a trial was underway.⁵⁵⁷ Having concluded that the distribution of materials would have influenced a trial verdict, Lord Kenyon was particularly concerned that justice should be seen to remain impartial:

*It is the pride of the constitution of this country that all causes should be decided by jurors, who are chosen in a manner which excludes all possibility of bias, and who are chosen by ballot, in order to prevent any possibility of their being tampered with... Up on the merits I will not now give any opinion; but it would be a discredit to the administration of justice if we were to refuse granting an information on the evidence laid before us.*⁵⁵⁸

This concern to keep trial processes untainted by less legally constrained discussions also manifested in the form of proceedings for contempt. In *R v Fleet* (1818) the contempt derived from the publication of an account of a riot while a coroner's court was sitting to determine the circumstances of three deaths that had resulted from it. Here again the concern was with threats to the impartiality and the accuracy of the decisions to be made, Abbot J noting that, it being difficult to overcome 'preconceived prejudices and opinions, and that more especially in matters of sentiment or passion' publication of information would be 'most mischievous to the temperate administration of justice.'⁵⁵⁹

Making decisions in ways that conformed to notions of justice was more therefore than simply a matter of getting cases right; it was also a matter of making the cases and the judicial system acceptable to a wider audience. Both of these values were pressed in pursuit of differing ends as can be seen from the various cases concerning the prosecution of Clement, the owner of *The Observer* newspaper, for publishing details of the trials of the Cato Street conspirators. The

⁵⁵⁶ John Brewer, 'The Wilkites and the Law' in John Brewer and John Styles (eds), *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* (Hutchinson 1980) 154-5

⁵⁵⁷ *R v Joliffe* (1791) 4 Term Rep 285; 100 ER 1022, 289; the importance of impartial and independent juries was also a significant feature in the arguments in *R v Perry* (1793) 5 Term Rep 453; 101 ER 255 and *Withnell v Gartham* (1795) 6 Term Rep 388; 101 ER 610

⁵⁵⁸ *R v Joliffe* (n 557)

⁵⁵⁹ *R v Fleet* (n 570) 384-5

matter had first been taken to the King's Bench where the legality of an order restricting publication had been challenged. It was Denman and Platt who argued the matter on behalf of Clement that the publicity of trials was

*most conducive to the due administration of justice; and that being so, the Court had no power to make an order to prohibit that which was not an obstruction, but a furtherance of public justice.*⁵⁶⁰

The King's Bench rejected this argument on the grounds that

*[T]he Court before whom the trial was about to take place was a Court of General Gaol Delivery, and had authority to make any order which they might judge to be necessary, in order to preserve the purity of the administration of justice in the course of the proceeding then depending before them, and to prohibit any publication which might have a tendency to prevent the fair and impartial consideration of the case.*⁵⁶¹

Central to this dispute was a vastly different perception of where the power to dispense this core aspiration of adjudication, justice, should be located. Wilkes and radical Whigs favoured (or at least saw a role for) popular institutions like the press and the jury. A predominantly Tory, or at least conservative, judiciary were not willing to forsake such control. At the same time, both the jury and an open press could be associated with justice and a wider set of rights and entitlements of the freeborn Englishman. For this reason even the most conservative judge had to tread carefully before reducing jury powers or closing off the courts. It was a fertile area for a nebulous concept like justice to be deployed.

As the fine against Clement had been estreated into the Exchequer, the argument continued there. For Clement it was argued that

*[C]ourts of justice are open to all the world; that accessibility had always been considered an inseparable incident from the administration of justice, whereby an advantageous publicity was given to their proceedings, and a greater degree of certainty imparted to the knowledge of the laws themselves.*⁵⁶²

The Barons of Exchequer were quick to reject such an argument. Sir Richard Richards, the Chief Baron, described the publication as 'a direct contempt, tending to obstruct and impede the due

⁵⁶⁰ *R v Clement* (1821) 4 B & Ald 218; 106 ER 918, 227

⁵⁶¹ *Ibid* 230

⁵⁶² *Re Clement* (1822) 11 Price 86, 77

administration of justice' such that it was 'impossible for us to hesitate a moment in refusing' to dismiss the estreatment⁵⁶³ and Baron Graham considered that there were 'the best reasons are to be found for [the original order], in the necessity of such a course for ensuring fair administration of law and justice.'

This was not simply a concern about wrongly convicting the defendants, but about inaccurate outcomes more generally. Baron Wood, for example, observed that in making the order, the trial court had felt it:

*necessary, for the sake of the pure administration of justice, that the proceedings should not be made public till they were closed: and with very good reason; because the case for the Crown, and the evidence given on the first trial, might thus come to the knowledge of the other prisoners who were yet to be tried; and when they had been made aware of the circumstances intended to be proved against them, they might have got up a defence purposely to meet the case for the prosecution, and may have produced false witnesses in support of it.*⁵⁶⁴

It should be remembered that the idea that prisoners should know the case against them was not accepted (a perspective to be contrasted with attitudes in the civil cases noted above and which would become increasingly untenable in criminal cases as the nineteenth century progressed).⁵⁶⁵

Garrow B preferred a particular type of accuracy over a wider public interest in open justice:

*The necessity of keeping the testimony of witnesses concealed from parties, and from each other, is sometimes of the utmost consequence in the administration of justice, particularly on such trials as these where the same evidence must necessarily be given in each case almost verbatim, and of which advantage may be taken, either to the undue favour or prejudice of the prisoner.*⁵⁶⁶

Clement shows the complicated interplay of values in justice discourse and the need for caution before reaching overly stark conclusions as to which values predominated. The central principle

⁵⁶³ *ibid* 83

⁵⁶⁴ *ibid* 88

⁵⁶⁵ Beattie, *Crime* 351-2; Langbein, *Adversary Trial* 62

⁵⁶⁶ *Ibid* 91: he also took the matter further, expressing profoundly paternalist reasons for judicial control over the publicity of trials, in suggesting, at p 90, that 'the right of the publication of trials has always been exercised by the Courts, and they have never hesitated to use their power of exclusion, in fit cases, of all persons except those whose duty compelled them to endure the misery of being present. If they have no such authority, newspapers must be banished from all families, for trials, attended with the most indecent and disgusting details.'

upon which the defence had relied was the importance, both to a wider society and to the court process itself, of being open to publicity. Justice and its administration was to be furthered by being subject to external scrutiny. This liberal discourse was open to two main challenges: one the concern for ensuring the constitutional position of the courts as impartial arbiters of disputes, the other a pursuit of the truthfulness of judicial outcomes. From the perspective of an early nineteenth century judge, openness was a threat to both values in contrast to the judicially controlled neutrality of the formal trial processes.

In a society with a deeply circumscribed sense of free speech, the justice of impartiality could be pushed to significant degrees. It was used, for example, to deny Sir Francis Burdett a defence to libel following his condemnation of the St Peter's Fields massacre in 1820. His publication of articles condemning the yeomanry and suggesting the killings were acts of the government, led to his prosecution for seditious libel. Having been convicted, he sought to introduce affidavit evidence in mitigation of his punishment which suggested that what he had said was true. This the court rejected, again on the grounds of the importance of impartial justice.

[I]n this case any evidence of the truth of the facts charged in this information is inadmissible. If we were to accede to it, we should let in a most dangerous rule of practice, and one which would be a great disgrace to the administration of justice. The libel in question imports, that the troops had killed men unarmed, unresisting, and had disfigured, maimed, cut down, and trampled on women. If that were done, if unresisting men were cut down, whether by troops or not, it is murder for which the parties are liable to be tried by the law of the country; and I for one will ever uphold this, that a man shall come to his trial fairly, and without any prejudice created upon the public mind in that respect.⁵⁶⁷

It might be argued that this was merely a rationalisation of an underlying motive; it is difficult to see how letting Burdett use the truth of the allegations, would necessarily have impacted upon any proceedings against any of the troops at St Peter's Fields. Nor was it explained why one set of proceedings (the potential murder trials) would be preferred over another (the actual libel proceedings) in achieving just results. Equally, as was argued for Burdett, any evidence that the facts were wholly false would conversely have been admitted to aggravate the offence so the truth of the allegation was clearly of relevance to the sentencing decision.

⁵⁶⁷ *R v Burdett* (1821) 4 B & Ald 314; 106 ER 952, 323 (per Bayley J)

Whatever the sincerity or credibility of such statements or the motives of their makers, the resort to them suggests how strong the totemic value of neutral and impartial adjudications could be. Justice values were powerful tools of rhetorical use; they could be deployed, to varying extents, to further chosen purposes. Bayley J was, of course, not having to convince, merely to justify, but the fact of his rhetorical use of impartiality demonstrates its power as a justifying argument. Even if expedient rationalization, it was a rationalization by which the law, and judges as its custodians, had to live. The courts had, as Thompson has argued, to live by their own standards.⁵⁶⁸ The best illustration of this can perhaps be seen from the other prosecution of a radical that arose from the Peterloo massacre. Orator Hunt was put on trial for his role in the gathering. In seeking to have the trial removed from Lancaster to York, he was able successfully to rely on both the actuality and the image of justice as impartial, suggesting that it was of the 'highest importance that the administration of justice should not only be pure, but above all suspicion.'⁵⁶⁹ Impartial justice was therefore a fluid concept to be deployed in favour of a variety of arguments but certainly not invariably useful for either conservative or radical political purposes.

This rhetorical flexibility of the justice concept fostered a significant discourse on impartiality in the early decades of the nineteenth century, particularly in actions taken against publishers and others for presenting information that, it was argued, might sway independent determinations.⁵⁷⁰

Impartial justice could also justify decisions enforcing judicial control and authority over the courtroom. The protection of the independence of the tribunal required the securing of the regular proceedings and respect for the court as much as insulating the tribunal from external influences. In *Garnett v Ferrand* (1827), for example, the King's Bench dismissed an action for trespass against a coroner who had ejected the plaintiff from his hearing. The defendant had pleaded the necessity of ejecting the plaintiff due to his 'disturbance and violation of due order and decency in the administration of justice, and to the great hindrance thereof.'⁵⁷¹ Lord Abbott CJ agreed:

⁵⁶⁸ Thompson, *Whigs and Hunters* 262-3

⁵⁶⁹ *R v Hunt* (1820) 3 B & Ald 444; 106 ER 725, 446-7

⁵⁷⁰ *R v Fisher* (1811) 2 Camp 563; 170 ER 1253; *R v Fleet* (1818) 1 B & Ald 379; 106 ER 140; *Duncan v Thwaites* (1824) 3 B & C 556; 107 ER 840 (where publication of details of an appearance before examining magistrates constituted a libel on the court); the somewhat selective application of the principle can be seen from the unwillingness of the Court of Exchequer to delay a tithing case the earlier proceedings of which had been printed in the *Yorkshire Gazette*: *Willis v Farrer* (1829) 3 Y & J 381; 148 ER 1227

⁵⁷¹ *Garnett v Ferrand* (1827) 6 B & C 611; 108 ER 576, 611-2, 618

*It will be, in many cases, impossible that a proceeding should be conducted with due order and solemnity, and with the effect that justice demands, if the presiding officer ... has not the controul of the proceeding, and the power of admission or exclusion according to his own discretion. ... The power of exclusion is necessary to the due administration of justice.*⁵⁷²

There were, in fact, in Abbott's view, two principles at stake. Not only had it been right for the judge to ensure that court processes were both effective and decorous, but the integrity of the judicial office also required that the independence of judicial decisions was not to be undermined by such challenges:

*This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer justice ought to be ... In the imperfection of human nature it is better, even, that an individual should occasionally suffer a wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it ... And it is not to be supposed before-hand, that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction.*⁵⁷³

Central, then, to the maintenance of a visibly impartial judicial system was the autonomy of its judicial officers. This could be set against other justice concerns such as the reviewability of outcomes and the correction of errors during trial.⁵⁷⁴ There were, however, limits to this protection of minor judges. In *Daubney v Cooper* (1829)⁵⁷⁵ a successful action was brought against magistrates in very similar circumstances. The plaintiff had been ejected under the orders of three Lincolnshire magistrates determining a prosecution of one Preston for a poaching offence. Daubney was an attorney who had been intent on appearing to represent Preston. The King's Bench declined to comment on Preston's entitlement to such representation but they were conclusive that, as the hearing had concerned trial of a summary offence, this had been a

⁵⁷² Ibid 628

⁵⁷³ Ibid 626-8

⁵⁷⁴ See below at p 146

⁵⁷⁵ *Daubney v Cooper* (1829) 10 B&C 237; 109 ER 438

judicial proceeding, it was therefore a matter of public interest and ‘one of the essential qualities of a Court of Justice’ to which the public in general (whether or not lawyers) were entitled to access.⁵⁷⁶

The difference between *Garnett* and *Daubney* is not difficult to define. The court was at pains to stress that *Daubney* had not disrupted proceedings. The two cases show something of shifting values about the nature of judicial proceedings in the early decades of the nineteenth century and reflect concerns about the nature of court hearings as events to which the public should have access, and in which they had any entitlement to participate. Mulcahy has suggested that as early as the late eighteenth century, there was an increasing tendency to separate the public from judicial activity. This was motivated by an increasing tendency to see the public as either dangerous or disruptive to an ordered, decorous or rational (i.e. lawyerly) judicial process, an attitude that came increasingly to manifest itself in court architecture that separated the jury, the defendant and lawyers from the general public.⁵⁷⁷

Mulcahy’s evaluation of the changing uses of the physical space can be read alongside a narrative of the growing role of lawyers in criminal proceedings, with the resulting conceptual shift from a public, participative process towards one that was significantly controlled by legal personnel with the sort of fully ‘lawyerized’ courtroom procedures which were already standard in Westminster civil cases.⁵⁷⁸ It was this process that was playing itself out in the 1820s through the central courts by means of civil actions against the lesser magistracy in ways that sought to reconcile the trial as a public but also an orderly process.

There was therefore a widening of access to the courts alongside a tendency to control and regulate the nature of such access. While justice would become open to public observation, public participation was being reduced by increasing control of the nature of such access. In part, as Mulcahy has suggested, this may be motivated by fears of the unpredictable nature of the public amongst a legal elite in times of political and social uncertainty.⁵⁷⁹ Thus access to the courts became a battleground between values of openness, on the one hand, and judicial independence and autonomy, on the other.

This was, of course, only one aspect of the justice discourse related to impartiality. The concern of the central courts had been increasingly to protect impartial decision-making. As has been

⁵⁷⁶ *ibid* 440

⁵⁷⁷ Mulcahy, *Legal Architecture* 43-6, 51

⁵⁷⁸ Lemmings, *Professors of Law* 205; Langbein, *Adversary Trial* 8; Cairns, *Advocacy* 54-5

⁵⁷⁹ Mulcahy, *Legal Architecture* 54, 131

seen, this created tensions between truth-oriented concerns and countervailing perceptions of justice as openness. Equally, as the nineteenth century progressed, impartiality came increasingly to be associated with a lawyer-managed process in all courts. The justice of legal representation therefore came to be increasingly significant.

Representation

The presence of legal professionals and even the right of parties to rely upon them seems to have been settled, at least for the central courts, before the 1770s.⁵⁸⁰ There was not, however, a simple right to be represented in whatever way a party liked. The paternalistic concerns of judges and their sense of themselves (rather than advocates) as the source of just outcomes meant that the concerns about decorum and decency of proceedings that had influenced decisions about public access would also influence the courts in determining entitlements to legal representation and the obligations under which such representatives acted. Civil courts, at least, recognised that parties should have legal representation in a form that reflected how the client would wish the case to be put. Out of such freedom the most significant and useful information, whether evidence or argument, would be obtained, a justice aspiration particularly associated with 'the interests of justice.'⁵⁸¹ In *Kinleside v Harrison* (1818) such a conceptualisation was used to deny a costs application against a party due to an excessively forceful argument advanced by his advocate because, the court stated, 'the interests of justice are involved in free discussions of cases at the bar.'⁵⁸²

The value of candid representation was not unlimited, however. In *Robertson v Graham* (1815), Lord Eldon expressed a principle of general application when discussing legal representation in a Scottish case before the House of Lords:

*[I]n our proceedings in Chancery if scandal is introduced, those who really introduce it may be made answerable, not only in costs, but in a way which may affect them more. And it may be well worthy of consideration whether, if a counsel could so far mistake what is matter of pertinent allegation ... as to introduce what is impertinent and scandalous, the expense of expunging is to fall on one who cannot act without advice and without an adviser.'*⁵⁸³

⁵⁸⁰ Lemmings, *Professors of the Law* 27-8

⁵⁸¹ *R v John St John Long* (1831) 4 Car & P 423, 438; 172 ER 727 (a concession by counsel for the defendant); *Wellesley v Duke of Beaufort* (1831) 2 Russ & M 639, 656; 39 ER 538 (a moment of self-congratulation by Lord Brougham for inviting argument)

⁵⁸² *Kinleside v Harrison* (1818) 2 Phil Ecc 449, 573; 161 ER 1196

⁵⁸³ *Robertson v Graham* (1815) 3 Dow 273, 279; 3 ER 1064

Advocates were not, therefore, necessarily immune from the consequences of their arguments. However against this principle of restraint, Lord Eldon set a countervailing concern that recognised that open arguments should, at least provisionally, be permitted:

But for the sake of the general interests of justice, and the fair discussion of matters in dispute between man and man, great freedom of allegation must be allowed ... For if justice cannot be done without bringing forward transactions and the agents in these transactions in this way, it necessarily belongs to the course of justice that the evil should be submitted to, till it can be seen whether the allegation is really wanton scandal, or whether it is pertinent matter bearing hard for the time, but no longer than till the case is inquired into.⁵⁸⁴

Representation in late Georgian courts was to be achieved by a conditional form of free speech, therefore. Advocates would be allowed their freedom to allege and contend but this was to be overseen by the judiciary, who would reconcile such justice-related interests with countervailing concerns of respect, probity and restraint (whether or not explicitly related to justice). The same principle was adopted in Common Law courts, it being noted by Wood B in *Hodgson v Scarlett* (1817) that such freedom was 'necessary to the due administration of justice'.⁵⁸⁵ That what was said might be offensive was an accepted feature of courtroom advocacy. The principle that the parties (or at least their lawyers) were the best arbiters of the right arguments and that the role of the judge was simply to moderate excesses, was explained more fully by Holt in his note on the case:

The principle, therefore, belongs to natural justice as well as to law. It is a part of the necessary means to enable counsel to make as full and sufficient a defence as could be made by the party himself. Nor, on the other hand, is there any injury in the extravagance natural to a counsel or his client, under these circumstances ... Whatever excess there may be in it, is amended by the same liberty allowed to the opposite counsel in answer and defence, or by the correction of the Judge upon his observations on the evidence and the whole case. In the result, therefore, any restriction to the liberty of speech at the bar would be more injurious to the interests of public justice, than any latitude in the exercise of it (always subject to the controul of the Court) could possibly be to individual feeling and character.⁵⁸⁶

⁵⁸⁴ *ibid*

⁵⁸⁵ *Hodgson v Scarlett* (1817) Holt NP 621, 622; 171 ER 362

⁵⁸⁶ *ibid* 626-7

There were, however, lingering concerns of excess, concerns that foreshadowed a discourse of legal restraint that would occur in the context of criminal trials after the introduction of the Prisoners' Counsel Act in 1836.⁵⁸⁷ Representation was a less certain entitlement in criminal cases even during the early decades of the nineteenth century. In *R v White* (1811) the issue was whether a defendant on trial for a misdemeanour should have been able to use counsel to provide support on aspects of his case. In deciding to restrict the defendant's entitlement to rely on a lawyer in this way, Lord Ellenborough said:

*I am afraid of the confusion and perplexity which would necessarily arise; if a cause were to be conducted at the same time both by counsel, and by the party himself. I am extremely anxious that a person accused should have every assistance in making his defence; but I must likewise look to the decent and orderly administration of justice.*⁵⁸⁸

The argument from the defendant in *White* had been that he should be allowed to use a barrister to participate more fully in the process and more effectively to challenge the evidence against him. In refusing this argument, Lord Ellenborough was therefore preferring stability and predictability of processes over the full and detailed challenge of cases, and a paternalistic judicial process of truth-finding over a lawyer-led system of inquiry.

By the 1820s, this paternalistic orthodoxy was under challenge. In *Cox v Coleridge* (1822)⁵⁸⁹ it was representation before examining magistrates that was in issue. Denman, as advocate, argued that the defendant should have had a legally qualified advocate on 'plain principles of justice'. The significant increase in summary jurisdiction meant that many individuals would 'be obliged to defend himself often in a nice question of law without having any right to legal advice or assistance' which would 'have a tendency to produce great injustice.' Where a magistrate was to be making preliminary determinations, it was 'surely essential to justice that the fullest materials should be afforded for his decision, which can only be by giving to the accused, who may be illiterate, the right to be assisted by a person skilled in the law.'⁵⁹⁰ Coleridge's argument to the contrary had little to say about the issue of justice. The main statutes on the examination of suspects⁵⁹¹, he argued, simply did not contemplate legal representation, nor did any of the

⁵⁸⁷ Cairns, *Advocacy* 40-9

⁵⁸⁸ *R v White* (1811) 3 Camp 98, 98; 170 ER 1318

⁵⁸⁹ *Cox v Coleridge* (1822) 1 B & C 37; 107 ER 15

⁵⁹⁰ *ibid* 45-9

⁵⁹¹ 1 Ric 3, c 3; 3 Hen 7, c 3; 1 and 2 Ph & M, c 10; 2 and 3 Ph & M c 10

leading authorities on criminal proceedings.⁵⁹² In addition, he argued, there were practical difficulties in allowing advocates into court, not least of all the possibility that those claiming to be attorneys may not be.⁵⁹³

Abbott CJ was more impressed with Coleridge's arguments for the plaintiff: this was a question of the existence of a right. Being so, the absence of any record of such a right determined the matter. This was not, however, the denial of *any* right to legal representation. Abbott CJ was simply concerned that such an absolute right might cause dangers to defendants as well as to wider interests. In effect, a judicial discretion was preferred to any entitlement as a means of ensuring the most just result in each case.⁵⁹⁴

In reaching views like this, judges were supporting the 'Marian' system of pre-trial interrogation that had prevailed in criminal justice since the sixteenth century,⁵⁹⁵ in which judges rather than professional advocates were the basis of just determinations. The Marian procedure gave examining magistrates a tightly controlled discretion whether to commit for trial but their function was not to try the prisoner.⁵⁹⁶ In fact, at this early stage magistrates frequently conducted further investigations,⁵⁹⁷ a power, it was noted, that might be undermined by the presence of counsel.⁵⁹⁸ It was also doubted what the benefit of introducing counsel would be. Abbott CJ (probably quite accurately) predicted that a right to legal representation was far more likely to benefit prosecutors than defendants⁵⁹⁹ and Bayley J noted that a defendant would be more likely to be able to present the sort of information that would prevent a committal than could any arguments advanced by lawyers.⁶⁰⁰ As such, the judges were far happier with case-by-case judicial control than the acceptance of party control over their own interests.

At the heart of this dispute, then, was another instance of a judicial preference for paternalistic judicial control of the justice processes rather than opening truth-finding to professional lawyers. All four judges concluded that a defendant's entitlement to legal representation should be

⁵⁹² He cited Dalton's *Justice*, 407, Hale's *Pleas of the Crown*, vol ii, 121 and Hawkins, vol 2, c 46, s 29

⁵⁹³ *Cox v Coleridge* (n 589) 43-5

⁵⁹⁴ *ibid* 49-50, 19-20; this was also the view of the other three judges, Bayley J (at 50-1, 20), Holroyd J (51-2) and Best J (52-6)

⁵⁹⁵ Langbein, *Adversary Trial* 40-8

⁵⁹⁶ This was pressed in argument by Coleridge for the defendant (at 42) and accepted by Holroyd J (at 52) and Best J (at 54). Bayley spoke of the examining magistrates being 'a magistrate is clearly bound, in the exercise of a sound discretion, not to commit any one, unless a prima facie case is made out' (at 50).

Abbott CJ agreed that, being only a preliminary inquiry made this a very distinct proceeding to a trial (at 50)

⁵⁹⁷ Langbein, *Adversary Trial* 41-2

⁵⁹⁸ A concern that influenced Best J (at 54-5, 21)

⁵⁹⁹ *ibid* 50, 20

⁶⁰⁰ *ibid* 51, 20

decided by the magistrate on a case-by-case basis. The tension between justice values here was not, however, simply a matter of choosing between accuracy and some other value. Both alternatives, paternalistic and laissez faire, were deeply concerned with obtaining truthful and accurate verdicts. It was the best means of obtaining that aim that was in dispute.

As the century progressed, the pressure for legal representation in criminal cases would grow. *Cox v Coleridge* foreshadowed much of the debate that was to come, both within courts and in Parliamentary attempts to reform the laws relating to legal representation of defendants at felony trials. Cairns has suggested that it was such a concern about the truth to be achieved through professional and expert advocacy that formed the core of the debates on the Prisoners' Counsel Act of 1836.⁶⁰¹ Again, there was no single sense of how such truth was best achieved. Opposition to the Act was motivated, in part, by concerns about the extent to which professional lawyers and adversarial procedures would secure truth. For example, Sir Stephen Copley's arguments against reform in the 1820s had been based on a view that truthful or accurate verdicts were best obtained by a dispassionate and calm inquiry. This would be jeopardized rather than assisted by counsel for the parties. The 'wit, ingenuity and eloquence' of professional advocacy was deemed inconsistent with truth and lawyers might put tactical considerations ahead of a pure investigation of the facts.⁶⁰² Whilst it might be simplistic to describe this as a necessarily 'Tory' version of the truth⁶⁰³, it does represent a particular approach to the issue of the resolution of doubts, one in which courts were to determine truth without the confounding effect of legal processes and legal practitioners. What those who were advocating the introduction of lawyers into felony trials perceived as a process of forensic challenge to unearth truth, was rather seen by conservatives like Copley as ways in fact of obscuring it.⁶⁰⁴ The reformers, in contrast, sought truth through full and extensive argument. Legal expertise and

⁶⁰¹ Cairns, *Advocacy* 4, 67

⁶⁰² *Ibid*, 69 citing Sir Stephen Copley, *Sir Stephen Copley, Hc Deb* (6 April 1824)col 208

⁶⁰³ See for example the distinction between the Tory and Benthamite individualist periods suggested by Dicey in Albert Venn Dicey, *Lectures on the Relation between Law & Public Opinion in England During the Nineteenth Century* (pp. xx. 503. Macmillan & Co.: London; Macmillan Co.: New York 1905) Lecture IV cited in Cairns, *Advocacy* 70. According to Cairns, Dicey suggested a period of reactionary Toryism being replaced, during the mid-century by Benthamite individualism. This characterisation may however be too crude to sum up the varieties of mood, the forms of resistance and the nature of institutional legal concerns that altered the way in which national ideas operated within the legal system.

⁶⁰⁴ Note here the relations advanced by Shapiro between rhetoric/persuasion and science/truth: Barbara J. Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law, and Literature* (Princeton University Press 1983). This conservative approach appears to cohere more closely with the classical view that persuasive tricks were inconsistent with the obtaining of truth. Such views are either therefore lingering remainders of the old classical school of thought or represent a persisting alternative vision of how disputes and doubt is to be resolved.

argument, they felt, produced truth through full discussion. How advocacy might further or undermine the search for truth therefore became a key aspect of the debate.⁶⁰⁵

What, however, had been objectionable in the 1820s became less so in the 1830s. Copley, for example, had changed his position by 1836. Whilst retaining his concern for truth and simplicity, he came to accept that it was now the case that advocacy (and hence the adversarial system) would be the best mechanism for ensuring true verdicts.⁶⁰⁶ Speaking during the second reading of the Bill in 1836, Copley, by then Lord Lyndhurst, suggested that previous concerns about the frenzy of adversarial litigation as an impediment to truth (and therefore justice) had been proven ungrounded. What the interests of truth and justice required in cases of complexity was that evidence should first of all be examined fully by counsel but also that the judge would be assisted in presenting the case fairly and accurately to the jury.⁶⁰⁷ It was in this way that the two aspects of truth enhancing procedural justice could be reconciled.

The Law Commissioners, in presenting their Second Report, had also advocated in favour of removing the felony counsel restriction on the basis of the truth-facilitating power of advocates. They considered it beyond dispute that 'permitting the advocate to speak for the client tends generally to the discovery of the truth and the consequent advancement of justice.'⁶⁰⁸ In particular, the expertise and eloquence of advocates would enable them to present 'some statement or explanation' to illustrate the truth to decision makers.⁶⁰⁹ Lawyers would provide jurors with better access to truth in complex cases and so reduce the risk of inaccurate verdicts.⁶¹⁰ Implicit in this reasoning was the logic that full argument would be more, rather than less, likely to create greater clarity. The commission members (all lawyers or from legal backgrounds) saw a particular value of lawyers in discovering rather than impeding truth.

Cairns' account suggests this increasing tendency towards adversarial trial processes was suggestive of a particular sense of truth and its attainment.⁶¹¹ The resulting reforms created tensions within the justice discourse of the courts. The introduction of prisoners' counsel required the determination of rules and practices under which they would proceed. An initial uncertainty concerned the extent to which barristers were to explain, as opposed to present, the

⁶⁰⁵ Cairns, *Advocacy*, 69

⁶⁰⁶ *Ibid* 72

⁶⁰⁷ Lyndhurst, *HI Deb*; see also Cairns, *Advocacy* 72

⁶⁰⁸ His Majesty's Commissioners on Criminal Law, *Second Report from His Majesty's Commissioners on Criminal Law* (343, 1836) 2 cited in Cairns, *Advocacy* 74

⁶⁰⁹ His Majesty's Commissioners on Criminal Law 2 cited in Cairns, *Advocacy* 77-79

⁶¹⁰ Cairns, *Advocacy* 81

⁶¹¹ Cairns, *Advocacy* 70-2 and see Damaska, *Faces of Justice* cited in Mulcahy, *Legal Architecture* 63-4

evidence. This anxiety can be seen in the judgments given in *R v Bird and Bird*.⁶¹² By the 1860s, Stephen was to consider the requirement that the prosecution have a speech in reply to be necessary to satisfy the fundamental rule of all litigation that both sides ‘be heard on any matter which may be propounded’.⁶¹³

Justice (and particularly ‘interests of justice’) arguments were also raised in the development of rules to protect the secrecy of discussions between lawyers and their clients. Although of older provenance, ‘interests of justice’ discourse grew out of what came to be the definitive statement of the extent of legal privilege in *Greenough v Gaskell* in 1832.⁶¹⁴ Lord Brougham stated the principle as follows:

*[I]t is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources, and deprived of all professional assistance; he would not venture to consult any skilful person, or would only dare to tell his counsellors half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous.*⁶¹⁵

Brougham spoke of ‘interests’ and ‘administration’ of justice distinctly and in ways that suggest some of the ambiguity of these concepts. His reference to ‘interests’ concerned the aims of justice whereas his use of ‘administration’ was a reference to the effective conduct of cases. It is, however, justice rather than simply law that was being administered. Brougham therefore saw lawyers both as a practical necessity for litigation and of normative value for the sake of a more specific concept of justice. At the heart of Brougham’s statement was a truth and accuracy concept: legal advice enables the better raising and discussion of issues. There were also other justice concerns less obviously related to accuracy of outcomes. Brougham’s conception of justice here also involved removing disincentives to taking legal advice and legal action. Equally in his concern about ‘superfluous’ proceedings there appear to be cost and efficiency concerns.

⁶¹² *R v Bird and Bird* (n 20)

⁶¹³ James Fitzjames Stephen, *A General View of the Criminal Law of England* (Macmillan and Co. 1863) 161 cited in Cairns, *Advocacy* 55

⁶¹⁴ *Greenough v Gaskell* (1833) Coop t Brough 96, 47 ER 35 (also reported at (1833) My & K 98, 39 ER 618)

⁶¹⁵ *ibid* 100 (the Cooper report is being used for citations)

Attaching privilege to such communications also had truth-inhibiting consequences: potentially useful evidence was being sacrificed for the sake of those other justice concerns. For this reason, privilege could not simply be advanced as just, therefore countervailing justice-related arguments would define its limits. In *Ford v Tennant (No 2)* (1863), Sir John Romilly, MR explored these consequences of the *Greenough* principle in a way that echoed Brougham's justification:

*It is for the interests of justice that the most full, free and complete communication should take place between a client and his solicitor, for, if that did not take place, it would be impossible to conduct a suit or to obtain justice, or for a man to defend himself and prevent an injustice. It is, however, important that this rule should not be extended further than is necessary for the purposes of justice.*⁶¹⁶

Justice therefore became an index for the operation of the privilege. Whereas *Greenough* had applied to communications between lawyers and clients outside of litigation, *Ford* concerned communications between lawyers and third persons. In such a case Romilly was not prepared to apply the privilege protection. Case law since *Greenough* had limited the scope of such protection for the sake of obtaining useful, probative evidence.⁶¹⁷ Whilst, therefore, the fundamental principle of privilege was recognised as a function of justice, such privilege was to be limited in the interests of maximising the evidence available before the court. The difficulty was that there was no obvious sense of the shape or form of that justice content. Although interests of justice proved central to the definition and evaluation of the privilege into the 1860s,⁶¹⁸ the courts developed the rule on a case-by-case basis rather than by exploring the nature and the content of the justice to be invoked.

It did seem fairly well established by the 1860s that lawyers had a key and important role to play in all types of courts by achieving justice through accurate results. It had become largely accepted that advocates enhanced accuracy. By the 1860s, it appears to have become established that lawyers were central to all types of litigation both at the centre and in the localities. The remaining areas of dispute related to the exact role such advocates would play.

In fact there were areas where the courts were still resistant to this process of increasing the involvement of lawyers. There were still processes that were not seen as full trials and where concerns like efficiency, speed and convenience were deemed to be superior values. This

⁶¹⁶ *Ford v Tennant (No 2)* (1863) 32 Beav 162, 167; 55 ER 63

⁶¹⁷ *ibid* 170-172

⁶¹⁸ The 'interests of justice' aspect of Lord Brougham's judgment was cited in *Russell v Jackson* (1851) 9 Hare 387, 391; 68 ER 558; *Brown v Foster* (1857) 1 Hurl & N 735, 739; 156 ER 1397 and paraphrased in *Churton v Frewen (No 1)* (1856) 2 Drew & Sm 390, 393; 62 ER 669 and *Ross v Gibbs* (1869) LR 8 Eq 522, 523

evaluation was also conducted through the medium of justice discourse. In *re Macqueen* (1861), the Common Pleas supported a decision for arbitrators under the Friendly Societies Act 1853 not to allow counsel to attend the arbitration hearing. It had been argued for the plaintiff that the interests of justice required him to be allowed to employ counsel for such a hearing. Erle CJ disagreed. Noting that there was no authority in favour of the point, he continued:

*As far as the interests of justice are concerned, I can foresee that there might be great failure of justice if counsel were allowed to interfere in all cases. ... [D]isputes of this sort should be terminated speedily and finally: and, so far from the interests of justice being advanced by hearing counsel, I am inclined to think it would be allowing an unfair advantage if counsel were heard for the complainant, and imposing a hardship on the trustees if they were called upon to pay counsel out of the funds of the society, and might make the decision of the arbitrators to depend rather upon the relative merits of the counsel than upon the intrinsic merits of the case.*⁶¹⁹

In addition to noting a form of injustice arising from the imposition of costs, Erle's resistance reflected the concerns of previous decades relating to the use of counsel in the criminal courts; concerns about lawyers as obstacles to, rather than enhancers of, accurate outcomes. Rather, allowing the tribunal discretion about access by legal professionals would do more to enhance just results: where not positively required to do so by statute law, Erle CJ saw justice as better enhanced by judicial control of proceedings than by passing control to parties and their lawyers.⁶²⁰ This reflects, to some extent, Copley's change of position regarding felony trials: advocates were of value in some situations to assist in clarification. This was still not an unquestioning endorsement of advocates as truth enhancers. Lawyers could *sometimes* be useful. However, for all the developments across legal practice, there lingered a sense that there were aspects of just decision-making processes beyond the simply adversarial.

In fact the drive towards adversarialism and lawyer-activism had not been a one-directional process. Even by the 1860s the courts were still contesting its implications. In the more obviously public arena of criminal trials, the vigour and partisanship with which advocates promoted the interests of the party they represented, would be a matter of some controversy during the 1840s.⁶²¹ As has been seen, its implications were still being explored in *R v Bird and Bird*. With the growth of the Bar during the middle decades of the century and the loss of harmonising or

⁶¹⁹ *Re Macqueen and the Nottingham Caledonian Society* (1861) 9 CB NS 793, 795-6; 142 ER 312

⁶²⁰ *ibid* 796; Williams J adopted the same view (at 797)

⁶²¹ *ibid* 127-141

controlling influences over attitudes and behaviours, the behaviour of barristers became an increasing matter of concern.⁶²²

The difficulty the courts faced was that barristers, in particular, were not simply officers of the court. They were *ex officio* gentlemen and frequently engaged in the wider social and political world alongside their legal practice. Many were often members of Parliament or members of county elites. As such their independence (probably commonly aligned with individualism) could frequently place them in conflict with the authority of the courts. This was not just the problem in the sorts of criminal cases Cairns identifies as impacting on wider social consciousness.⁶²³ It was a matter of internal controversy for the courts; a controversy mediated through differing conceptualisations of justice and enforced, ultimately, by proceedings for contempt.

In *Lechmere Charlton's* case in 1837⁶²⁴, contempt proceedings were instituted against Edmund Lechmere Charlton for his behaviour in the conduct of a Chancery petition for the appointment of trustees of a charity in Ludlow. Lechmere Charlton was the Member of Parliament for Ludlow at the time and in fact one of the petitioners in the suit (all local Ludlow dignitaries). He was a member of the county elite of Hereford, Shropshire and Worcestershire, having inherited his property from the Lords Lechmere of Ludford.⁶²⁵ He was also a barrister, although he had never practiced in the Westminster courts⁶²⁶. Nonetheless he had appointed himself to act as counsel in the proceedings. Something of the ambiguity of his position as a consequence can be seen from the letter he sent to Master Brougham, who had been appointed to hear the suit and had just appointed the trustees:

Permit me to say, this is exceedingly unfair; nay more, it is practising a deception on me that is unwarrantable, and which entitles me to call on you for an explanation; in doing which, I hope I shall not exceed the limits that are allowed to a gentleman who feels himself to have been undeservedly aggrieved. As a mere barrister, advocating the cause of my clients, I question if I have any right to dispute, in this stage of the business, your authority, your law, or your decision, in a private communication, as there is another tribunal open to me for appeal; but, in the present case, I maintain that I am justified in adopting this mode of proceeding, because you have in these notes that are ascribed to you, either stated what is not true, or you have drawn

⁶²² Duman, 'The English Bar' 60-1

⁶²³ Cairns, *Advocacy* 126-40

⁶²⁴ *Lechmere Charlton's Case* (1837) 2 My & C 316; 40 ER 661

⁶²⁵ John Burke and John Bernard Burke, *A Genealogical and Heraldic Dictionary of the Landed Gentry of Great Britain & Ireland*, vol 1 (Henry Colburn 1847) 208

⁶²⁶ *Lechmere Charlton's Case* (n 624), 327

*conclusions from my statements and affidavits, which are at variance with the facts, and which, directly or indirectly, cast an imputation on my character as an advocate, or as a gentleman.*⁶²⁷

The letter was referred to Lord Cottenham, the Lord Chancellor, who postponed the matter. While they did so Lechmere Charlton wrote again, this time to the Lord Chancellor himself. He was unrepentant. Lechmere-Charlton suggested that Brougham was 'from the reprehensible manner in which he preserves order in his own Court ... barely entitled to that respect and dignity which ought, in my humble opinion, to be devoted invariably to the solemn functions of a Judge.'⁶²⁸ In Lechmere-Charlton's view he had done nothing wrong. Although not a practising barrister, he thought he should be no 'less entitled to the protection that a counsel has right to demand in behalf of justice and his clients.'⁶²⁹ Lechmere-Charlton went on to appeal to the Lord Chancellor:

*I ask your Lordship, I ask any man of honour, what he would have done under these irritating circumstances but write to Master Brougham, and attempt to obtain the fulfilment of his pledges, which, as a man of honour and a gentleman, he was bound to perform ... I had at heart, the disappointment that I had experienced as a counsel, the injustice to my clients and constituents, the suspicions that had been excited, the trick that I had been played, from all which there was no appeal.*⁶³⁰

Lechmere-Charlton invoked a conception of justice that has not featured significantly in the discourse so far; one constituted in and through a sense of gentlemanly honour. It was certainly stylistically different from the usual advocacy to which the courts had become accustomed, having something of the public school playing field in its content. It was, for all that, still a conception of justice that was not in its content wholly alien to the values the courts promoted as just. As an appeal to the honesty and integrity it was an argument for procedural fairness. It just happened not to be *legally* just procedure in its terms.

For his conduct Lechmere-Charlton was deemed to be in contempt. It was not simply the tone but also the fact of his lobbying by letter that offended the Lord Chancellor's sense of justice. Observing that the power of committal existing 'for the purpose of securing the better and more

⁶²⁷ Ibid, 339

⁶²⁸ Ibid 326

⁶²⁹ Ibid 327-8

⁶³⁰ Ibid 330-1

secure administration of justice,⁶³¹ Charlton was committed to the Fleet prison for contempt, having acted in a way that was 'scandalous with respect to the Master, and an attempt improperly to influence his conduct in the matter pending before him.'⁶³²

He had to petition twice for his release. On the first occasion his petition still did not gainsay his previous arguments. The Lord Chancellor was unmoved:

*Bound as I am to protect the administration of justice in this Court, and bound, therefore, to hold out to all parties who have any transactions in this Court, that they cannot with impunity be guilty of that offence for which, by my order, this gentleman has been committed to prison, I should feel I was not doing my duty, if, on such a petition, I should order his discharge.*⁶³³

Ultimately, three weeks after committal, Edmund Lechmere-Charlton obtained his freedom. His second petition for release had qualified his original account. No longer was his letter an attempt to change a wrong-headed decision. Rather, it was an attempt to obtain a rehearing of that decision. The Lord Chancellor was not entirely convinced by this, but observing that he did not:

*[F]ind that this petition contains that challenge of the authority of the Court, or of the propriety of the order, which is found in the former petition ... I do not think it inconsistent with my duty to receive this petition as an expression of contrition for the offence which the Petitioner has committed.*⁶³⁴

Lechmere-Charlton's case is instructive in a number of ways. First of all, much as it was a case of the late 1830s, it constitutes a species of case that shows something of the way in which justice concepts were promoted and protected in the Westminster courts.

The contempt case alleged against him consisted of his attempts to influence a legal process through methods seen as unacceptable by the courts. It was, however, more than a question of his undermining of the fairness of the process. It was, in the nature of contempt of court cases, to combine promotion of the internal moral validity of decisions and processes (that they *were* fair) with the open and public protection of the wider integrity of justice and its administration (that they were *seen* to be fair). Both of those aims could be invoked when committing for contempt and protecting the administration of justice. In Lechmere-Charlton's case, whilst he was

⁶³¹ *Lechmere Charlton's Case* (n 624) 339

⁶³² *Ibid* 353

⁶³³ *Ibid* 357

⁶³⁴ *Ibid* 360

unrepentant about the wrongfulness of his writing of the letters and of their contemptuous tone, he was kept in the Fleet. When, however, he showed some contrition on the latter and provided enough of an explanation to assuage (if not persuade) Lord Cottenham on the former, he was allowed his liberty. Both justice as impartiality and justice as authority had therefore prevailed over the broad form of justice that had informed Lechmere-Charlton's particular vision of proper debate and argument.

Although qualified as a barrister, Lechmere-Charlton was really an outsider. It was, in large part, his only partial understanding of the expectations of advocates and the judges that got him into such trouble. It would be wrong, however, to think of his attitude as out-dated as such. He is likely to have got into as much trouble in earlier decades for what he did.⁶³⁵

Equally, other, more regular participants in trial processes, were also liable to fall foul of contempt proceedings when they acted in ways deemed contrary to the requirements of justice. That adversarial litigation expected parties to disagree and argue made this somewhat inevitable.

The independence of the bar and its argument-driven representation formed the basis of many justice-related disputes. This clearly hit the public consciousness in assize felony trials especially in the years after 1836 as the boundaries of proper representation were being explored in the courts. Such tensions in fact extended beyond the assize courts where the 1836 Act had effected reform and reflected the wider development towards adversarialism within English justice. They were also being felt in the lesser courts. In *Re Pater* (1864),⁶³⁶ contempt was alleged against a barrister appearing at the Middlesex Quarter Sessions whose conduct was directed not at the judge but at the foreman of the jury.

Pater represented a defendant on a larceny charge. In the course of the trial the foreman of the jury had made objections to Pater's conduct of the case and objected to his cross-examination of a witness. Pater responding by saying, 'You had better not get into collision with me, Sir,' and in summing up the case he said to the jury, 'I thank God there is more than one jurymen to determine whether the prisoner stole these articles, for if there was only one, and that one the foreman ... there is no doubt what the result would be.' A heated argument ensued. Once the case had been decided, the judge, Joseph Payne esq., suggested that Pater's comments were 'hardly the way to treat a gentleman who was discharging upon oath an important and compulsory duty in a Court of justice' and requested that he withdraw his comments and

⁶³⁵ Lord Cottenham relied heavily on Lord Erskine's judgment in *Ex Parte Jones* (1806) 13 Ves Jr 237; 33 ER 283 in determining the course of action.

⁶³⁶ *Ex Parte Pater* (1868) 5 Moo PC NS 111; 16 ER 457

apologise. Pater not only refused but threatened to repeat them again, 'which he did in the same loud, offensive, and insulting manner as before, and also added that if the deponent wished them to be taken down he would repeat them again, and would repeat them to the end of time.' Pater's conduct was such, it was deposed, that 'the conduct, manner and gestures of the applicant during the proceedings were violent, offensive and contemptuous, and were, in the judgment of the deponent, calculated to disturb and obstruct the due and proper administration of justice.' Pater was fined £20 for contempt.⁶³⁷

Pater brought a challenge by way of a writ of certiorari. Lord Cockburn, then the Chief Justice of the King's Bench, was clearly dissatisfied by the conduct of all concerned. He regretted that the judge had not intervened earlier. He also stated that not only should the juror not have interrupted as he had, but also that Pater's comments to the jurors were no more than a barrister was entitled to make in representing his client. What made a difference, however, was that when asked to withdraw the comments, Pater had repeated them.⁶³⁸ The order of the Sessions was affirmed.

Again, two concepts of justice were having to be reconciled and mediated. As Blackburn J explained, all Courts of Record, including the Quarter Sessions, had the power to treat 'unwarrantable obstruction of the administration of justice in the face of the Court, even although it be by counsel'⁶³⁹ as a contempt. This was not, however, an easy decision. Two important justice interests had to be reconciled, as Lord Cockburn explained:

*I should be the last man to abridge the rights and privileges of members of the bar, which are given to them for the sake of suitors in Courts of justice; but, on the other hand, we are bound to protect jurymen in the important duties which they have to discharge against indignity or insult. Under the circumstances of the present case, I regret much that I feel bound to come to the conclusion that we should not be justified in interfering.*⁶⁴⁰

In the adversarial, and frequently emotive, environment of court proceedings, participants often found themselves in conflict with the courts. This could be perilous; backed with the power to commit, all courts of record could enforce their sense of the expectations of justice in such situations of heightened tension. Two views of justice would influence the decision as to how

⁶³⁷ Ibid 300-6

⁶³⁸ Ibid 310-1

⁶³⁹ Ibid 312

⁶⁴⁰ Ibid 311

such powers were to be exercised. First of all, the courts would act to protect actual justice values, process values such as the impartiality of tribunals, the accuracy of adjudications, and the candid development of arguments. In such situations, where parties sought to promote particular concepts of justice that might conflict with those values, as in *Lechmere Charlton's case*, they ran the risk of committal. Getting this balance between values wrong could lead to committal for contempt, as *Pater* found. Contempt of court sanctions could therefore be used to moderate some of the more extreme imbalances between justice rights.

Chapter 4

Trial Processes and Reviews

Evidence

Evidence had always been profoundly and explicitly based on a concept of justice rather than simply law. In *R v Drummond*, Eyre J, spoke of ‘the rules of evidence, which are rules of justice,’⁶⁴¹ and in *Morse v Royal* (1806) Lord Erskine spoke of ‘the rules of evidence; standing upon the eternal principles of justice.’⁶⁴² These were more than rhetorical flourishes; they were central to questions of how laws were properly to be applied. In *Morse*, Erskine’s point was that there were reasons why some matters might be resolved as matters of evidence (and therefore fact-specific case-by-case adjudication) rather than by the imposition of rigid and binding rules. The issue there was whether a party could introduce evidence challenging the actions of a trustee after significant delay. In refusing to make any rigid rule excluding such evidence, Lord Erskine went on to say:

*[W]here there is no bar by the Statute of Limitations, a Court of Equity will never lay down as a general proposition, that though the fact, that imposition has been practised, is established, the party is too late; ... Considered in that way, length of time may have some operation ...: in what degree depends upon the circumstances of this case; which are peculiar.*⁶⁴³

Here again, justice provided guidance until rules removed such latitude. There was, however, no clearly defined relationship between justice and evidence in the later decades of the eighteenth century. Justice therefore provided a great deal of latitude but not much conceptual guidance when it came to resolving disputes about whether evidence should be admitted or subject to restrictions. The invocation of justice appears, partially and imperfectly, to have filled gaps in the body of laws. In *R v Drummond* (1784),⁶⁴⁴ for example, Eyre B refused to admit a convict’s scaffold confession to a robbery for which the defendant was being tried. This was, according to Eyre B, a view of justice and ambiguously related to the accuracy of outcomes:

⁶⁴¹ *R v Drummond* (1784) 1 Leach 337, 337; 168 ER 271

⁶⁴² *Morse v Royal* (1806) 12 Ves Jr 355, 374; 33 ER 134

⁶⁴³ *ibid* 374; nonetheless significant delay by plaintiffs could, under the doctrine of laches, defeat their claims and, as such, be sufficient to cancel what would otherwise be seen as the interests of justice:

Bampton v Birchall (1847) 11 Beav 38, 41; 50 ER 730

⁶⁴⁴ *R v Drummond* (n 641 above)

*The principle upon which this species of evidence is received is, that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath. The declarations therefore of a person dying under such circumstances, are considered as equivalent to the evidence of the living witness upon oath.*⁶⁴⁵

The truth-based logic was clear. There was more to this than accuracy, however; issues of legal sanctity also played their part. Eyre B continued:

*But to examine a witness to the declarations of an attainted convict, would be carrying the rule of evidence beyond its possible extent, even if the person were alive; for, as an attainted convict, he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive.*⁶⁴⁶

Therefore while ordinarily dying declarations were recognised as enhancing truthful and accurate verdicts because equivalent to testimony on oath, such an analogy would not be applied to an attainted convict. This was not a matter of accuracy. As Eyre B explained, the imminence of death and the solemnity of the oath were assumed to carry equal emotional impact. However for a reason associated with ‘principles of justice’ a convicted felon would not be subject to this same logic. As a matter of law, an attainted felon could not actually take an oath. It did not follow that such a felon could not be ‘impressed with the awful idea of approaching dissolution’ following execution, nor did eighteenth century society make any such distinction. Attempts to encourage confessions (to one’s own rather than others’ crimes) and statements of remorse were embedded features of eighteenth century executions.⁶⁴⁷ The emotional power of approaching death in extracting honesty was an assumed feature of execution. There does not therefore seem to have been any sense that a convicted felon could not be influenced by such motives for truthfulness in such a situation. There were, therefore, other justice values than accuracy in consideration.

⁶⁴⁵ *ibid* 337

⁶⁴⁶ *ibid* 337-8

⁶⁴⁷ Beattie, *Crime* 455; V. A. C. Gatrell, *The Hanging Tree: Execution and the English People, 1770-1868* (Oxford University Press 1994) 26, 44-5

Drummond raises a number of issues worthy of note. First of all, rules of evidence were equated with rules of justice, as opposed to rules of law. While Old Bailey cases did create patterns of consistent practice,⁶⁴⁸ many rules of criminal evidence were relatively unformed during the late eighteenth century.⁶⁴⁹ While numerous technical rules and restrictions created narrow categories of admissibility, these had not developed into a body of rules of evidence underpinned by any clear set of principles.⁶⁵⁰

It was therefore more than an idle claim on the part of Eyre B to associate rules of evidence with justice rather than law. Even where rules existed regulating the admissibility of evidence, there were often significant gaps. This was the case with evidence other than that given on oath. Judges like Eyre B had to reach decisions with such sparse material. The basis for admitting hearsay evidence was far from resolved in the late eighteenth century.⁶⁵¹ Therefore while Eyre, as Chief Baron, would later resolve similar issues by drawing more extensively upon a small body of case law to establish the admissibility of dying declarations,⁶⁵² the relative lack of established rules in cases like *Drummond* made concepts of justice, concepts that were more generic and adaptable than specific cases, far more significant in such determinations.

Secondly and, to some extent conversely, the approach to such justice principles was heavily influenced by a form of rule-mindedness that influenced the application of legal rules. Eyre's approach stayed close to values of consistency, parity and categorisation by status or class. Rather than, for example, examination of underlying principles of factual accuracy and truth that explained both testimony under oath and dying declarations, Eyre distinguished attainted convicts as a class from other witnesses in their situation. Nor for that matter did Eyre B identify accuracy-based reasons for rejecting the evidence of an informant who would not be subject to cross-examination upon his evidence.

⁶⁴⁸ The reporter notes two cases in which the same principle was applied: *R v Henrietta Radburne* (Old Bailey, July Session 1787) and *R v Woodcock's* (Old Bailey January Session 1789; subsequently cited as *R v Woodcock* (1789) 1 Leach 500; 168 ER 352)

⁶⁴⁹ C. J. W. Allen, *The Law of Evidence in Victorian England* (Cambridge University Press 1997) 3; Langbein, *Adversary Trial* 178-80

⁶⁵⁰ Allen, *Evidence* 3-4

⁶⁵¹ Langbein, *Adversary Trial* 233-5

⁶⁵² *R v Woodcock* (n 648)

Accuracy clearly played a part in Eyre's judgment⁶⁵³ but did so implicitly and by limiting the types of evidence to be admitted rather than seeking to increase the information available to the court. While Eyre B recognised a truth-enhancing logic of admitting such evidence, his use of justice principles were aligned more to the sanctity or legitimacy of outcomes based on such evidence. This was in fact a different concept of truthfulness; one that placed greater weight on the truth-enhancing protections from sanctified oaths than the truth-enabling benefits of maximising evidence. This was a tension in understandings of truth that was to linger, in various forms, into the nineteenth century. The logic that testimony based on a religious oath was particularly credit-worthy would undergo profound challenge during the mid-nineteenth century.⁶⁵⁴ However, such a disagreement as to the best means of achieving accuracy reflected a wider uncertainty about how truth was best achieved in situations of dispute. This was not only the difference between managed and laissez-faire adjudications noted above, but also a dispute as to how best to use evidence to reach accurate and avoid inaccurate conclusions.

R v Drummond therefore suggests that while justice could have potentially significant influence on the reception of evidence, strong constraints within the legal culture limited the ways in which justice values would be applied. Equally, wider cultural constraints profoundly influenced understandings of what such evidence could in fact do. As the nineteenth century progressed, attitudes would shift in both of these respects. The courts of the centre developed a more principled approach to evidential questions, one that reflected wider social and intellectual trends and increased tendencies to value scientific and fact-based decision making.⁶⁵⁵

This was not a sudden change, however. Even in the early decades of the nineteenth century, the availability of full evidence and the basing of decisions on analysis of evidence was explicitly related to just adjudication. This can be seen in the recurrent preference for evidence-based decisions rather than legal presumptions or fictions, which preferences were regularly associated with the concept of justice.⁶⁵⁶ Justice was also used to justify a

⁶⁵³ Eyre B went on to note, 'The fact, however, that a man resembling the person of the prisoner was executed, may be given in evidence, provided it is confined within such time as to make it probable that he was the person who committed the robbery': *R v Drummond* (n 641 above) 378

⁶⁵⁴ Allen, *Evidence* 50-61; although a sense of the additional creditworthiness of formal evidence-giving would last into the twenty-first century: Dennis, *Evidence* 662-3

⁶⁵⁵ Hilton, *England* 606

⁶⁵⁶ While such an argument was to fail in *R v Burdett* (1820, discussed at pages 129-133 below), it was to prove more successful in the ensuing decades: see *Abbott v Hendricks* (1840) 1 Man & G 791, 795; 133 ER

number of developments in the rules of evidence. In *Hall v Brown* (1814), the restriction of hearsay evidence was linked in argument to the ‘first principles of justice.’⁶⁵⁷ Lord Eldon, in refusing to make an order in *White v Lady Lincoln* in 1803 due to the poor state of evidence, justified his refusal on the grounds that ‘the general interests of justice and the safety of mankind in their dealings call upon the Court to declare, that if a person bound to furnish regular accounts leaves the affairs in this state, such a demand cannot be supported in equity.’⁶⁵⁸ It was also stated to be ‘for the interests of justice’ that parties should be able to challenge the competency of witnesses not only in advance of, but also during, their examination.⁶⁵⁹ The diligent oversight of the provenance of documents to be used in evidence was linked to the interests of justice in *Loxley v Jackson* (1819).⁶⁶⁰

As the nineteenth century progressed, justice discourse came increasingly to explain the interest of the courts in obtaining a solid evidential base for decisions. The link between justice and effective adversarial challenge became central to just determination. That evidence should, ‘on every principle of justice, to be brought to the test of cross-examination,’⁶⁶¹ was a core element not only of evidential practice, but of trial processes more generally.⁶⁶²

Equally, relating the obtaining and using evidence to the administration of justice, was used from the 1840s onwards to sidestep technical applications of rules in order to obtain sufficient evidence for the deliberation of disputed issues,⁶⁶³ to enhance the effectiveness of the lower courts in obtaining useful evidence⁶⁶⁴ or to refuse to reach decisions in the absence of sufficient evidence.⁶⁶⁵

In fact, as the rhetorical use of the ‘interests of justice’ took off in the nineteenth century, it became the basis of a number of statements as to the importance of factually sound decision-making. In *R v Stoveld* (1834), it was the basis for preferring fact-based, evidential decisions over

551, 553 (per Bosanquet J); *The Attorney-General v The Fishmongers' Company* (1841) 5 My & C 16, 17-8; 41 ER 278

⁶⁵⁷ *Hall v Brown* (1814) 2 Dow 367, 373; 3 ER 897

⁶⁵⁸ *White v Lady Lincoln* (1803) 8 Ves Jr 363, 374; 32 ER 395

⁶⁵⁹ *Beeching v Gower* (1816) Holt NP 313, 314; 171 ER 253; see also *Hartshorne v Watson* (1839) 5 Bing NC 477, 485; 132 ER 1183 (per Erskine J)

⁶⁶⁰ *Loxley v Jackson* (1819) 3 Phil Ecc 126, 133; 161 ER 1277

⁶⁶¹ *Cast v Poyser* (1856) 3 Sm & G 369, 374; 65 ER 698

⁶⁶² See pages 71-93 above

⁶⁶³ *Attwood v Small and Others* (1838) 6 Cl & F 232; 7 ER 684; *Newton v Chaplin*

⁶⁶⁴ *R v Greenaway* (1845) 7 QB 126; 115 ER 436

⁶⁶⁵ *M'mahon v Burchell* (1846) 1 Coop t Cott 457; 47 ER 944

legally technical defences⁶⁶⁶ and in *Meux v Bell* (1841), the danger of making decisions on an incomplete evidential base was described as ‘a great risk to the interests of justice.’⁶⁶⁷ In *R v Vickery* (1848), the phrase was used to explain the general rule that witnesses who had knowledge of a case should be compellable to give evidence.⁶⁶⁸ In *R v Rowton* the same rationale was used to explain why bad character evidence should be admissible to correct a false impression of a defendant’s good character.⁶⁶⁹

This free-proof justice discourse and its associations with truthful or accurate verdicts would increasingly in the 1830s and 1840s be set against technical rules or restrictive legal practices.⁶⁷⁰ In *Taylor v Rundell* (1841), for example, the court refused to let a business partner’s refusal of consent justify a defendant’s failure to disclose relevant documents on the grounds that doing so ‘would stand in the way of the administration of justice, and ... unfairly prevent the arrival at truth.’⁶⁷¹ Equally in *Noverre v Noverre* (1846), Dr Lushington had ‘not a shadow of a doubt that, [the court] it has the power to compel ... the production of a letter or any other document essential to the investigation of truth, and the due administration of justice’.⁶⁷²

As shall be seen below, right-result justice would significantly inform the adjudication of disputes about disclosure and discovery.⁶⁷³ It would also be invoked to restrict open access to courts for the sake of more reliable outcomes at the expense of other justice values, particularly entitlements to participate and concepts of liberty. This increasingly truth-oriented discourse was reflective of shifting perceptions. What had seemed perfectly normal in previous decades, came to be subject to controlling rules. In *Taylor v Lawson* (1828), for example, Best CJ came to wonder whether it might not be better for the administration of justice for witnesses in *Nisi Prius* cases to be kept out of the court until they had given evidence.⁶⁷⁴

⁶⁶⁶ *R v Stoveld* (1834) 6 Car & P 489, 490; 172 ER 1332

⁶⁶⁷ *Meux v Bell* (1841) 1 Hare 73, 92; 66 ER 955

⁶⁶⁸ *R v Vickery* (1848) 12 QB 478, 487; 116 ER 946

⁶⁶⁹ *R v Rowton* (1865) Le & Ca 520, 533; 169 ER 1497

⁶⁷⁰ See for example *Fraser v Welch* (1841) 8 M & W 629; 151 ER 1190 (the dangers to the ‘correct administration of justice’ caused by the technical practices of special pleaders); *Humblestone v Welham* (1847) 5 CB 195; 136 ER 850 (the court refused to set aside a trial based on irregularities in the pleadings to which the objecting party appeared to have consented)

⁶⁷¹ *Taylor v Rundell* (1841) 1 Y & C Ch 128, 132; 62 ER 821

⁶⁷² *Noverre v Noverre* (1846) 1 Rob Ecc 428, 439-40; 163 ER 1090

⁶⁷³ *Bent v Young* (1838) 9 Sim 180; 59 ER 327; *Flight v Robinson* (1844) 8 Beav 22; 50 ER 9 and see pages 110 to 113 below

⁶⁷⁴ *Taylor v Lawson* (1828) 3 Car & P 543; 172 ER 538 and see pages 113 to 124 below

Quite what truth-driven justice entailed was not straightforward. A particular concern was whether it was best achieved by obtaining as much evidence as possible or by ensuring that evidence to be admitted was subject to controls to ensure its reliability. This had been the issue in *Drummond*. The idea of maximising evidence would come to be referred to as ‘free proof’ and was something which Bentham would make central to his ‘natural model of legal procedure.’⁶⁷⁵ It was not, however, alien to the courts before then and there were many cases in which maximising evidence significantly influenced the interpretation and application of existing rules. A steady stream of cases seeking to establish rules for the immunity from arrest of witnesses or parties to litigation, particularly those who were also debtors and therefore subject to enforcement actions, drew on such free proof justice concepts in requiring courts to reconcile tensions between obtaining necessary evidence and allowing the enforcement of court judgments.⁶⁷⁶

Free proof logic made the courts not only accept witnesses whose credibility might be questionable but also screen that potential lack of credibility from scrutiny at trial. In *R v Lewis* (1802), the issue was whether a witness could be cross-examined about time he had spent in the House of Correction. Lord Ellenborough stopped such questioning on the grounds that ‘it would be an injury to the administration of justice, if persons who came to do their duty to the public, might be subjected to improper investigation.’⁶⁷⁷ Although the shortness of the report does not assist a full understanding of Lord Ellenborough’s logic, his sense of an ‘injury’ to the administration of justice is capable of two meanings. Either this injury was to the image of the courts or to their effectiveness in obtaining evidence. The principle of justice in *Lewis* in this latter sense is reflected in *Crowther v Hopwood*⁶⁷⁸ where the interests of getting informed witnesses prevailed again over doubts as to their credibility.

There were similar difficulties in defining what justice as truth required in *R v Watson* (1817), the trial of the Cato St conspirators. Justice was the basis of an argument that the previous convictions of John Castle, a major prosecution witness, should be admissible to prove his unreliable character. The crown had objected to such evidence on the grounds

⁶⁷⁵ Jeremy Bentham and Etienne Dumont, *A Treatise on Judicial Evidence Extracted from the Manuscripts of Jeremy Bentham Esq by M. Dumont* (Baldwin, Cradock & Joy 1825) 4-6; William Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld & Nicolson 1985) 3, 12

⁶⁷⁶ *Meekins v Smith* (1791) 1 H Bl 636; 126 ER 363; *Arding v Flower* (1800) 8 Term Rep 534; 101 ER 1531; *Halsey v Grant* (1806) 13 Ves Jnr 73; 33 ER 222; *Ex Parte Jackson* (1808) 15 Ves Jr; 33 ER 699; *R (otp) Smith v Blake* (1832) 4 B & Ad 355; 110 ER 489; *Newton v Constable* (1841) 2 QB 157; 114 ER 62; *Mountague v Harrison* (1857) 3 CB NS 292, 293; 140 ER 753

⁶⁷⁷ *R v Lewis* (1802) 4 Esp 225, 225; 170 ER 700

⁶⁷⁸ *Crowther v Hopwood* (1821) 3 Stark 21; 171 ER 753

that only proof of the fact of conviction by a certificate would be admissible. Wetherell, for the defence, argued that it should be equally possible to prove Castle's guilt by calling evidence of the acts for which he had been convicted, stressing the absurdity of insisting upon reliance on a document rather than full scrutiny of the facts:

[I]t would militate against the plainest principles of justice to reject such evidence, since a man might be able to prove that a witness was not to be believed upon his oath, by shewing that he had been guilty of a number of criminal acts, although he could not produce a single record of conviction ... [T]he consequences would be enormous and alarming to the administration of justice, if such evidence were to be shut out. A witness who had committed a multitude of crimes, but who had not been convicted of one, would stand as a fair and credible witness in a Court of Justice; if he were to be asked the question, he would not be bound to answer it; and, therefore, if other evidence could not be adduced to prove it, that testimony, which is essential to the ascertainment of truth, inasmuch as it ascertains the degree of credit due to a witness would be wholly excluded.⁶⁷⁹

This was a strong argument based on principles of free and open proof in pursuit of accurate verdicts. The court rejected it on different grounds.

For Bayley J, a combination of efficiency and accuracy concerns militated against admitting the evidence. 'It would,' he said, 'be impossible to proceed in the administration of justice, because on every trial the Court would have to try 100 different issues' and although any witness could be presumed capable of defending his character when questioned, 'he cannot come prepared to defend himself against particular charges without notice, and such evidence would, on that account, supply but a very imperfect test of credibility.'⁶⁸⁰

For Lord Ellenborough a combination of efficiency and fairness concerns (somewhat elided) were preferred. Although it was possible (though improper) to ask a witness about crimes committed:

[I]f he does answer promptly, you must be bound by the answer which he gives, for the Court does not sit for the purpose of examining into collateral crimes. It would be unjust to permit it, for it would be impossible that the party should be ready to exculpate himself, by bringing forward evidence in answer to the charge, there would

⁶⁷⁹ *R v Watson* (1817) 2 Stark 116, 150-1; 171 ER 591

⁶⁸⁰ *ibid* 152-3

*be no possibility of a fair and competent trial upon the subject, and therefore it is never done.*⁶⁸¹

For Abbot J, it was simply a matter of efficiency as the 'jury might be kept here from day to day to an indefinite period.'⁶⁸² Holroyd J reasoned predominantly on the basis of accuracy that,

*In addition to the great inconvenience, it would be impossible truly and justly to decide collateral issues of this nature. How would it be possible for a party or a witness to come prepared to explain and rebut ... proofs applicable to every action of his life ... The effect would be to withdraw the attention of the jury from the question which they were impanelled to try, in order to try a number of collateral issues, and to render witnesses unwilling to appear in a Court of Justice, where they would be liable to charges, which for want of previous notice they could not repel.*⁶⁸³

The judges therefore rejected the defendant's truth-centred argument on its own terms but also by drawing on a number of other values that fitted within a justice discourse. What was common to all four judges, to some extent or another, was the potential inefficiency of any such procedure. Even this value was not, however, a simple counter-argument to that of the defence; the concern about such evidence carried within it a range of other values. One such concern was a second accuracy and truth-related objection. For Bayley J, such collateral evidence imperilled the accuracy of the trial determinations by reason of distraction from the main issues, a concern shared by Holroyd J. Even before Bentham's onslaught onto inefficient judicial practices of 'Judge & Co',⁶⁸⁴ therefore, the courts had been sensitive to the need to focus trial processes on matters of significance and had been willing to relate such concerns to core justice principles such as the accurate determination of proceedings.

As *R v Watson* shows, courts were not willing simply to admit evidence in all circumstances, and in refusing to follow free proof logic they would often draw on equally truth-related concerns to control the quality of any evidence obtained. This was so in the *Berkeley Peerage* case (1811), where the House of Lords was unwilling to admit evidence of the pedigree of the Earl of Berkeley on the grounds that 'the administration of justice would be perverted if such declarations could be admitted which have not a presumption in their favour that they are consistent with truth.'⁶⁸⁵

⁶⁸¹ *ibid* 151-2

⁶⁸² *ibid* 155

⁶⁸³ *ibid* 156

⁶⁸⁴ Bentham 356

⁶⁸⁵ *Berkeley Peerage* (1811) 4 Camp 401; 171 ER 128 (this reference to presumptions was not a reference to any rule of evidence)

This cautious handling of evidence and, particularly, a strong resistance to the testimony of interested parties was central to notions of just adjudication. So, in *Best v Best* (1814), the application of such a principle served to prevent a divorcing husband from providing affidavit evidence to explain his delay because refusing such self-serving evidence was ‘essential to the pure administration of justice.’⁶⁸⁶

Such caution could even run directly against the relatively relaxed attitude to interested or dishonest witnesses in operation in *Lewis*⁶⁸⁷ or in *Crowther*.⁶⁸⁸ In *Bushel v Assignees of Mills* (1826), for example, the defence successfully objected to the calling of a witness who had previously been convicted of bribery on the grounds that his testimony would be evidence ‘the tendency of which was to introduce falsehood into the course of justice, and to obstruct the due administration thereof.’⁶⁸⁹

By the 1830s and 1840s it would appear that, while full evidence arguments continued to be a significant element of the accuracy-related discourse, it was still the credibility of the evidence that represented the more significant concern when the two aspirations were contrasted. Resort to justice in advancing such arguments did not always succeed. In *Grissells v Peto* (1832), the court rejected an argument that it would be contrary to the interests of justice to allow a defendant to be represented by an attorney who had previously acted for a party bringing a similar action alongside the plaintiff.⁶⁹⁰ The court was not inclined to accept such a basis for restricting a party’s access to the civil courts with legal advice of their own choosing. Equally, in *Bishop of Meath v Marquis of Winchester* (1836), the court was equally unwilling to accede to a justice-based argument that they should impose onerous restrictions on the admissibility of useful documentary evidence.⁶⁹¹

Such arguments were not guaranteed to succeed, therefore. They were, however, frequently successfully invoked or used by judges as the basis for their own decisions. In *Wright v Tatham* (1837), hearsay evidence was held to be inadmissible because a ‘rule, established for the safe administration of justice in general, is, that evidence unconfirmed by oath, and not subject to

⁶⁸⁶ *Best v Best* (1814) 2 Phil Ecc 161; 161 ER 1107. A similar principle was adopted in *Smallcombe v Bruges* (1824) M’Cle 45; 148 ER 20 in refusing to accept evidence from a bankrupt about his debts. It was also to be the basis upon which, in criminal cases, defendants were not entitled to give evidence on oath until the 1890s: C. J. W. Allen, *The Law of Evidence in Victorian England* (Cambridge University Press 1997) 123; Langbein, *Origins* 52-3, 97

⁶⁸⁷ *R v Lewis* (n 677)

⁶⁸⁸ *Crowther v Hopwood* (n 678)

⁶⁸⁹ *Bushel v Assignees of Mills* (1826) Ry & M 434; 171 ER 1074

⁶⁹⁰ *Grissells v Peto* (1832) 9 Bing 1; 131 ER 514

⁶⁹¹ *Bishop of Meath and Alexander v Marquis of Winchester* (1836) 4 Cl & F 445; 7 ER 171

cross-examination, shall not be received.⁶⁹² In *Woods v Woods* (1840), the Consistory Court refused to accept evidence in an incest prosecution on the grounds that ‘nothing ... can be more dangerous to the credit of these Courts than that it should be considered that they would decide questions ... the individuals giving which, if they depose falsely and corruptly, might not be liable to an indictment for perjury.’⁶⁹³ In *Faulkner v Litchfield* (1845), it was informality and anonymity in the obtaining of the evidence that led to its rejection in the interests of justice.⁶⁹⁴

This caution about weak evidence was at the heart of concerns about ensuring that parties could participate adequately in testing evidence against them. Cross-examination and challenge were key instrumental devices in ensuring that injustice was not caused by over-reliance on unprobative evidence. This meant that evidence that could not be challenged was restricted on justice grounds. In *Bevan v M’Mahon and Bevan* (1859), evidence in a divorce case had been taken by commission. The interviewee had then requested a chance to provide more evidence. Rather than admit further evidence to extend the information available to the court, however, the Judge Ordinary, Sir Cresswell Cresswell, refused to order the commissioners to re-examine the witness. Recognising that it was ‘certainly in the discretion of the Court to grant the application ... if I believed the interests of justice required me to do so. But in my opinion it would be exceedingly dangerous to accede to it,’⁶⁹⁵ he decided not to admit it. Noting that steps could be taken to secure the interviewee a witness at trial (at which he would then be subject to scrutiny of his answers and more effectively bound by the legal implications of the oath), Cresswell concluded that it would be ‘extremely dangerous, and that the interests of justice might be prejudiced, if I were to allow a second examination of this witness.’⁶⁹⁶

Unrestricted evidence could also pose other dangers to just accuracy-based adjudications, particularly that of confusion due to the proliferation of issues. As the Vice Chancellor, Sir James Wigram, was to put it wearily in 1849:

I have felt great difficulty upon one question—which I always do when it is pressed upon me—that is, the rejection of affidavits. The consequence of doing so is that I know I am deciding the case without having before me all the information which the

⁶⁹² *Wright v Tatham* (1837) 7 Ad & El 313, 342; 112 ER 488

⁶⁹³ *Woods v Woods* (1840) 2 Curt 516, 523-4; 163 ER 493

⁶⁹⁴ *Faulkner v Litchfield* (1845) 1 Rob Ecc 184; 163 ER 1007. This was a case that arose at the heart of the controversies of the Oxford Movement and related to the question of whether a stone table was a communion table. The informally received evidence was a book, sent anonymously, entitled ‘The Restoration of Churches is the Restoration of Popery.’

⁶⁹⁵ *Bevan v M’Mahon and Bevan (falsely called M’Mahon)* (1859) 2 Sw & Tr 55, 57; 164 ER 912

⁶⁹⁶ *ibid* 58

*parties think material. ... If the practice be as I am now told, that, until the Plaintiff's case is over, the parties may go on filing affidavits, it is impossible that justice can be administered. The argument on the other side is opened; the defect in the case is pointed out; the Court itself makes observations which lead the attention of the parties to what are or may be supposed to be the weak points in the case; and, before the counsel sits down, new affidavits are poured in, to which the other side have no opportunity of addressing themselves.*⁶⁹⁷

Therefore, however established lawyerised trials were in civil cases and despite the drift in that direction in criminal cases, courts continued to maintain and justify control over evidence-gathering for the sake of just outcomes.

Such tendencies to restrict evidence in the name of justice as accuracy also influenced decisions about the admissibility of convictions of defendants themselves. In *R v Fairie and others*⁶⁹⁸ two defendants were on trial for nuisance. Their defence was that their conduct did not amount to any such nuisance. The prosecution sought to prove that they had been convicted for the same conduct previously. The difficulty was, however, that the conviction had been for a different offence.⁶⁹⁹ In rejecting the admissibility of the evidence, Coleridge J contended, 'if this conviction were admissible on the grounds suggested, the judge and jury must collaterally try the facts on which alone it is said to be admissible; and, on principles of general justice, the party ought not to be called upon to meet a charge of having formerly committed a nuisance, which he can hardly be supposed to be prepared to disprove.'⁷⁰⁰ The injustice alleged was not that it was wrong in principle for a defendant to have previous misconduct proven, rather it was a concern that the defendants' ability properly to challenge the case against them was in danger of being weakened by having not only to deal with the offence charged but also the proof or disproof of other collateral offences.

This was a concern about the justice of effective challenge. Campbell J was prepared to put the matter even more starkly.

I should have great difficulty in thinking even a conviction ... in precisely the same terms as the present indictment, but laying the offence at a different time, admissible. It is the boast of our administration of justice that the accused has only to

⁶⁹⁷ *East Lancashire Railway Company v Hattersley* (1849) 8 Hare 72, 85; 68 ER 278

⁶⁹⁸ *R v John Fairie, Adam Fairie and Thomas Fairie* (1857) 8 El & Bl 486, 120 ER 181

⁶⁹⁹ The defendants were charged with a common law nuisance whereas the previous conviction was under The Smoke Abatement, London Act 1853, 16 & 17 Vict, c 128, s1

⁷⁰⁰ *R v Fairie* (n 698) 492, 184

*answer to one charge at a time, and that on the trial for one offence the prosecutors may not give in evidence that he has been guilty of others. I think that to admit the evidence of the conviction, if it had been on an indictment, would be an encroachment on this principle.*⁷⁰¹

Un-enunciated as it was, this claim was a claim that their evidence should be focussed on the issues before the court, a desire to balance the maximisation of information with the obtaining of the most useful information available for the particular determination the court faced.

Allen's account of developing rules of evidence suggests a development from largely discretionary practices in the 1700s to increasingly rigid and complicated rules by the 1850s but notes that evidence scholarship was becoming by then increasingly principled.⁷⁰² This reflects, to some extent, Langbein's account of the development of evidential rules in assize courts as a precursor to the introduction of counsel in the 1830s.⁷⁰³ As has been seen from cases like *Drummond*, discretionary practices in fact arose not from a disinterest in rules of admissibility of evidence but from the large gaps between the already established rules. As the nineteenth century progressed, an increasingly complicated set of cases created an increasingly complicated set of evidential rules.

These developments continued to be inspired by concerns to maximise the quality of credible evidence for the sake of just determinations and therefore the proper administration of justice. This could sometimes be supported by proceedings for contempt of court in the face of refusals to give evidence and, where it did, not only the accuracy of determinations but also the image and authority of justice was central to judicial reasoning. In *R v Greenaway* (1845) the concern was that courts should be able to obtain full effective evidence from which to make accurate judgements. The defendants to the contempt action in *Greenway* were parish officials in a parish that was defending an action for the removal of a pauper and they refused to produce documentary evidence that was likely to prove her to be a resident of their parish.⁷⁰⁴

In fact, many of the contempt cases of the 1860s in which the administration of justice was referred to, were particularly concerned with these issues of evidential effectiveness. A particular concern related to the obtaining of evidence from unwilling witnesses. In two cases during the early 1860s this issue was addressed, both of them relating to instances of election fraud in the

⁷⁰¹ *ibid* 490, 183

⁷⁰² Allen, *Evidence* 2-4, 25-6

⁷⁰³ Langbein, *Adversary Trial* 178-245

⁷⁰⁴ *R v Greenaway* (n 664)

West and East Ridings of Yorkshire in 1859. *R v Charlesworth* (1860) related to allegations of bribery in the Wakefield election.⁷⁰⁵ Fernandes was alleged to have acted on behalf of Charlesworth in offering bribes to various electors. At trial, when asked whether he had received money for the payment of such bribes, however, he refused to answer even though he had been granted a certificate of immunity from the prosecution by the commissioners appointed to investigate the election. *R v Boyes* (1861) also related to election bribery, this time for the constituency of Beverley. Again the contempt arose from the witness refusing to answer questions. In both cases the witnesses were convicted of contempt. In Charlesworth it was enough to found a contempt that a certificate of statutory immunity had been granted. This meant that the witness had no lawful reason to refuse to answer questions. In *Boyes*⁷⁰⁶, the witness had been offered and accepted a pardon under the Great Seal for the bribe he had taken but, unconvinced by the level of protection it offered, continued to refuse to answer questions. In both cases the witnesses were punished for contempt and in both cases the administration of justice was, unsurprisingly, invoked. In Charlesworth the trial judge had told Fernandes that what he had done was to 'thwart the due administration of justice'.⁷⁰⁷ In *Boyes*, where the concern was whether there was any real danger of a prosecution for the accepting of the bribe, Lord Cockburn CJ said:

*We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice.*⁷⁰⁸

There was, therefore, a close association in these contempt cases, not simply with the authority of the courts, but also with the underlying purposes of trial process in reaching accurate outcomes.

As the nineteenth century progressed there therefore grew an increasingly principled set of rules regulating the use of evidence. Justice notions significantly influenced many of these developments. Where invoked, justice was strongly related to the accurate determination of cases. This was not, however, a straightforward set of arguments. Quite how truth-based justice was best obtained remained a matter of disagreement, with justice being equally invoked to

⁷⁰⁵ *R v Charlesworth* (1860) 2 F & F 326; 175 ER 1081; *In the Matter of Fernandes* (1861) 6 Hurl & N 717; 158 ER 296

⁷⁰⁶ *R v Boyes* (1861) 1 B & S 311; 121 ER 730

⁷⁰⁷ *R v Charlesworth* (n 705) 334

⁷⁰⁸ *R v Boyes* (n 706)

support maximising the quantity of evidence and also restricting the quantity of evidence for the sake of increasing its quality.

Trial Process

The conduct of the trial was unsurprisingly an issue in respect of which justice concepts were raised. In fact much of the justice discourse related particularly to criminal trials at assize. Although jury trials remained a central feature of civil process, civil trial was not generally a matter of such controversy as the criminal trial. This may be, as Langbein has suggested, because the pleading process in civil cases had reduced the importance of juries in the determination of disputes.⁷⁰⁹

Even in criminal cases the discourse about the justice of jury trial is not extensive. The fact that trial processes were, to a considerable extent, aspects of a judicial discretion, meant that indications in court reports of how justice was perceived and achieved even in criminal cases are sadly lacking.⁷¹⁰ There are areas, however, where the law reports do show active discourses on the relationship between justice and the way in which trials should be conducted.

All trials, even for crimes, were heavily dependent on the forms and pleadings under which the trial was conducted. Such formality could be a significant constraint on trial justice throughout the period 1770 to 1870. Balancing formal validity and factual accuracy was difficult, as can particularly be seen from the case of *R v Mawbey and others*.⁷¹¹ Two justices of the peace and two inhabitants of the parish of Windelsham had been prosecuted for conspiracy to pervert the course of justice, it being alleged that they had agreed fraudulently to certify a highway in their parish as repaired. At the Surrey assizes of Spring 1795, the parishioners, Cooper and Leycester, had been acquitted but the justices of the peace, Mawbey and Liptrott, had been convicted. Those representing the convicted defendants moved for a new trial on the merits of the case and for an arrest of the judgment against them on the grounds that their conduct could not, in law, amount to a fraudulent conspiracy.

⁷⁰⁹ Langbein, *Adversary Trial* 8

⁷¹⁰ The records contained in the Old Bailey Session Papers could provide an alternate source although there are difficulties in using them as a consistent source over this period owing to the variable quality of the reporting in them: Robert Shoemaker, 'The Old Bailey Proceedings and the Representation of Crime and Criminal Justice in Eighteenth Century London' (2008) 47 *Journal of British Studies* 559, cf Langbein, *Adversary Trial* 183-90. Nonetheless some periods where the reports are more reliable will merit further investigation into that court's justice discourse.

⁷¹¹ *R v Mawbey, Liptrott, Leycester and Cooper* (1796) Term Rep 619; 101 ER 736

The application for a new trial immediately encountered difficulties that shows much about the concepts of criminal justice influencing court discourse at the turn of the eighteenth century. The main objection raised by those representing the crown (Garrow and Lewes) concerned the form and formality upon which such a trial was based. The difficulty was that, as the four defendants had been convicted on a single record produced from a single indictment and a single venire summoning the single jury to try them, to annul the conviction two of the defendants would also, technically, annul the acquittal of the others. The validity of all four verdicts, it was suggested, rose or fell with the fate of the documents upon which the crimes were alleged, from which the jury was given jurisdiction, and upon which the outcomes were recorded.⁷¹²

Those representing both sides⁷¹³ based their argument significantly around concepts of justice. At the heart of the appeal was the relationship between formality and accurate outcomes. 'The forms of law,' the defence argued,

*were created for the furtherance of substantial justice, and the practice of the Court is from time to time adapted to that end. Where forms therefore are found to impede and obstruct the object of their creation, the Court will new-model them accordingly, making the means give way to the end. This is more peculiarly the case with respect to the granting of new trials, which formed no part of the common law jurisdiction of the Court, nor was given to them by statute, but arose out of the imperious necessity of doing justice, the effecting of which is the only boundary to their discretion in this respect.*⁷¹⁴

The Crown argued, however, that 'the Court in granting or refusing new trials cannot be altogether governed by the principle of obtaining substantial justice, but their discretion in this respect is limited by law and usage.'⁷¹⁵ Not only, however, was this a claim of deference of justice to established law, practice and formal validity, it also raised broader issues about the sanctity, or at least the finality, of jury verdicts. In fact, to unmake a verdict reached by formally valid deliberations by allowing the retrial in this case, 'would go to the destruction of trial by jury.'⁷¹⁶

⁷¹² *R v Mawbey* (n 711) 619-21

⁷¹³ Erskine, Piggott, Shepherd and Leach represented the defendants; the florid nature of the prose hints at the part played by Erskine in making the arguments.

⁷¹⁴ *R v Mawbey* (1796) Term Rep 619, 622; 101 ER 736, 738

⁷¹⁵ *ibid* 625, 739

⁷¹⁶ *ibid* 625

Although contending that the courts were not necessarily bound by restrictive rules, the defence nonetheless suggested that the power to order new trials was a well-established feature of the developing system of justice. The granting of new trials, it was argued, had been developed over time to the extent that ‘the attainment of substantial justice is so decidedly the ruling principle on which the Court acts, that in civil cases judges might refuse to grant a new trial even where a verdict was ‘against the law, if upon the whole they see that substantial justice has been done.’⁷¹⁷ New trials were therefore linked in the defendants’ arguments with the obtaining of just outcomes. For this reason, therefore, because the Crown ‘has no interest but the attainment of solid justice, the Court will exercise its power for the purpose of attaining it, and their jurisdiction must necessarily be co-extensive with this great end.’⁷¹⁸ What mattered ultimately was justice rather than formal validity.

There was a broad power that therefore had to be exercised not only for single defendants seeking new trials but also where there was a need, as here, for the court to take steps to sever the forms upon which original verdicts had been based. Here two justice values came into conflict. The Crown had argued strongly in favour of principles of fidelity to established practices and respect for the sanctity of formal processes. This meant that:

*the discretion of the Court in granting new trials must be regulated by former practice, and so exercised as not to raise any incongruity on the record. It is a settled rule that the jury cannot find less than the issue before them; if they do, the verdict is bad for the whole.*⁷¹⁹

This challenge of consistency and legitimacy had to be met by the defence in two ways. First of all, such claims were set against the justice of truth and accuracy. ‘Many cases might be put where the most flagrant injustice would prevail without such a power’ such as depriving defendants of the favourable testimony of their former accomplices or where one convicted defendant was deprived of the benefit of some exculpatory evidence and his co-defendants were acquitted.⁷²⁰

Secondly, however, claims of a formal necessity to adhere to recorded verdicts was also challenged both in terms of its importance (the ‘form of doing justice’ being argued to be

⁷¹⁷ *ibid* 623, 738

⁷¹⁸ *ibid*

⁷¹⁹ *ibid* 625-6, 739

⁷²⁰ *ibid* 623, 738

‘but a secondary consideration’⁷²¹) and also in its implications for just outcomes. There was no rational difference, it was argued, between the case of four defendants tried at the same time, some of whom were acquitted and some of whom were convicted, and situations where only some indicted defendants were tried because only they had been detained.⁷²² Even if the formalities of the trial process were of significance, formal obstacles were not, the defence argued, insoluble. Here, legal creativity and a degree of principled pragmatism were enjoined. Three options were offered. First of all the fact of a new trial could simply be entered on the existing record. Secondly, the original venire (the document upon which the trial result was recorded) could be amended to remove the convicted defendants but retain the names of those acquitted, and the convicted defendants could then be proceeded against on a next venire. Thirdly, all four defendants could be put upon trial again with directions to the judge at the new trial not to receive any evidence against those already acquitted.⁷²³

In advancing these retrial arguments, the justice of the issue was key. When it came to the validity of the original trial, the issue of conspiracy, the nature of the argument differed in a way that reveals something of the place of discourse on justice in the courts’ determinations. Neither party had raised a significant body of case law in support of the retrial arguments. In fact there were only three cases that provided much authority on the point,⁷²⁴ and the crown could argue ‘that no instance [in support of the defence argument] can be found except *Fern’s case*, which has been questioned and over-ruled.’⁷²⁵ The conspiracy arguments supporting the arrest of judgment were of a different order, being rich in case law and strongly based on assertions of the key legal principles in dispute. In fact, other than a passing reference to ‘public justice’ as a matter in respect of which it was possible to conspire⁷²⁶ there is no reference to justice in the eight pages of the Term Reports covering the conspiracy issue.⁷²⁷

The judges of the King’s Bench concluded that it was possible for the defendants to have been convicted of conspiracy for their acts and discharged the application for a new trial

⁷²¹ *ibid* 624, 738

⁷²² *ibid* 623-4, 738

⁷²³ *ibid* 624, 738-9

⁷²⁴ *Fern’s case* Hil 27 & 28 Car 2; *Collier v Morris* (Mich 1735) and *Captain Crabb’s Case* (Mich, 23 Geo 2); both sides were heavily reliant on sources from commentators such as Blackstone (3 Blac Comm 388) and Buller (Bull Ni Pri 326) for even this case law

⁷²⁵ *R v Mawbey* 625, 739

⁷²⁶ *ibid* 629, 741

⁷²⁷ This is in contrast to the fifteen references to justice in the five pages of the retrial argument.

on the evidence. However, they concluded that the defendants could, in principle, have obtained a retrial.⁷²⁸

In reaching this conclusion, the judges preferred the justice of accuracy over the justice of consistency or rule-mindedness. Lord Kenyon offered the first judgment of the court, observing that a rule that a new trial could not be granted in such a case:

*would bear extremely hard on particular persons accused; for then however unjust the verdict against some of the defendants might appear to be, and though it should turn out beyond all contradiction that the verdict had been obtained by the grossest perjury, the guilt of those defendants must necessarily stand on record, provided one defendant ... were acquitted. But I think that the rule was correctly stated by the counsel for the defendants, that in granting new trials the Court know no limitations, (except in some excepted cases,) but they will either grant or refuse a new trial as it will tend to the advancement of justice.*⁷²⁹

Although a retrial was not to be granted on the facts, Lord Kenyon stressed the principle that justice was the basis upon which a retrial might be granted in appropriate cases, saying that he had not doubt that:

*[E]ven without the assistance of that case I should have no doubt but that, for the advancement of justice, and to prevent the manifest injustice that would otherwise ensue, the Court might on principles of common sense and law grant a new trial in a case circumstanced like the present. I have studiously gone out of the way in order to express my opinion on this point, an opinion formed on great deliberation, lest the public should be misled by the arguments used on behalf of the prosecution, and imagine that manifest injustice must be effected in this case because the forms of law cannot yield to substantial justice.*⁷³⁰

For Grose J, this was not only a matter of accurate verdicts but also the equal and consistent treatment of defendants:

[I]f a new trial may be granted where there is only one defendant, the ends of justice require that it should also be granted in a case where there are more defendants than one on the record and some have been improperly convicted, though others

⁷²⁸ *R v Mawbey* 637, 746

⁷²⁹ *ibid* 638, 746

⁷³⁰ *ibid* 638-9, 746

*may have been acquitted. It is true that substantial justice does require it; and I have no doubt but that we may so mould the proceedings of the Court as to effect that purpose.*⁷³¹

Lawrence J was equally impressed by the need for single and multiple defendants to be treated similarly. He tried to avoid getting the courts 'entangled in the strict forms of proceeding'⁷³² by addressing the formal difficulties that were attendant on treating the four defendants differently. He adopted two of the suggestions proposed by the defence, the alteration of the first venire or the recording on the venire of the fact of mistrial of the two defendants.⁷³³ As the defendants were held to have been properly convicted on the first indictment, he was not obliged to resolve the difficulties of form that retrial would present.

R v Mawbey therefore illustrates the variety of conceptions of justice in the 1790s. The case presents in sharp dichotomy two types of legal disputes. One type, the more common, was that in which effective advocacy was based on the marshalling and development of specific legal sources. Here it was possible but not common to draw on justice notions to influence the interpretation of uncertain rules and principles. That, however, did not happen in this case nor in any other case decided during the period. The second type, however, consisted of cases where either for lack of clear rules or because of the discretionary nature of the procedural questions being raised, there was far more openness to arguments based on notions of justice. *Mawbey* not only fits into the latter category but in fact represents one of a narrow range of cases in which justice appears to have been accepted as the test to be used to resolve such questions.

Where this was the case, the content of such arguments could draw on a range of values encompassed within concepts of justice. In *Mawbey*, values such as achieving accurate verdicts, attaining legitimate sanctions and following established practices were triggered by justice arguments. Some of these were not directly related to the term 'justice'; in fact in *Mawbey*, justice generally related mostly to the reaching of accurate verdicts by following proper processes. However, positing accurate outcomes as the basis of just decisions raised consideration of other aims that could also be associated with a 'just' result, whether alongside or in opposition to that value. That this would happen was an inevitable feature of the adversarial nature of advocacy in the central courts. Although

⁷³¹ *ibid* 639, 746

⁷³² *ibid* 639-40, 747

⁷³³ *ibid* 640, 747

justice as truth held a dominant place in that discourse, that dominance was not uncontested and, in this system that promoted argument, nor were the implications of truth-based justice without scope for dispute.

These contested values and meanings were often canvassed as issues in cases relating to jury trials. There was a lack of a clear consensus as to the roles juries were in fact to take in ensuring just outcomes and the extent to which their decisions were subject to legal control. The jury had an iconic status in English society as a symbol of its justice.⁷³⁴ Its core functions and the rules under which it operated were deeply entrenched although not always clearly established. There were numerous situations in which what juries did and how they did it could be disputed inside and outside of the courts. These tensions can be seen in cases like *R v Shipley*,⁷³⁵ the trial of the Dean of St Asaph for seditious libel following the publication of Sir William Jones' *The Principles of Government, in a Dialogue between a Gentleman and a Farmer*. At Shipley's trial, the jury had found the defendant to have published the pamphlet but refused to make a finding that his act was a libel. They had first entered a verdict of 'guilty of publishing only' and then, under pressure from the presiding judge, Buller J, 'Guilty of publishing, but whether a libel or not the jury do not find.' On this basis, Buller proceeded to convict on the grounds that the libellous nature of a publication was a matter of law not of fact and therefore not for juries to decide.⁷³⁶ This issue had clearly troubled the jury and Erskine brought the matter before the King's Bench by a writ of certiorari arguing that no conviction could for this reason have taken place.

Erskine's argument for Shipley pressed a traditional Wilkite or radical Whig position: the central role for juries in the determination of matters of guilt. This was, he said, their historical and constitutional position. He contended that 'the whole administration of justice, criminal and civil, was in the hands of the people themselves, without the control or intervention of any judicial authority' and that 'if the administration of criminal justice were left in the hands of the Crown or its deputies, no greater freedom could possibly exist than Government might choose to tolerate from the convenience or policy of the day.'⁷³⁷

However, as Buller J had persuaded the jury to return the limited verdict that they had (i.e. a special verdict of publication only), in circumstances in which they had been doubtful that there had been a libel at all, Erskine argued that it was not possible to claim that there had been a

⁷³⁴ Hay 38

⁷³⁵ *R v Shipley* (1784) 4 Douglas 73; 99 ER 774

⁷³⁶ *R v Almon* (1770) 5 Burr 2686; 98 ER 411; *R v Woodfall* (1774) Lofft 776; 98 ER 914

⁷³⁷ *R v Shipley* (n 735), 111, 135

conviction at all. According to Erskine, either the jury had the role of deciding guilt or they did not. The guilty verdict was, he said, 'either ... operative or unessential; an epithet of substance, or of form.' If Buller J's direction had been simply to require them to find whether there had been a publication and not actually to consider guilt (i.e. to enter a special verdict) then any reference to 'guilty' in their verdict and on the record would have been mere form, 'inconclusive of the defendant's guilt, and from which no valid judgment could have followed.'⁷³⁸

The jury could not, if all they did was to enter a special verdict, have actually determined the issue of guilt. If the court now ignored that reality and to treat the record of a 'guilty' verdict as legally valid and a sanction for punishment:

*the defendant has suffered injustice, because ... a criminal conclusion from a fact has been obtained from the jury, without permitting them to exercise that judgment which might have led them to a conclusion of innocence; and that the word guilty has been obtained from them at the trial as a mere matter of form; although the verdict ... stating only the fact of publication ... would have been an absolute verdict of acquittal.*⁷³⁹

On the other hand, Erskine argued, if the court were now to accept that there had not been a proper determination of the guilt of the defendant at trial by reason of the jury's incomplete deliberations and therefore that the use of the word 'guilty' in the verdict, 'is to be reduced to a mere word of form ... be it so: let the verdict be so recorded; let the word guilty be expunged from it, and the defence ... will maintain, in arrest of judgment, that he is not convicted.'⁷⁴⁰

It was in the third possible situation, essentially the position of the Crown, where it was insisted that there had been a deliberation which justified the recording of guilt but also insisted on the jury only being entitled to decide the special issue of publication that presented the danger of injustice. In such a situation, he argued, 'it will then become us (independent of all consideration as lawyers) to consider a little how that argument is to be made consistent with ... that fairness of dealing which cannot but have place wherever justice is administered.'⁷⁴¹ For Erskine, then, the point was more than simply legal. There was something, 'justice', that was independent of legal considerations that determined validity of outcomes. There were therefore issues of just dealing

⁷³⁸ *ibid* 134

⁷³⁹ *ibid*

⁷⁴⁰ *ibid* 135

⁷⁴¹ *Ibid*

in the question of the jury's role in which they had or should have had the capacity to decide issues of guilt in ways that contrasted markedly from the restrictions of strict legal authority.⁷⁴²

Although the Dean of Asaph's judgment was ultimately arrested and conviction discharged, Mansfield did not, on the motion for a new trial, accept Erskine's arguments on the jury and their role in dispensing justice. Mansfield took a very different view of their in producing just results. Just results were a matter of law not jury-led facts. He did not accept their decision-making as a manifestation of a system of delivering justice. Rather, he said, it was in accordance with the 'eternal principles of justice', that juries were not to make decisions on the application of the law. To Mansfield's mind, justice involved a strong degree of fidelity to the law and therefore a significant deference of non-lawyers within the process to legal professionalism:

*[B]y the constitution the jury ought not to decide the question of law, whether such a writing, of such a meaning, published without a lawful excuse, be criminal. They cannot decide it against the defendant ... therefore it is the duty of the Judge to advise the jury to separate the question of fact from the question of law; ... It is almost peculiar to the form of the prosecution for a libel, that the question of law remains entirely for the Court upon the record, and that the jury cannot decide it against the defendant; so that a general verdict "that the defendant is guilty" is equivalent to a special verdict in other cases.*⁷⁴³

However special the issue in libel trials, the judgment here reflected Mansfield's strong suspicion of the appropriateness of juries' determining of moral and legal issues more generally.⁷⁴⁴ It would be wrong, he thought, for a jury not to follow a legal direction as to what was libellous and to seek to make up their own mind on such a matter. '[T]hey do not know,' he said, 'and are not presumed to know, any thing of the matter; they do not understand the language in which it is conceived, or the meaning of the terms. They have no rule to go by but their affections and wishes.'⁷⁴⁵

For Mansfield, 'affections and wishes' had no place in making appropriate decisions in courts, and attempts to decide by other standards were simply wrong because in doing so the jury 'usurp the judicature of law.' Even if they happened to reach the right conclusion,

⁷⁴² Michael Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime, C1770-1820' (1990) 10 OJLS 307 315-6

⁷⁴³ *ibid* 164-5

⁷⁴⁴ Atiyah, *Freedom of Contract* 123

⁷⁴⁵ Shipley (n 735) 170

they would be 'themselves wrong, because they are right by chance only, and have not taken the constitutional way of deciding the question. It is the duty of the Judge, in all cases of general justice, to tell the jury how to do right.'⁷⁴⁶ In this sense, Mansfield's 'general' justice was that sort of justice applied at law.

Mansfield was suspicious of juries. His preference for Special Juries may, as Atiyah has suggested, have reflected movement in his preferred direction of jury-less deliberations. Where juries had an established role, however, placing profound limits on their deliberations would have been for him the next best option.⁷⁴⁷ They did not make decisions by the right processes, by legal processes based on reason and principle.⁷⁴⁸

Mansfield's legal justice was set against Erskine's popular (or at least non-lawyerly) justice and it was ultimately the application (or misapplication of legal rules rather than any jury-based thinking) that was to save Shipley.⁷⁴⁹ They were two very different things that were deeply seated in profoundly different ways of understanding the role of juries and legal processes in the society within which they operated. Erskine's passionate advocacy of the role of the jury reflected his Foxite politics and constituted a continuation of battles over the jury and its role that had informed the radical discourse of the 1760s and 1770s.⁷⁵⁰

Mansfield was politically what would come later to be called a Tory. He had little sympathy for the demi-populism of Foxite politics and their faith in jury trials, and his perceived Scottish anti-libertarian tendencies and preoccupation with government rather than justice had become the focus of radical criticism.⁷⁵¹ Conversely, motivated by Foxite Whig politics, Erskine frequently drew upon the importance of the jury and of a wider representativeness of the law. This was certainly what informed his resort to his claims to jury trial and related notions of justice in *R v Shipley* and *R v Watson*. In the politically charged atmosphere of the 1790s and into the early decades of the nineteenth century, the jury continued to provide a focus for political justice but the battles in cases like *Shipley* set a new tone for the discourse and had placed it under new restraints.

⁷⁴⁶ *Shipley* (n 735) 170

⁷⁴⁷ Atiyah, *Freedom of Contract* 123

⁷⁴⁸ *Ibid* 97; Lobban, *Common Law* 104

⁷⁴⁹ Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime, C1770-1820' 317-9

⁷⁵⁰ Brewer 154-5; Hilton, *England* 71

⁷⁵¹ Lemmings, *Professors of Law* 286 noting also Paul Langford, *A Polite and Commercial People: England 1727-1783* (Clarendon Press, 1998 1989), 30

It is worth remembering at this point Brougham's peroration in *Clayton v Attorney General* on legal and non-legal forms of justice.⁷⁵² Across the wide political spectrum, from moderate Whig to ultra-Tory, lawyers espoused a judicial form of justice in legal argument. They did not do so consistently: it is likely that Tories like Mansfield did so more readily in such sensitive political cases but there was still a legal consensus around which legal discourse could rally and that could exclude and reject the more radical justice interpretations of those like Erskine.

These Wilkite and Foxite arguments about the jury fell away in the Westminster courts in the 1790s. The radical bar had not lost its stomach for the fight; Erskine continued to advocate both as barrister and MP for a free press and independent jury, and in 1793 and 1794 established his reputation as the advocate of choice for radical activists with his spirited defence of members of the London Corresponding Society amongst others.⁷⁵³

Rather, the decline in this discourse about the justice of juries in the central courts might at first seem surprising; the jury after all certainly proved its value as a defence against a state exercising extensive arbitrary power during this period in particular.⁷⁵⁴ In fact three factors appear to explain the absence of this. First of all, the authoritarian acts in response to fear of revolution, 'Pitt's Terror', did not constitute direct attacks on the jury as an institution. Furthermore, Fox's Libel Act of 1792 had taken some of the heat out of the issue of jury power by explicitly enabling them to decide matters that Lord Mansfield had been so keen to keep from them. Both Pitt and Burke had supported Fox's reforms and both retained a strong commitment to jury trial as an institution. Certainly the practices of the law officers and of the government while seeking to restrict many liberties did not involve removing jury trial.⁷⁵⁵ The result was that issues of the power of the jury that agitated justice discourse so much in the 1770s and 1780s did not feature in the battles of the 1790s and afterwards.⁷⁵⁶

Secondly, however, the failures in cases like *Shipleigh* and *Watson* (however much Fox's Act had neutralised the precise issue in those cases) had made the advocacy of a broad power on the part of juries increasingly difficult. Advocates of the importance of the jury took their arguments elsewhere. Erskine found another more suitable tribunal in the assize court juries themselves.

⁷⁵² *Clayton v Attorney General* (n 247)

⁷⁵³ Briggs, *Age of Improvement* 133-5; Thompson, *The Making of the English Working Class* 148; Lemmings, 'Erskine'; Hilton, *England* 71-2

⁷⁵⁴ E. P. Thompson, *Making History* (The New Press 1995) 152;

⁷⁵⁵ Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime, C1770-1820' 320-4

⁷⁵⁶ Boyd Hilton, *A Mad, Bad, and Dangerous People?: England 1783-1846* (Clarendon Press 2006) 73

While Lord Mansfield had labeled his arguments 'puerile',⁷⁵⁷ juries of the 1790s responded again and again with acquittals.⁷⁵⁸ This sympathy of juries in the 1790s provides the third explanation of the end of justice in central discourse until 1820; the number of acquittals significantly reduced the number of cases that were taken into those courts.

In fact the controversy of the jury trial and the role jurors could play would resurface during further political trials in the 1820s. In *R v Burdett* (1820),⁷⁵⁹ again the issue arose as to the matters over which juries should be able to make decisions. This time, however, it was a matter of whether there had been sufficient reason to leave a case to a jury at all. Sir Francis Burdett was put on trial for criminal libel following his criticism of the massacre at St Peter's Fields. To be criminally liable, the offending letter had to have been published in the county (Leicester) in which he was tried. Publication therefore required that the letter had been either posted unsealed or handed to someone in that county. The defence argued that there was insufficient evidence to leave the matter to the jury on this point because nearly all of the evidence suggested that the letter was posted as a sealed document and only opened in London.⁷⁶⁰

This was a technical argument but one of great significance, constituting as it did, the basis upon which it might be possible to prosecute at all.⁷⁶¹ Justice was not invoked by the defendants explicitly in its support of their point. It was, however, enjoined by Best J (who had been the judge at the assize trial) in developing an evidential basis upon which the prosecution's case could be sustained. It was 'according to the principles on which justice is administered', he said, that the matter had been left to the jury in the particular case.⁷⁶² In this sense, principles of justice were used to refer to the ordinary practices and rules of evidence, these practices also therefore referred to the constitutional roles of judges and juries but in this context it was the technical device of a presumption that was being specifically referred as the principle of justice.

Such a matter might only be left to a jury if there was sufficient evidence for them to reach a verdict on the point. This was possible, Best J, Holroyd J and Abbott CJ concluded,

⁷⁵⁷ *R v Shipley* (n 735), 170

⁷⁵⁸ Thompson, *The Making of the English Working Class* 149

⁷⁵⁹ *R v Burdett* (1820) 4 B & Ald 95; 106 ER 873

⁷⁶⁰ *ibid* 113-5, 880

⁷⁶¹ Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime, C1770-1820' 331; the fact of technicality noted by Bayley J in his dissent on the issue: *R v Burdett* (n 759) 893

⁷⁶² *ibid* 126, 885

because the jury could work on the basis of a presumption drawn from the evidence presented. Such presumptions reflected the Crown's duty to prove a crime but also furthered effective prosecutions (and arguably, therefore, another form of justice) by ensuring proof was not unattainable in some situations of poor evidence. It was a compromise on how true a case had to be shown to be at the point of trial. Abbott CJ explained presumptions in this way:

*A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained, by inference in a Court of Law, very few offenders could be brought to punishment ...*⁷⁶³

In this sense, presumptions reflected the practical empiricism that had come to inform early modern English justice.⁷⁶⁴ They reflected a realistic form of fact-based justice. This had, however, to be reconciled with inherent constitutional concerns about liberty:

*No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?*⁷⁶⁵

There was, therefore, a reconciliation of two types of fact-related concerns. The injustice of improper acquittals and the injustice of improper convictions. The judges in the majority concluded that a broad use of presumptions provided a sufficient basis for allowing a jury to conclude that Burdett had delivered his letter to someone in Leicester. This was a matter of proper constitutional function defined by rules of procedure. Invoking the 'principles under which justice is administered,' Best J explained:

The rule that governs a Judge as to evidence, applies equally to the case offered on the part of the defendant, and that in support of the prosecution. It will hardly be contended, that if there was evidence offered on the part of the defendant, a Judge would have a right to take on himself to decide on the effect of the evidence, and to

⁷⁶³ *ibid* 161

⁷⁶⁴ Shapiro, *Probability and Certainty* chapter 6

⁷⁶⁵ *R v Burdett* (n 759) 162

*withdraw it from the jury. Were a Judge so to act, he might, with great justice, be charged with usurping the privileges of the jury, and making a criminal trial, not what it is by our law, a trial by jury, but a trial by the Judge.*⁷⁶⁶

Best, therefore, justified his support for the position of the majority by invoking justice as a justifying norm. Liberty, while recognised, was not to be allowed to sacrifice fundamental needs for effective outcomes. This view on the evidential position (and therefore the justice) was not inevitable. Bayley J was not convinced that there had been anywhere near sufficient evidence. He disagreed not simply on the facts of the case but on the constitutional issue too. It seemed to him, he said, ‘that as the case at present stands, the jury were desired to make a presumption without having sufficient premises, and that if they did draw that presumption they acted not upon justifiable inference, but upon unwarrantable conjecture.’⁷⁶⁷ That being so, at the point of the appeal, it was not justifiable for the judges to try and assume that the verdict of the jury was justified on the evidence.

*If the case has been put to them on a ground which cannot be supported, we must use great caution in proceeding upon the idea that there was another ground on which they might have acted. The jury ought never to invade the province of the Judge as to questions of law, but it is for them alone to come to a conclusion on questions of fact.*⁷⁶⁸

The difficulty was that presumptions were, practically speaking, a synthesis of legal and evidential decisions; what could be presumed was defined legally but the factual basis of the presumption and the precise conclusions to be reached should be matters for the jury. They also presented the danger of false or constructed rather than real knowledge. Starkie’s *Treatise*, published in 1824, would note the convenience of presumptions but would warn that,

they are not used as the means or instruments of truth but are in virtue and effect nothing more than mere technical and positive rules ... whose only foundation is their

⁷⁶⁶ *ibid* 121 (Best J’s use of ‘justice’ here illustrates the difficulties of any simple textual searching for ‘justice’ within the databases)

⁷⁶⁷ *ibid* 151-2

⁷⁶⁸ *ibid* 152

*utility and convenience. To go farther ... must in all cases, where the object is simply the attainment of truth ... would frequently be productive of absolute injustice.*⁷⁶⁹

It could in reality be hard to work out where the facts ended and the law began when presumptions were raised. This, in essence, was the basis of the disagreement between the judges in *Burdett* and it was an additional difficulty that the precise basis upon which the presumption in question worked was not clear. This was to be an endemic problem of much of the discussion in the courts about rules of evidence in the early nineteenth century, owing to the relative lack of principle to underpin cases deliberated by the courts of record.⁷⁷⁰

In fact the case law was lacking; there was only one clear case on this presumption that dealt with the issue of libellous publication.⁷⁷¹ It was this vagueness in the use of the prosecution evidence that troubled Bayley J. Not only did there not appear to be sufficient evidence to invite the presumption advanced, but the prosecution had been permitted, in effect, by being allowed to rely on this presumption to fall short of their duty to prove the case against *Burdett* in two material ways. First of all they had not had to call witnesses, including Bathurst, the supposed recipient of the libellous tract in Leicestershire and Brookes, who had received it in London and who could therefore have provided evidence as to how and what manner it had been posted.⁷⁷² Secondly, by inferring publication on weak case law, they had been able to refuse to leave to the jury the question of whether there had been sealed delivery on a special verdict, by which means the court had supplanted the jury and deprived the defendant of a right to challenge the case against him.⁷⁷³

It is worth noting at this point the deliberations did not, again, make extensive reference to justice. Best J considered the issues to be based in general on the principles of justice but the subsequent analysis did not reiterate this concept. For all the silence, however, Best was right: the dispute raised significant questions about the way in which just outcomes were to be achieved. For all that Best sought to validate his view of the case as consistent with justice principles, his view of what those principles would require was not beyond dispute.

⁷⁶⁹ Thomas Starkie, *A Practical Treatise of the Law of Evidence* (London 1824) Vol 1, vi-vii, cited in Allen, *Evidence* 21

⁷⁷⁰ Allen, *Evidence* 25-6

⁷⁷¹ *R v Watson* (1 Camp 215), a *Nisi Prius* case decided by Lord Ellenborough, that never went to appeal having been resolved by acquittal; the judgment in fact appears to be a manifestation of some political motivated judicial interpretation: Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime, C1770-1820' 332-3

⁷⁷² *R v Burdett* (n 567) 151-2, 894

⁷⁷³ *ibid* 155, 895

In the grand scheme of things, the issue of the place of publication may seem insignificant. It was a technical lawyer's argument that did not engage with the core issues of the case. Burdett was on trial for his condemnation of the government's role in the Peterloo massacre. All four judges agreed that he could not avoid conviction for a criminal libel on the grounds that his criticisms were based on truth. In the most fundamental sense, justice issues were obscured amid such technicalities. Nonetheless, arguing and judging the case (and one assumes for Sir Francis Burdett himself), they were significant issues. Legitimacy and issues of procedure (values again that could be associated with just outcomes), although removed from essential issues of truth and accuracy, mattered in determining the validity of any punishment. Equally, as has been shown, there was also an on-going issue of constitutional importance to be resolved in defining not only the proper province of the jury but also the procedure to be used to achieve aims like truth and accuracy. In Burdett, Best J's particular justice perspective, one focused upon the effective prosecution of crimes with simple procedures, prevailed against another in which the defendant's rights and liberties were protected by the formalities and limitations of systematic trial processes. In other words a crime control model of justice prevailed on one that focused on due process.⁷⁷⁴

This dispute as to the role and function of the jury and consequential issues of the evidence they were to receive, was to continue into the nineteenth century and libel proceedings were frequently to draw out discussions of justice in this context. In *R v Gutch* (1829)⁷⁷⁵, the issue was how the defendant's responsibility for a libel should be left to the jury, Gutch being the proprietor of a newspaper that had published a libel but not shown on the evidence to have been involved in the actual publication. The difficulty faced by Pollock, acting for the defence, was that recent case law had established either that a proprietor could be liable as a matter of law⁷⁷⁶ or that such publication by a servant was prima facie evidence against the master.⁷⁷⁷ Pollock, nonetheless, sought to persuade the court to leave the matter to the jury on the grounds that, 'when ... reason and principle are one way, and are supported by the ancient authorities, though not be certain modern cases, the jury should have the sanction of the Court in following and acting on the ordinary principles of justice and good sense.'⁷⁷⁸ In an era in which firm doctrines of precedent were not yet established,⁷⁷⁹ it was an optimistic but not a hopeless argument. Nor was it guaranteed to succeed. Lord Tenterden CJ retained fidelity to the limited vision of jury discretion and directed the jury, 'I cannot propose to you a different rule from what I find

⁷⁷⁴ Packer, *Criminal Sanction* Ch 8

⁷⁷⁵ *R v Gutch, Fisher and Alexander* (1829) Mood & M 432, 173 ER 1214

⁷⁷⁶ *R v Walter* (1799) 3 Esp 21, 170 ER 524 and *R v Cuthell* (unreported)

⁷⁷⁷ *R v Almon* (1770) 5 Burr 2686; 98 ER 411

⁷⁷⁸ *R v Gutch* (n 775) 436

⁷⁷⁹ Lobban, *Common Law* 81-5; Baker, *Legal History* 199

adopted by those who have filled my situation before me' and invited the jury to convict.⁷⁸⁰ Again, legal fidelity had prevailed over any notion that juries should be empowered to deliver a wider form of justice.

The issue of what juries did and how their decisions were to be treated did not cease with these cases. In fact many of the cases that have been examined elsewhere in this thesis were predicated on concerns about the jury and its role in delivering justice. It was an issue at the heart of the cases concerning formalities of pleading (such as *R v Reed*),⁷⁸¹ openness (*R v Clement*⁷⁸²) and impartiality (*R v Hunt*⁷⁸³). In fact, the sanctity and unassailability of jury determinations would raise new justice issues as the century progressed. It was key to the consideration of the *autrefois* concept in *R v Bird and Bird*⁷⁸⁴ and would become central to disputes about the justice of appeals and reviews of trial verdicts.

Appeals, Finality and Reviewability

By the 1770s there were a number of mechanisms by which initial judgments could be overturned. Courts undertook processes of cross-review of the formal records of their proceedings by the writ of error procedures.⁷⁸⁵ Procedures had also been developed in the common law courts during the seventeenth and eighteenth centuries to obtain orders for new trials through the Westminster Courts.⁷⁸⁶ The House of Lords possessed a power to review the Chancery decisions in addition to the possibility of re-application to the Lord Chancellor as a new first instance hearing.⁷⁸⁷ Furthermore, by the eighteenth century the use of prerogative writs enabled the King's Bench to overturn exercises of authority under the royal prerogative.⁷⁸⁸ Finally, where matters of difficulty or complexity concerned a trial judge, assize court verdicts could be respited and referred to the twelve judges for review with the possibility of a pardon on a successful outcome.⁷⁸⁹

⁷⁸⁰ *R v Gutch* (n 775) 437

⁷⁸¹ *R v Reed* (1854, n 381)

⁷⁸² *R v Clement* (1820, n 560)

⁷⁸³ *R v Hunt* (1820, n 569)

⁷⁸⁴ *R v Bird and Bird* (1851) 2 Denison 94; 169 ER 431 (see Chapter 1)

⁷⁸⁵ Cornish and Clark, *Law and Society* 25, 35; Baker, *Legal History* 137-8

⁷⁸⁶ Cornish and Clark, *Law and Society* 25-6; Kevin Costello, 'The Writ of Certiorari and Review of Summary Criminal Convictions, 1660-1790' UCD Working Papers in Law, Criminology and Socio-Legal Studies accessed 21 November 2012; Douglas Hay, *Criminal Cases on the Crown Side of King's Bench: Staffordshire, 1740-1800* (Staffordshire Record Society 2010)

⁷⁸⁷ Baker, *Legal History* 141

⁷⁸⁸ *Ibid* 143

⁷⁸⁹ *Ibid* 139

Clearly, as seen already, such appeals related to and therefore invoked a number of justice principles. There was, however, a further justice principle that could and would be enjoined specifically in the context of appeals and reviews, and this was the justice of finality and the related concern about the sanctity of verdicts. In principle, courts recognised that cancelling or overruling orders made on inaccurate understandings would further the interests of justice.⁷⁹⁰ Rules about appeals had, however, been developed to discourage the unnecessary reopening of matters.⁷⁹¹ Although the courts do not appear to have formally adopted a concept of finality (i.e. one to which they attached such a name) in England until 1831,⁷⁹² such a principle was not only informing judicial practice before then but being, upon occasion, explicitly linked to and informed by notions of justice. As ever as a justice principle, it was, however, neither absolute nor unquestioned, however.

Courts would not willingly reopen issues and required some considerable reasons for doing so. Hay has suggested that decisions of Justices of the Peace were rarely reviewed in the closing decades of the eighteenth century.⁷⁹³ That this may be so is not contradicted by the tendency of the courts to see their own duty and that of the inferior courts as the adherence to the exercise of rules. As Hay has shown, cases that progressed as far as the Westminster courts were most frequently unsuccessful due to filters before the matter reached court.

Certain courts were in fact more open to review or even rehearing of particular types of cases. In *Barker v The Tithe Commissioners* (1841), Lord Abinger CB considered that the entitlement to re-litigate a claim to a modus (a proceeding related to tithe laws) could not 'on the mere ordinary principles of justice and equity' be doubted given the complexity of the pleading and processes involved.⁷⁹⁴ Equally, in *re Tommey* (1853),⁷⁹⁵ Lord Cranworth noted, in relation to the power of the House of Lords to re-hear matters,

Although in any question decided by this House upon appeal the matter is finally settled between the litigant parties, it is always subject to this condition, that if one party has, by any misrepresentation ... led the House into an error ... all the

⁷⁹⁰ See for example, *The Glenburn* (1863) Brown & Lush 62; 167 ER 299: that the order in this case was made by consent does not qualify the general principle

⁷⁹¹ Cornish and Clark, *Law and Society* 34-5

⁷⁹² 'Finality' appears first to have been used in English courts in relation to the overturning of an award or judgment in *MacArthur v Campbell* (1834) 2 Ad & El 52, 54; 111 ER 21, 21

⁷⁹³ Douglas Hay, 'Dread of the Crown Office: The English Magistracy and King's Bench, 1740-1800' in Norma Landau (ed), *Law, Crime and English Society* (Cambridge University Press 2002) 21

⁷⁹⁴ *Barker v The Tithe Commissioners* (1841) 9 M & W 129, 147, 152 ER 55

⁷⁹⁵ *Ex parte James White, Robert Courtenay, George Kernan, and Thomas Read Milliken, in re Henry Tommey v The said James White and others* (1853) 4 HL Cas 313, 10 ER 483

*commonest principles of justice compel this House, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting a fraud.*⁷⁹⁶

The difficulty with a concept of final judgments was that they posed the risk of making errors permanent and therefore of diminishing rather than enhancing the justice of the outcome. One solution in cases of error was for courts to correct their own orders. In *Mara v Quin* (1794), Lord Kenyon CJ was willing to amend a judgment before it had been enforced on grounds of principles of justice that valued accurate outcomes over matters of strict formality:

*The forms of the Court are always best used when they are made subservient to the justice of the case; and that judgments have been amended in a variety of instances, when it has been thought necessary to answer the justice of the case, cannot be doubted ... where the interest of no third person is affected, judgments are frequently altered on the other side of the Hall. Therefore, without infringing any rule of law, in order to forward the justice of this case I think we are bound to make this rule absolute, as the defendant has not shewn by any affidavit that injustice will be done to any person by it.*⁷⁹⁷

It was also possible, as noted above, for cases to be revisited in other courts. In fact the English legal system into the nineteenth century seemed to encourage re-litigation of issues. Rather than using the limited powers of appeal established by law and practice, a party might use one of a variety of additional procedures for enforcing judgments to revisit the merits of the case. Such tactics had to be resisted on justice grounds as can be seen from the statement of Lord Wynford (Sir William Best as was) in *de Nieuwerkerk v Reynolds and Firebrace* (1829):

[I]t would be a most inconvenient doctrine, and inconsistent with the principles of justice, to allow a man to appeal against a writ of execution, and upon that appeal to go into the merits of the original judgment. It would increase that delay ... if a man was not bound to appeal when the judgment was given ... If we delay still longer the execution of that judgment, it will be productive of great inconvenience and expense.

⁷⁹⁶ *ibid* 334, 491 (Tommy did not have the strongest basis for his argument for finality of decisions having persisted in these proceedings since 1834 and having brought the matter before the House of Lords to be overturned twice 1839 and 1847)

⁷⁹⁷ (1794) 6 Term Rep 1, 8

*I shall, as long as I sit here, endeavour to make people appeal in the first instance, or consider that they have waived their right to do so.*⁷⁹⁸

In imposing a requirement, therefore, that an appeal on a writ of execution should only be allowed in relation to matters that had arisen *since* the original judgment, Lord Wynford was thus affirming a number of the justice concerns that a concept of finality raised. First of all, delay or denial of access to merited remedies should be avoided.⁷⁹⁹ Secondly, parties should not be put to additional inconvenience and expense in pursuit of those remedies. Finally, an accuracy- and appropriateness-based conception of justice was also being reinforced in that the matter actually applied for (the overturning of the writ of execution) had to be determined on the factual and moral merits of that particular application rather than on the original merits of the case.

Such principles would be invoked in other cases too and, as the trial processes became increasingly subject to statutory reform, justice-based claims in support of finality became more tenable. Thus it was that in *Place v Potts and Bradley* (1855) it could be suggested in relation to Admiralty Court proceedings, 'That Court can now finally dispose of the interests and claims of all the parties in conflict; and it would be against the first principles of justice to force any of them to try over again the same questions in another Court.'⁸⁰⁰

The new evidence requirement in *de Nieuwerkerk* did not undermine the finality doctrine, however, but rather affirmed it. Lord Wynford's statement affirmed that such a process could not justly reopen the merits of the original application. This principle was affirmed in *Horlor v Carpenter* (1857).⁸⁰¹ There, a defendant's argument for a new trial was stopped by Cockburn CJ on the grounds that the point being appealed had not been put to the jury as evidence, it being 'essential to the administration of justice,' he said:

that certain rules should be adhered to. At the trial, the defendant's counsel relied only upon the point raised by the sixth plea ... and the direction to the jury proceeded upon the assumption that that was the only issue relied upon. It was never suggested until after that had been disposed of by the finding of the jury, that there was a

⁷⁹⁸ *de Nieuwerkerk v Reynolds and Firebrace* (1829) 1 Kn 151, 167; 12 ER 278

⁷⁹⁹ The avoidance of delay was a value particularly identified as one of the 'interests of justice': *Jones v Turberville* (1792) 2 Ves Jr 11, 13; 30 ER 498; *Woolley v Brownhill* (1824) M'Cle 317, 335; 148 ER 133; *Smith v Blackwell* (1828) 4 Bing 512, 513; 130 ER 865; *Mellish v Richardson* (1832) 1 Cl & F 224, 236; 6 ER 900. In *Mellish* concerns about the injustice of delay and added expense led Lord Tenterden (at 236-7) to suggest to the House of Lords that appeals on interlocutory matters should not be allowed.

⁸⁰⁰ *Place v Potts and Bradley* (1855) 5 HL Cas 383, 10 ER 948

⁸⁰¹ *Horlor v Carpenter* (1857) 3 CB NS 172; 140 ER 705

*further point ... The defendant is clearly precluded by every principle of justice and convenience from relying upon that point now.*⁸⁰²

Nor were the courts willing to allow fresh evidence to be advanced to support a claim, in *Shedden v Patrick* (1869), where Lord Hatherley LC said:

*It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting a new trial. If this were permitted, it is obvious that parties might endeavour to obtain the determination of their case upon the least amount of evidence, reserving the right, if they failed, to have the case re-tried upon additional evidence, which was all the time within their power.*⁸⁰³

Of course, admitting new evidence could often make cases more accurate and therefore more just but, as is clear from Lord Hatherley's statement, any idea of the truth enhancing quality of such extra evidence was to be understood within the context of adversarial litigation. The idealism of justice was a realistic idealism that recognised that for all the laissez faire logic of adversarial trials as the mechanism for getting the fullest truth, it was likely that such a system would also produce competitive tactics. There should not, therefore, simply be freedom for parties to pursue cases as they saw fit; justice required that the courts supervise, however lightly, such appeal processes.

The role and constitutional status of the jury also imposed a significant check on the reopening of issues, both in criminal and in common law civil cases. The powers to review a decision of the jury were profoundly limited. It was certainly not the case that jury decisions could be reviewed simply on the grounds that they may or may not have got the decision wrong. This was the case for both civil and criminal trials. Cresswell J explained the position in 1849, saying,

It would be extremely dangerous, and highly injurious to the interests of justice, that new trials should be granted upon a speculative surmise that the jury may have been

⁸⁰² *ibid* 180, 708

⁸⁰³ *Shedden and Shedden v Patrick and the Attorney-General* (1866-69) LR 1 SC 470

*confused or misled by the particular manner in which the judge frames his direction to them in point of law.*⁸⁰⁴

Given the centrality of jury trial on criminal matters, and the lack of the filtering of cases by refined pleading processes, this was a particular issue for criminal justice. The use of the twelve judges for cases of criminal review had been roundly criticised during the early decades of the nineteenth century.⁸⁰⁵ In 1848, this informal practice had finally been replaced with a statutory power for an assize judge to refer a criminal case to the Court of Crown Cases Reserved under The Crown Cases Act 1848.⁸⁰⁶ Section 2 of the Act defined the powers of review of the new Court, which were to:

hear and finally determine the said Question ..., and thereupon to reverse, affirm, or amend any Judgment ..., or to avoid such Judgment, and to order an Entry to be made on the Record, that ... the Party ... ought not to have been convicted, or to arrest the Judgment, or order Judgment to be given thereon at some other Session ..., or to make such other Order as Justice may require.

The Act therefore restated the review powers under the old process but had added a power to make such orders as justice required. It was not immediately apparent how significant a change to the practices of the twelve judges this was. It would only become clear once the judges had interpreted the powers they had been given.

One of the first significant opportunities to do so only occurred a decade later in *R v Mellor* (1858).⁸⁰⁷ There a defendant had been convicted following an error in the calling of his trial jurors, one juror having been mistakenly sworn under the name of another. This error had only come to light after the defendant's conviction. On this basis Wightman J (not without some hesitation as to the lawfulness of his act) had reserved the matter for consideration by the Court of Crown Cases Reserved.

There were two points that the case required the judges to determine, one jurisdictional and one relating to whether there was any error to appeal. First of all there was an issue as to whether the court had any power to consider the case at all. The error had only come to the attention of the judge after conviction. There was therefore a doubt as to whether the

⁸⁰⁴ *Doe d Strickland v Strickland* (1849) 8 CB 724, 749; 137 ER 693

⁸⁰⁵ Cornish and Clark, *Law and Society* 35; D. J. Bentley, *English Criminal Justice in the Nineteenth Century* (Hambledon Press 1998) 283-4

⁸⁰⁶ 11 & 12 Vict c 78; the power also applied to the Courts of Quarter Sessions

⁸⁰⁷ *R v Mellor* (1858) Dears & B 468, 169 ER 1084

error had 'arisen on the trial' as the Act required.⁸⁰⁸ Additionally, on this first point, there was some doubt as to the extent of the court's powers, particularly whether the court could adjudicate an error of this sort and, if it could, whether it had the power to order a retrial or simply to quash the original verdict. The second issue on appeal was whether there had been a mistrial at all given the type of error that had occurred. In particular, the judges took differing views, as to whether the defendant had actually suffered any actual prejudice or injustice as a result of this error and, if not, whether there could be a mistrial simply on the basis of a possible, unproven prejudice.

The capacity for the Court of Crown Cases Reserved to expose the fissures in judicial notions of rightful adjudication was as apparent here as it had been in *Bird and Bird*. There were fourteen judges. Eight of them affirmed the conviction and six declared that there had been a mistrial and ordered a new trial. The nature of the judgments shows two aspects of justice-related discourse: first of all, the degree of willingness to treat the achievement of justice as a principle that defined powers of review and appeal, and secondly, the meaning of justice (and injustice) in the face of uncertain and unknowable facts. Given the text of the Act, the concept of justice and its requirements would be key to their determinations.

Lord Campbell CJ, who gave the first and longest judgment of the six judges in the minority,⁸⁰⁹ concluded that there had been a mistrial on the grounds that the defendant had been substantially deprived of a right to challenge the actual person who served under the wrong name. Furthermore there was a significant body of cases that suggested that such errors would invalidate trials.⁸¹⁰ He also concluded that the Court did possess the power to deal with such an error by way of ordering a retrial. On this he said:

[I]f we have jurisdiction to consider the question, surely we ought finally to decide it, which we can do in this Court without being perplexed by the technicalities by which a writ of error would be surrounded. The fullest powers are conferred upon us by the statute for this purpose, and the simple and expedient course seems to be at once to set aside the verdict and judgment, and to order that the prisoner may be tried before another jury properly constituted. ... There may certainly be a dread that

⁸⁰⁸ The Court had already determined that it did not have a power to review a case that had not yet reached a verdict in *R v Faderman* (1850) 1 Den 565, 169 ER 375

⁸⁰⁹ He was also the original sponsor of the Act creating the Court of Crown Cases Reserved: Rosemary Pattenden, *English Criminal Appeals, 1844-1994* (Clarendon Press 1996) 8

⁸¹⁰ *R v Bird and Bird* (n) 472-3 and 474-5

*frivolous objections to procedure in criminal cases may be encouraged by our decision; but it is no frivolous objection that the prisoner, on a trial for murder, was without any fault of his own deprived of his right to challenge one of the jurymen who tried him, and I hope the Judges may safely rely upon their own efforts, and, if necessary, upon the aid of the Legislature, to repress mere technicalities, which seek to screen guilt instead of protecting innocence. What justice requires ... is that we order an entry to be made on the record ... that in our judgment the party convicted ought not to have been convicted, and that a venire de novo issue.*⁸¹¹

Cockburn CJ was also minded to allow the appeal. Although, as he summarised the situation:

*no practical injustice of any sort or kind has been done to the prisoner; he has sustained no wrong, and, so far as we are made aware, he has preferred no complaint, nor is it alleged on his behalf that he has been in any way prejudiced or wronged by what took place at the trial. Nevertheless there can be no doubt that a prisoner might sustain a very serious prejudice in such a case as the present by a state of circumstances by no means inconsistent with probability, and which may very readily be stated.*⁸¹²

Cockburn CJ did not find this an easy case to resolve for this reason. Like Campbell, he was concerned at the hypothetical objection Mellor could have made even without evidence that the particular juror was objectionable to him. However this raised difficult issues for Cockburn in that existing rules offered no suitable remedy. While a pardon based on proof of some actual prejudice (presumably that there was something that would have been objected to about the actual juror) might solve the problem this could lead to ‘very serious inconveniences.’ On the one hand, a guilty person might escape conviction based on evidence not directly related to the question of guilt. On the other hand, an innocent person could not be sure of escaping conviction merely because of such evidence. There had been, however, a clear breach of the defendant’s rights but this was not enough to overturn a potentially rightful verdict without qualms:

[T]he constitution of the jury should be such as he by law has a right to have it ... [I]t seems to me it is impossible to make a distinction between a case where the prejudice to a prisoner is one that exists in theory and the case where it exists in practice. I wish there were some procedure in the administration of the criminal law,

⁸¹¹ *ibid* 480-1

⁸¹² *ibid* 482

*whereby such a case might be disposed of on its intrinsic merits, where the fact might be ascertained, either by reference to the Judge who presided at the trial, or by reference to this Court if it were necessary, whether in reality the prisoner had sustained prejudice or not ... Under all these circumstances, though I own with regret, that, in a case where no practical wrong or prejudice is alleged to have existed, we should defeat justice by a technicality of this sort being held to amount to a mistrial, I do not see my way to an opposite conclusion, and I think that, at all events, in favorem vitæ, looking at the serious consequences that would ensue to the prisoner if the contrary was held, the wisest course is to hold that there has been a mistrial.*⁸¹³

Coleridge's use of the word, 'justice' shows something of the dominant discourse of the era: it was the factual accuracy that merited this term. To his mind other values were significant reasons, to be set against justice, that were also to influence outcomes. The other judges who spoke in favour of the appeal were Coleridge J, Wightman J (the judge at the original trial), Martin B and Watson B. Coleridge interpreted the act broadly and concluded that it enabled consideration of errors that had taken place after the actual trial.⁸¹⁴ He concluded that there had clearly been a mistrial and that this necessitated a response from the court. His broad interpretation of the 'justice required' provision led him to conclusions about the need to intervene and the nature of such intervention, conclusions which were closer in their boldness to the approach of Campbell CJ and which drew on a broader sense of what justice might entail than that of Cockburn CJ:

*[J]ustice requires us to interfere, and to say that there has been such a mistrial; and though it may be extremely possible that in this case no injustice has been done, I must take leave, with reference to what fell from the Lord Chief Justice of the Common Pleas, to state that in my opinion it is hardly right to judge of the importance of any question of law presented to a Court of justice by considering whether, in any particular case, injustice may or may not have arisen: we know nothing about that; we only know that under a particular state of circumstances injustice may have arisen, or hardship may have resulted; and, if that be so, the prisoner is at liberty to stand upon that ground, and say I am not to be submitted to a state of things in which injustice or hardship may have arisen.*⁸¹⁵

⁸¹³ *ibid* 482-484

⁸¹⁴ *ibid* 489-90

⁸¹⁵ *ibid* 492

Coleridge J resolved the tension between actual and potential factual injustice by applying, therefore, a conceptualisation of justice that recognised that *risks* of factual error could constitute injustice. In this sense, as his last sentence shows, personal liberty or even some form of rights, could inform understandings of what justice was. What mattered more than questions about actual factual accuracy in a simple sense, were issues of the sufficiency of factual accuracy to justify the deprivation of liberty. In practical terms this was not that different from Cockburn CJ's conclusion but it was one that suggested a more fundamental approach to intervention and the overturning of potential errors of the lower criminal courts.

Wightman J (who had originally tried the case) took a broad reading of 'as justice may require' also to conclude that there was a clear basis for ordering a retrial.⁸¹⁶ Martin B concluded that it was necessary 'to give a most liberal construction to the Act of Parliament, and, instead of limiting it, to extend it as far as we possibly can, for the purpose of giving a prisoner the opportunity of asserting every right which the law confers on him.'⁸¹⁷ In fact, inclined to recognise the innovation of the Act, he suggested that rather than achieve a new trial by ordering a *venire de novo*, which was the order under the writ of error procedure, 'the authority given to us by the Act of Parliament ought to be carried out in the plainest, simplest and most direct form we can, and without reference to any of the old entries that occurred in error' and that the order on the record ought to be simply for the defendant to be tried again.⁸¹⁸ Watson B took a similar view.⁸¹⁹

Pollock CB gave the leading judgment of the eight judges who affirmed the conviction (or refused to recognise the Court as having a power to review it). Basing his judgment on a close reading of the relevant statute, he concluded that, as the Act made references to the powers of courts under writ of error procedure, this Court had not been intended to replace those writ of error procedures. There was therefore, he concluded, no authority under the Act to order a new trial, this being a feature of the writ of error procedure and not something that the Act had contemplated.⁸²⁰ This view of the powers of the Court appears to have influenced his willingness to find prejudice and therefore mistrials on the merits of the case. He shared Cockburn's concern at inappropriate acquittals:

⁸¹⁶ *ibid* 495-6

⁸¹⁷ *ibid* 506-7

⁸¹⁸ *ibid* 507-8

⁸¹⁹ *ibid* 518

⁸²⁰ *ibid* 485-6

*If this part of the Act, which enables us to make any other order such as justice may require, is to be taken to apply to a case like the present, I should be glad to know why, if we can award a venire de novo, we cannot grant a new trial in any case where improper evidence has been received, but which in reality was not calculated to have any influence upon the verdict.*⁸²¹

Like Cockburn, he saw a distinction between errors of process (with their hypothetical injustices) and actual errors on the facts (and therefore real injustices). For him, however, the issue was more stark. Having concluded that the Court had no power to order a retrial but only to vacate a conviction, the consequence of finding an error was that a 'prisoner, guilty of some atrocious crime, should not thereby escape justice.'⁸²²

Erle J's conclusion was also influenced by his view of justice, one in which the sanctity of the jury verdict played a key role. He stated that, 'If the present case is to be decided, without reference to authority, by recourse to the principles of justice, the allegation that a party may have been misled in his challenge is insufficient for setting aside a verdict returned by twelve qualified men sworn in the presence of the parties.'⁸²³ There could be no error without actual prejudice being shown.⁸²⁴ He was doubtful, as Pollock had been, of the existence of an entitlement to appeal, a view that was to be solidly based in traditional common law pleading practices. He doubted that any valid reference could have been made to the Court on the basis of information reported to the judge about the mistake, saying:

*The entry must be according to the supposed fact, and ought to be traversable, so that the truth should be legally ascertained. That entry is essential for a judgment in error, and I cannot assent to the notion that every judicial officer who tries an indictment may receive a rumour, and, if he believes it, make an entry accordingly to vitiate a record otherwise correct.*⁸²⁵

Channel B took a similar view,⁸²⁶ and Williams J also interpreted the scope of the Act narrowly. An error revealed after a verdict was, he said, not 'a question of law that had

⁸²¹ *ibid* 486

⁸²² *ibid* 487

⁸²³ *ibid* 500; he had in fact taken the view that there were no clear authorities that assisted a case of this type, a very different view of the case law to the conclusion reached by Cockburn LJ.

⁸²⁴ *ibid*

⁸²⁵ *ibid* 501-2

⁸²⁶ *ibid* 519

arisen on the trial' as the Act specified.⁸²⁷ For this reason no reference could have been validly made in this case. Like other judges in the majority, he also took a limited view of the extent of change under the Act, seeing it as doing little more than placing the powers of the twelve judges on a statutory footing. On this basis he was not willing to interpret the Act in a way that would supplant rights of the Crown in error proceedings without much more explicit statutory provisions to that effect.⁸²⁸

Crompton J was also affirmed of the conviction on the basis that this was the type of case where 'an irregularity has occurred in the course of the proceedings which does not necessarily vacate the verdict, but where the Court ... may interfere if any unfairness or real prejudice has occurred, but where such interference is only a matter of discretion.'⁸²⁹ He also took a narrow view of the extent of reform and preferred the use of writ of error procedures to explore errors of the sort that had been alleged to have occurred.⁸³⁰

Crowder J was also against overturning the verdict. His concern was particularly with the dangers of creating too broad a set of rules for the review of proceedings and therefore undermining the concept of finality:

*Verdicts found at the Assizes and Quarter Sessions after the most patient and careful investigation, where the trials have been conducted with the utmost impartiality, and the results have been most satisfactory to the ends of justice, might be set aside, and the prisoners, if convicted, might have another chance of escape, or, if acquitted, might have their lives and liberty again imperilled by another trial.*⁸³¹

Willes J concluded that there had not been a mistrial⁸³² and that the Act only empowered the Court to make final determinations, not retrials, and therefore 'such order as justice may require' was to be read in a way that was limited to the existing powers stated in the Act (a judgment was reversed, affirmed, amended or avoided but not in any way enabling retrial).⁸³³ Byles J also thought that the defendant had not suffered prejudice and therefore there was no mistrial because 'a mere possibility of prejudice cannot vitiate the trial; for, if

⁸²⁷ 11 & 12 Vict c 78, preamble

⁸²⁸ R v Mellor (n 807) 503

⁸²⁹ ibid 508

⁸³⁰ ibid 513

⁸³¹ ibid 514-5

⁸³² ibid 517

⁸³³ ibid 520-1

so, ... any other misdescription of the juryman, when called into the box, would be a fatal objection to the trial.⁸³⁴

Different conceptions of justice were therefore key in determining these issues. There were clearly different views on the extent to which it was appropriate to review determinations of the lower courts. Such differences stemmed from some of the complicated interactions of the justice values central to this thesis.

The first interaction was another tension within the aspiration for accuracy of verdicts. Concerns about wrongful outcomes influenced thinking on either side. The impossibility of knowing absolutely whether Mellor was guilty of the crime alleged or not was compounded by the fact that the particular error was not one that obviously rendered Mellor more or less apparently guilty. While the principle of challenge seemed generally to protect a defendant's interests in an accurate verdict by allowing him to remove jurors hostile to his cause (a fact noted by more than one of the judges in the minority),⁸³⁵ it was generally accepted that there was no clear evidence that this defendant had in fact suffered any actual prejudice.

The underlying logic of juror challenge was the avoidance of prejudicial thinking in the determination of the case; to prevent the *risk* of irrelevant factors influencing the verdict and therefore undermining its factual accuracy. The error in this case meant that Mellor had lost the *chance* of identifying the *possibility* that a juror *was* prejudicial against him (and of then acting upon that possibility). Even if it had been shown that the actual person on the jury had been hostile to Mellor, it would not be clear that such a person had in fact exercised that hostility. Classic jury challenges could only reach this point and, for the protection of the liberties of defendants, particularly their protection from wrongful punishment, allowed a precautionary power of challenge. The law and the judge's sense of what the justice of the case required had to work, even where the rules on challenge worked as intended, around the sanctified secrecy of jury verdicts. In Mellor's case this was then compounded by the unfortunate lateness of the discovery.

This reality had a differing impact upon the majority and the minority. The majority were, due to the lack of clear signs of actual prejudice, unwilling to override other important values, not only the effective punishment of the seemingly guilty where trial processes *seemed* to be accurate but also the sanctity and finality of the jury verdict. For the

⁸³⁴ *ibid* 522-3

⁸³⁵ Lord Campbell CJ at 473, Cockburn CJ at 482, Wightman J at 495 and Martin B at 505

minority, such concerns *were* outweighed by a more profoundly risk averse attitude to criminal convictions. Although implicit, it is clear that at least some of the judges in the minority were influenced by a sense that the benefit of any doubt should rest with the defendant. Although slow in reaching judicial recognition, the presumption of innocence and even of proof beyond reasonable doubt had been lodged within the discourse of criminal justice for some time.⁸³⁶ The presumption hardly tripped off the tongues of Victorian and pre-Victorian judges but it was well enough recognised to be invoked in argument⁸³⁷ and was recognised by Treatise writers.⁸³⁸ It seems to have influenced Cockburn CJ enough to provide the benefit of the doubt to the defendant '*in favorem vitae*' despite his misgivings.⁸³⁹ Coleridge J was most emphatic on this, seeing it in terms of the defendant's right to an acquittal if the case against him did not reach a sufficiently compelling standard of proof.⁸⁴⁰

The second tension was between this concern about factual injustice and another justice value, that of finality. In fact it was the responses to the appeal and finality question that so profoundly split the judges. All of the judges who thought that the court could not offer a retrial also all concluded that there had not in fact been a mistrial. Equally every judge who concluded that there was a mistrial believed that a retrial was possible.⁸⁴¹ Cockburn came closest to finding a mistrial but refusing to order a retrial, but ultimately he reconciled himself with the minority. There was no reason, in point of legal interpretation or logic, why these two issues had to stand or fall together. It was intellectually possible to conclude that the error in respect of the juror had caused a mistrial but to conclude that the Act did not allow a retrial. Alternatively it could have been decided that there was a power of retrial but one was not needed in this case. This did not happen and it seems that the decision on the retrial issue strongly influenced the mistrial decision. This was especially so given the indistinctness of any actual risk of an inaccurate verdict. For the minority to conclude that there had been a mistrial was not going to present the danger of an innocent man being set free because, in their view, the error only required the matter

⁸³⁶ Langbein suggests that it became a phrase of significant use in assize trials by the late eighteenth century: Langbein, *Adversary Trial*, 264-5

⁸³⁷ It was, for example, used in the argument against presumptions against Sir Francis Burdett in 1820: *R v Burdett* (n 759 below)

⁸³⁸ Starkie, *Treatise* 755

⁸³⁹ *R v Mellor* 484, 1091

⁸⁴⁰ *ibid* 493, 1093

⁸⁴¹ Crowder J only reached a conclusion on the issue of mistrial and did not, therefore, consider the retrial issue

to be tried again.⁸⁴² This option was not open to those who had concluded that a retrial was not authorised under the Act, and they were accordingly confronted by the spectre of a guilty person being acquitted.

The reasons for concluding that a retrial was not authorised seemed to stem from concerns for fidelity to the text of laws. These interpretations were influenced by a respect for the established practices and processes of the law and a resultantly strong sense of the importance of finality of outcomes as a value. Each of these perspectives could be described as 'just' in the broad sense of relating to appropriate outcomes or appropriate processes for reaching those outcomes. Rule fidelity and respect for stated laws represent the justice of consistent application of rules and outcomes, and of the clarity of those outcomes to a wider audience. Finality represents a strong respect for adjudication processes and a sense that the re-opening of those processes either undermines them, threatens liberties or is inefficient and wasteful.⁸⁴³

In reaching a limited understanding of the scope of the Act, Pollock CB combined a respect for the text with a respect for the established practices of the writ of error procedure.⁸⁴⁴ He was clearly also concerned about the implications of being able to reopen cases, however, saying, 'I apprehend it will be conceded on all sides ... that, however much we might all think that justice would require a new trial, we should be incompetent to grant it.'⁸⁴⁵ Erle J also based his consideration on this point on a narrow interpretation of the Act and therefore did not even consider the normative merits of the finality of verdicts; retrial was simply not lawfully empowered.⁸⁴⁶ Williams J's concerns about any such change were sufficient to encourage in him an equally limited interpretation of the changes made under the Act.⁸⁴⁷

Channel B clearly worked on the assumption that the power of the Act was limited to final determinations, saying, 'Whatever the Court does, it is to do finally.'⁸⁴⁸ Byles J was also concerned about the consequences of reopening matters, saying, 'If another rule is once introduced new trials in criminal cases will come in like a flood ... Moreover ... [t]he Crown may ...

⁸⁴² *ibid*: Lord Campbell CJ at 481; Coleridge J at 494. Wightman J and Martin B expressed no specific about acquitting the guilty but both concluded a retrial was appropriate (at 495-6 and 507-8, respectively). Cockburn J was clearly troubled by the idea of acquitting the guilty but concluded that a retrial was the least bad option: at 484

⁸⁴³ I. H. Dennis, 'Rethinking Double Jeopardy: Justice and Finality in Criminal Process' [2000] Crim LR 933; I. H. Dennis, 'Prosecution Appeals and Retrial for Serious Offences' [2004] Crim LR 619 620-2; Ashworth and Redmayne, *Criminal Process* 399-400

⁸⁴⁴ *ibid* 484-5

⁸⁴⁵ *ibid* 487; in the circumstances his apprehension seems to have been somewhat misconceived

⁸⁴⁶ *ibid* 502

⁸⁴⁷ *ibid* 504

⁸⁴⁸ *ibid* 520

take a similar objection, and the validity of all acquittals, past and future, is put in jeopardy.⁸⁴⁹ Crompton J was clearly concerned about unpicking verdicts: 'Very serious difficulties might arise if there should be a second conviction; and ... [t]his Court has certainly never yet awarded a new trial, even in cases where the justice of the case would be best met by a new trial.'⁸⁵⁰ Central to his concern (and that of the other judges) was anxiety as to the formalities of any process of unpicking the record of the previous trial so that it could be legitimately reviewed in this way.⁸⁵¹ This, too, had been Crowder J's concern at the 'awful consequences' of overturning verdicts that had been carefully (and therefore presumably validly) determined.⁸⁵²

Finality concerns were therefore complicated. They were related to notions of formal validity and thus legitimacy as much as to accuracy but, as Crowder J's comments show, they also raised the spectre of uncertainty and the concern that they could be abused in ways that would lead to wrongful outcomes.

There was therefore a sense of the imperfection and the imperfectability of trial processes that always qualified decisions about what a just outcome might be in circumstances of unknowability. It is this uncertainty that perhaps explains the attachment to institutions like juries to which factual determinations could be delegated. Such delegation could further the legitimacy, if not the actuality, of justice as legally understood. This required that such deliberations were properly bounded by rules and processes (as can be seen in *R v Shipley*⁸⁵³ and *R v Burdett*⁸⁵⁴) and that they were subject to clearly defined rules as to what they could decide (as can be seen in *R v Mawbey*⁸⁵⁵). In such circumstances, it was possible to see justice as achieved by following such processes and in maintaining processes for review. But such processes should be profoundly limited in scope so that the underlying validation by jury trial was maintained. This was a much better solution, in the minds of the majority in *R v Mellor*, than putting in place dangerous systems of review that could, in seeking the unattainable ideal of the perfectly accurate verdict, threaten both inaccuracy and instability.

In fact this resistance to retrials could be (and was) argued to favour defendants even more than the crown. The main drive of arguments against retrials was that defendants were

⁸⁴⁹ *ibid* 523

⁸⁵⁰ *ibid* 511

⁸⁵¹ *ibid* 501-2 (Erle J), 504 (Williams J), 513 (Crompton J)

⁸⁵² *ibid* 514-5

⁸⁵³ *R v Shipley* (n 735)

⁸⁵⁴ *R v Burdett* (n 759)

⁸⁵⁵ *R v Mawbey* (n 714)

entitled to a single determination and if that did not prove the case against them, they were entitled on grounds of justice to an acquittal. This can be seen from the reporter's footnote to *R v Winsor* (1865) which explained the situation where a judge discharged a jury that could not reach a verdict:

*If the prisoner has a right to the verdict ... then of course [discharge] must be ground of error ... for that it is of the very essence of criminal justice that the trial should be, if possible, final. It is a fundamental principle in criminal justice that there should be no new trial, either for or against a prisoner. All the rules and principles of procedure have a mutual relation; and this is closely connected with another, that the evidence in a criminal—at all events a capital—case, must be clear and conclusive beyond any reasonable doubt.*⁸⁵⁶

The danger was, as *Winsor v R*⁸⁵⁷ itself shows, that adherence to strict rules and formal processes could threaten injustices. By the 1860s a little more reasoning was required. The *Winsor* appeal concerned a second trial of a defendant following the discharge of the jury at a first trial. The defence had objected to the second trial on the basis that the defendant had previously been put on trial for that same offence but that the jury at the first trial had been discharged when unable to reach a verdict. It was therefore argued that the subsequent trial was unlawful.

In ruling that the decision to discharge the jury had been unlawful, Cockburn CJ said:

It appears to me that, if the true principle on which justice ought to be administered is regarded, it is essential in trial by jury not to abridge the judge's discretion, but to leave it unfettered. Our ancestors insisted on unanimity as the very essence of the verdict, but they were unscrupulous as to the means by which they obtained it; ... we, now-a-days, look upon the principles on which juries are to act, I hope, in a different light. We do not desire that the unanimity of a jury should be the result of anything but the unanimity of conviction ... When, therefore, a reasonable time has elapsed, and the judge is perfectly convinced that the unanimity of the jury can only be obtained through the sacrifice of honest conscientious convictions, why is he to subject them to torture, to all the misery of men shut up without food, drink, or fire, so that the minority, or possibly the majority, may give way, and purchase ease to themselves by a sacrifice of their consciences? I am of opinion that so far from the

⁸⁵⁶ *R v Winsor* (1865) 4 F & F 363, 376-8; 176 ER 600, 609

⁸⁵⁷ *Winsor v The Queen* (1865-66) LR 1 QB 289 (the matter reported at 4 F & F 363) was appealed by a writ of error to the Queens' Bench

*practice of thus discharging a jury being a mischievous one, it is one essential to the upholding of the pure, conscientious, and honest discharge of the duties of a juryman.*⁸⁵⁸

In both *R v Mellor* and *Winsor v R*, Cockburn CJ advanced a view of justice that was fact-dependent and therefore promoted flexibility and discretion on the part of the judges overseeing the adjudication. These views can be contrasted with the majority in *Mellor* and the orthodox theory of jury deliberations that was expressed in the Foster and Finlayson report but overruled in this Queen's Bench judgment. Those judges were not simply preferring rules over appropriate outcomes, however; they (or some of them) were willing to explore the best solution so long as it did not involve retrying the defendant. This, of course, limited their options in the uncertain situation they faced there but they were not (at least not all) averse to conceiving of appeals as corrective reviews of errors.

It was the nature of the errors that they were correcting that differed. Channel B, for example, was to say, in *Winterbottom v Derby*, in 1865, 'The real meaning of reserving leave is to raise a point of law for the consideration of the Court, and they have to deal with the case as they think best in the interests of justice.'⁸⁵⁹ It may make a difference that that was a civil case and *Mellor* was criminal, not because there was a clear distinction in terms of what a just process was in each type of proceeding, but because there was a fear of wrongful acquittals that informed many of the opinions in criminal cases. For Channel B, the concern in *Mellor* had been that decisions should be final rather than re-litigated. In *Winterbottom*, this was not an issue; the flexible solutions he conceived (arresting judgments, entering a nonsuit or entering a verdict) were all final solutions to the case. What did not feature within his sense of the best interests of justice was reopening the issues. Legal decisions could be reviewed, factual decisions could not.

By the 1860s, therefore, a complicated set of justice principles were being deployed in considerations of whether or not to revisit or reconsider trial determinations. Accuracy of outcomes was central but did not offer only one solution. From one perspective, it required faith to be placed in fact-finding institutions like the jury. On the other hand, and allied with a growing sense of the importance of the presumption of innocence, it required what has since been referred to as the 'principled asymmetry' of favouring defendants in situations of doubt.⁸⁶⁰ However, both of these perspectives had to be reconciled with other ingredients of what could

⁸⁵⁸ *ibid* 305; the other three judges, Blackburn J, Mellor J and Lush J, decided the case on similar bases

⁸⁵⁹ *Winterbottom v Derby* (1866-67) LR 2 Ex 316, 323

⁸⁶⁰ Paul Roberts, 'Double Jeopardy Law Reform: A Criminal Justice Commentary' (2002) 65 MLR 393, 402-4; Roberts and Zuckerman, *Criminal Evidence* 19

be described as justice. These include requirements of rule consistency, formal validity and the avoidance of delay. As with other areas of procedure, invocation of justice carried with them a range of frequently conflicting values.

Conclusion to Part One

For all its use as a rhetorical term to advance or justify arguments, justice was therefore profoundly ambiguous. At the same time, the term had a clear core meaning, a loose sense of rightness or appropriateness that involved both achieving the right result and adopting the right processes for doing so.

What the term did not itself identify, and therefore the basis for the fundamental ambiguity, was the precise form of rightness that was 'just'. The term could be, and was, associated with a number of values all of which could comfortably be associated with a notion of 'justice'. There were its conceptions. They included accurate determinations; morally appropriate outcomes; fair processes; fidelity to rules (the law in particular) and consistency; effective remedies and protections; efficiency; access to processes; the protection of rights and liberties; and the sanctity and legitimacy of determinations. These values were not always explicitly associated with justice but at times each one was. When this happened, such values were also being opposed. The invocation of justice therefore raised questions and so engaged with conceptualisations of how to do the right things or to do things in the right way. In the oppositional discourse that was litigation, such invocations would be opposed by counter arguments that, even if not explicitly associated with justice (although some were), created questions about what justice meant. It was therefore the flexibility of meaning combined with incentives to dispute that fostered this ambiguity.

In fact, as the preceding analysis has shown, accuracy did provide a central value of procedural justice discourse during the period from 1770 to 1870. Although not within the scope of this thesis, similar values, in terms of appropriate outcomes, were probably attached to uses of the concept of justice when invoked in debates about the substantive content of the law. Such an emphasis on accuracy was possibly more marked during the later half of this period, but concerns with maximising the quantity and quality of information was a core concern of judicial procedural justice. This 'right answer' concern also cohered with more popular uses of the word. Within legal discourses, however, finding the right answer did not itself provide a clear enough sense of how procedures should be run. This was so even when accuracy was not qualified by other justice concerns that have been identified in this Part. Even where it was simply a matter of achieving accuracy, there were difficult questions of *how* such accuracy was best attained. These concerns

keyed into much wider questions, reflecting the tensions between paternalistic and laissez-faire governance.

More fundamentally, justice as a value (whatever it meant on each occasion) was largely (but not entirely) subordinate to the existing rule structure of the law. The primary, and generally implicit, value of justice was consistency with and adherence to settled rules. This was far from absolute. Justice could lead to innovation and even reform. More frequently it could act as a lever for reinterpretation or restriction of rules. It was far from predominant in doing so, however. Justice arguments were only generally adopted where existing rules had not already settled the issues.

Examination of the discourse of the central courts is, however, only one way of understanding justice and its significance to adjudication. There were other courts away from the centre that also confronted similar problems of unknowability and ambiguity. They too had to reach rightful outcomes in situations of doubt and dispute. It is one such set of courts, the Courts of Quarter Sessions, that will be examined in the next Part. They were not at the centre and they were far less part of a national system of law-making. For all that, as shall be seen, they attempted in their own ways to determine how best to make just decisions and to provide just ends.

Part Two

The Justice of the Quarter Sessions

Chapter 5

Introduction to the Quarter Sessions

The superior courts in London were only a few of the many arenas in which a concept of justice was invoked and put into practice. In fact, the vast majority of disputes were resolved, and therefore justice enjoined, locally. The methods used were wide and varying and not all, of course, were legal. Thompson, for example, has illustrated the significant use of local community pressures and practices to punish or control the recalcitrant, the rebellious or those perceived as acting shamefully with rough music, 'riding the stang' and the charivari.⁸⁶¹ At the heart of such practices were local determinations of disputes and conflicts of a communal, non-institutional and roughly democratic nature. They were also practices that could spill over into social protest against local and national state institutions.⁸⁶²

There was also a broad array of localised legal institutions that aspired to effect justice in their decision making, including, according to Blackstone in 1765, the Courts of Oyer and Terminer and General Delivery (i.e. the Assizes), the Courts of Quarter Sessions for each County, Riding or Borough, the Sheriff's Tourn, the Courts Leet, the Coroners' Courts and the Court of the Clerk of the Market, as well as 'a few other criminal courts ... of a more confined and partial jurisdiction' and various ecclesiastical courts.⁸⁶³ In fact many of those courts exercised what would certainly now be, and was to some extent then, seen as both criminal and civil jurisdictions.⁸⁶⁴

In this Part Two of the thesis, the practices of one of these types of courts, the Courts of Quarter Sessions, will be the focus for analysis. The approach adopted here will be different from Part One although the purpose, to explore how justice varied, remains the same. Here the lack of text-rich sources requires different approaches and methods.

Two main sources of data will support this analysis: the rules and orders under which Quarter Sessions operated and the practices of particular courts in reaching decisions. A number of sets of rules and orders will be used from across England during the period. The practices of the Quarter Sessions courts will be explored by examination of minute books and indictment books of courts of Quarter Sessions in the West and North Ridings. Such a focus on particular courts in

⁸⁶¹ Thompson, *Customs in Common* 467-531

⁸⁶² Ibid 516-8 and see Walter, 'Grain Riots' and Robert W Malcolmson, 'A Set of Ungovernable People': The Kingswood Colliers in the Eighteenth Century' in John Brewer and John Styles (eds), *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* (London 1980)

⁸⁶³ Blackstone, *4 Bl Comm* (1st edn) 260-75

⁸⁶⁴ David Lieberman, 'Mapping the Criminal Law: Blackstone and the Categories of English Jurisprudence' in Norma Landau (ed), *Law, Crime and English Society, 1600-1830* (CUP 2002) 140

particular regions is necessarily limited and it is not intended to claim that the results necessarily show a national pattern. In fact a core argument of this thesis is to contend that attempts to see such national patterns should be adopted with some caution. While national factors and influences will certainly be seen, much of the practice of these courts remained throughout this period profoundly local. In this sense, focus on these two Ridings does not make any particular claim as to their importance. They are simply the two most accessible courts at the time of researching this project, and a broader analysis using the same approaches will certainly serve to draw a wider and fuller picture in due course.

The rules and orders of the Quarter Sessions do not invoke justice explicitly but there is evidence of the justice values discussed in Part One being effected in their drafting and implementation. The examination of these Standing Orders⁸⁶⁵ offers both a temporal and geographical perspective on the practice of these courts. Developed as they were across England and Wales from the late eighteenth century, examining them offers perspectives on processes of change over time and on the complicated web of interactions between different legal bodies in eighteenth and nineteenth century England. As shall be seen, orders were often developed, or adapted to changes, as a result of developments within a wider national legal culture. Equally, however, they reveal considerable continuities that sometimes defied, diluted or even, seemingly, ignored legal reform and therefore defended or preserved older notions of how justice should be delivered.⁸⁶⁶

As records of localised norm-creation, the Standing Orders of the Quarter Sessions also offer evidence of relations *among* regional institutions. King has identified the paucity of evidence as to how ideas and practices were transmitted across jurisdictional boundaries and of the exchange of ideas. Nonetheless, he notes, judicial practices in one part of the country have a habit of appearing elsewhere. Not all such changes can be attributed to initiatives from the centre. Innovation was as likely to result from localised responses to issues perceived from local perspectives.⁸⁶⁷ At the same time, however, there is clear evidence that initiatives were not *purely* local. Examination of the rules will confirm and expose examples of the sharing of ideas and practices between localities that King has revealed in other contexts.⁸⁶⁸

The surviving Standing Orders are not numerous and so the approach to be adopted is to examine those drafted across the period from the 1760s (when the first such orders were produced) into the 1880s to identify trends within rule-making among the Justices and therefore

⁸⁶⁵ The various orders in fact came under different names. 'Standing Orders' will be used as a generic term.

⁸⁶⁶ King, *Crime and Law* 36-7

⁸⁶⁷ *Ibid* 3-5

⁸⁶⁸ *Ibid* 53-5

the ways that justice values (if not explicitly justice itself) were effected by such local jurisdictions.

The data contained in the minute books and indictment books is much more extensive but far less text-rich. By the late eighteenth century, the Quarter Sessions in both the West Riding and the North Riding had developed distinct methods of recording their processes. In the West Riding, a series of Order Books was maintained alongside an Indictment Book. The Indictment Books recorded, in short form, the content of indictments, the determinations of the cases that resulted under those indictments, the names, and sometimes the details, of the jurors, and, until the 1830s, the recognisances that the court had taken. As a formal record of each session, the recital at the start also identifies the Justices formally in attendance (although it does not identify which ones were particularly engaged with the determination of judicial business).⁸⁶⁹ The Order Books recorded the governance business of the Sessions (although including appeals against Removal Orders).

By the late eighteenth century, the North Riding had also separated its 'judicial' and 'administrative' orders into two different sets of books. The North Riding recorded the *outcome* of cases and in doing so would replicate the content, for the most part, of the indictment. North Riding records also included, during the early years of the nineteenth century, a broader range of judicial matters including records of persons committed to the Sessions either from previous sittings or by lesser courts. Until the 1820s there was regular recording of the fate of vagrants who had been committed to the House of Correction.⁸⁷⁰

⁸⁶⁹ *West Riding Quarter Sessions Indictment Book, July 1776 to October 1780* (WR QS 4/39, 1776-1780); *West Riding Quarter Sessions Indictment Book, October 1780 to January 1784* (WR QS 4/40, 1780-84); *West Riding Quarter Sessions Indictment Book, July 1797 to January 1800* (WR QS 4/45, 1787-1800); *West Riding Quarter Sessions Indictment Book, January 1800 to October 1801* (WR QS 4/46, 1800-1); *West Riding Quarter Sessions Indictment Book, January 1818 to July 1819* (WR QS 4/54, 1818-1819); *West Riding Quarter Sessions Indictment Book, October 1819 to July 1821* (QS 4/55, 1819-21); *West Riding Quarter Sessions Indictment Book, July 1821 to January 1823* (QS 4/56, 1821-23); *West Riding Quarter Sessions Indictment Book, April 1838 to July 1839* (QS 4/67, 1838-1839); *West Riding Quarter Sessions Indictment Book, July 1839 to July 1840* (QS 4/68, 1839-40); *West Riding Quarter Sessions Indictment Book, October 1840 to July 1841* (QS 4/69, 1840-41); *West Riding Quarter Sessions Indictment Book, January 1858 to April 1859* (QS 4/87, 1858-9); *West Riding Quarter Sessions Indictment Book, May 1859 to July 1860* (QS 4/88, 1859-60); *West Riding Quarter Sessions Indictment Book, October 1860 to October 1861* (QS 4/89, 1860-1)

⁸⁷⁰ *North Riding Quarter Sessions Minute and Order Books 1778-92* (QSM/1778-92); *North Riding Quarter Sessions Minute and Order Books 1798-1804* (QSM/1798-1804); *North Riding Quarters Sessions Minute and Order Books 1814-1820* (QSM/1814-1820); *North Riding Quarter Sessions Minute and Order Books 1820-24* (QSM/1820-4); *North Riding Quarters Sessions Minute and Order Books 1834-43* (QSM/1834-43); *North Riding Quarters Sessions Minute and Order Books 1843-59* (QSM/1843-59); *North Riding Quarters Sessions Minute and Order Books 1859-70* (QSM/1859-70)

Despite the differences between these two documents, they contain sufficiently similar information to support comparison. The information on crimes, whilst lacking the sort of details to be obtained from trial transcripts, case reports or depositions, does provide enough evidence of the areas of practice of the Sessions and useful insights into aspects of the judicial practice of these courts. The main data on the Sessions held and the numbers of cases conducted can be seen in Appendix 8.

Owing to the breadth of judicial business in these courts across a century, it has been necessary to focus on particular smaller periods. Five such periods have been selected, namely Michaelmas term 1778 to Midsummer term 1781 and the corresponding sessions in the years 1798 to 1801, 1818 to 1821, 1838 to 1841 and 1858 to 1861.⁸⁷¹ There are, admittedly, methodological challenges to such an approach. It covers only a fraction of the 100-year period proposed. Equally in the interests of achieving an even spread, these periods run the risk of missing important steps in the processes of development. There are two aspects to this problem. One is that important dates, events or phases may be missed. The particular periods chosen miss completely the late 1820s and early 1830s when significant changes to the criminal justice process were effected, for example. Equally, given that the period from 1815 to 1818 has been omitted, this analysis can add little to Beattie's analysis of the relationship between prosecution rates and the end of warfare.⁸⁷² Secondly, what is produced is a stop-action image. Where change is revealed in this way, the *processes* by which such change occurred are not generally visible. What one gets instead is the stark result of any such change.

These difficulties are, however, offset by some of the advantages of such an approach. The primary question of this thesis is whether it is possible to identify and define variance in concepts of justice and its relationship to the practice of those involved in justice-related processes. To this end, a snapshot view of particular periods provides an illustration of the differences in practices and values across decades. Equally by taking five distinct sections of the judicial process, it is possible to make clearer like-for like comparisons while, it is hoped, at the same time putting each period in an accurate context.⁸⁷³

By examining these practices of the courts, it will be possible to see glimpses of another set of social structures in which justice practices had their own discourse and meaning. This analysis will

⁸⁷¹ Starting in Michaelmas rather at the beginning of any particular calendar year was a decision based on the availability of sources for all three courts.

⁸⁷² Beattie, *Crime and the Courts*, 213-6

⁸⁷³ A similar approach was adopted by King in evaluating the punishment of assaults at the Essex Quarter Sessions although he used wider periods of analysis across a shorter span of time: King, *Remaking Justice* 233-6

attempt to show, by looking from different perspectives, that the justice values identified and evaluated within the discourse in Part One also influenced the decision making practices of Quarter Sessions courts. In particular, it will be seen that within Quarter Sessions practice, there were reconciliations between the justice of rigid and predictable rules and formalities, on the one hand, and a 'right answer', accuracy-based, and essentially discretionary, justice on the other. At the same time these notions of formality underpinned the legitimacy of the verdicts obtained in these ways. The procedures of the Quarter Sessions also created tensions between the flexibility and practicality of this local and non-professional system of justice and aspirations towards promptness and efficiency. These tensions in turn required the development of rules and practices to promote effective notice of, and participation in, trial processes, outcomes which can be associated with values of accuracy and appropriate outcomes. As with Part One, therefore, it might be possible to perceive ambiguities and tensions within what might be described as 'justice.'

In the analysis that follows, the increasing influence of the centre, in the form of Parliament and the Home Office, will be seen. As nineteenth century criminal justice and law reform more generally became a matter of Peelite rationalisations, Benthamite lobbying, Whig activism and the social crises that were encapsulated in the 'Condition of England' question, central government became an increasingly powerful force for change in respect of local legal practices.⁸⁷⁴ The central courts, the legal professions and legal literature clearly set boundaries around, and imposed influences upon, the decision making processes of each Quarter Sessions. These processes of change were, however, not simply responses to such centralising and harmonising influences. Some areas of practice were left relatively untouched and, even where such reforms impacted directly on the business of the sessions, gaps and ambiguities in this central legal code were such that much was still left within the discretion of local justices.

Before starting with such an examination, however, it will be sensible to put the North and West Ridings Quarter Sessions in context.

The North and West Ridings from 1770 to 1870

The County of Yorkshire was divided into three Ridings, each radiating out from York itself. Each Riding was a distinct legal jurisdiction, as was the city of York itself, being constituted as the Liberty of St Peter. Each Riding was itself divided into a number of *wapentakes*, the equivalent of

⁸⁷⁴ Briggs, *Age of Improvement* 217-8, 273-85; Eastwood, *Governing Rural England*, chapters 3 and 9; B. Hilton, 'The Gallows and Mr Peel' in Blanning TCW and David Cannadine (eds), *History and Biography: Essays in Honour of Derek Beales* (Cambridge University Press 1996); Hilton, *England 1783-1846* 316-9; 575-9

hundreds of divisions in other counties into which judicial activity was divided.⁸⁷⁵ The geography of the North and West Ridings can be seen by examining the maps set out in Appendix 3.

The West Riding was the more populous and industrial of the two counties, encompassing most of the industrial towns as well as the western part of the Vale of York. The population of the Riding in 1801 was over 600,000 and twice that by 1851. This growth was fuelled by industrial expansion and that industry was, to a considerable extent, based around wool, coal and, in the south, steel. Leeds was to become the biggest city in the Riding by 1861 with a population of 207,000, gaining its prominence from its position as a principal market for woollen goods and coal. Bradford was profoundly influenced by the wool industry. By 1881, the city was producing 25% of all the worsted in the Riding. Its population grew from 9,000 in 1760 to 106,000 by 1861. Huddersfield grew less slowly, at least until the advent of the railway and steam milling in the mid-century. By the 1830s there were 42 mills in the city and 45 in the neighbouring parish of Almondbury. Bradford had six mills in operation by 1800, 39 by 1834 and 153 by 1851.⁸⁷⁶

Even in the 1770s, Sheffield and the outlying area depended on steel manufacture, particularly edged tools. Over the following century, this industry was to expand to Rotherham and Doncaster. Although established as an industrial centre in the late eighteenth century, it was to experience rapid growth in the first decades of the nineteenth century. Its population was approximately 65,000 in 1821 and about 111,000 by 1841. Sheffield's iron steel trade depended significantly on nearby sources of coal, another of the West Riding's principal industries. Coal production was to grow significantly in the period from 1775 to 1830.⁸⁷⁷ Coal fields ran from Leeds south and east to the edges of the riding, providing substantial employment in cities like Doncaster and Pontefract.⁸⁷⁸

The West Riding was not entirely industrial, however. Also included within the Riding were many of the valleys of the Dales based around the market towns of Skipton and, on the edge of the Vale of York, Knaresborough and Wetherby, and the coal mining districts were still largely rural. The agricultural economy still bestowed upon the towns and cities of the Riding a considerable

⁸⁷⁵ Cornish and Clark, *Law and Society* 20; see Appendix 6 for the distribution of these wapentakes.

⁸⁷⁶ Elie Halévy, *England in 1815*, vol 1 (2nd edn, Ernest Benn 1949) 301; John Richard Knipe, 'The Justice of the Peace in Yorkshire, 1820-1914, a Social Study' (Ph.D thesis, University of Wisconsin 1970) 2; Clifford John Lines, *Companion to the Industrial Revolution* (Facts on File 1990) 123, 190; Chris Williams, 'Expediency, Authority and Duplicity: Reforming Sheffield's Police, 1832-40' in Robert J Morris and Richard H Trainor (eds), *Urban Governance, Britain and Beyond since 1750* (Ashgate 2000) 118

⁸⁷⁷ In 1775 the Yorkshire coal fields are estimated to have produced 850,000 tons of coal, which was to increase to 2,800,000 by 1830: Daunton, *Progress and Poverty* 220

⁸⁷⁸ Asa Briggs, *The Age of Improvement, 1783-1867* (Longman 1959) 31; Knipe 2; Lines, *Companion to the Industrial Revolution* 123, 190; Williams, 'Reforming Sheffield's Police' 118

economic and social importance even outside of the industrial areas, and also provided significant industrial by-employment in parts of the county, such as knitting in the Yorkshire Dales, trades that would be increasingly dislocated as industrialisation progressed.⁸⁷⁹

The North Riding was more significantly agricultural for most of the period from 1770 to 1870. The Yorkshire Moors dominated the central part of the Riding, with bands of low-lying farmland in the Vale of York, the Vale of Pickering and Allertonshire in the central northern area. Until the growth of Middlesbrough in the mid-nineteenth century, it was predominantly a region of villages and market towns. It was also, however, a coastal county, with Scarborough and Whitby in particular providing substantial revenue to the Riding throughout the period.⁸⁸⁰ Scarborough was an incorporated borough with its own court of Quarter Sessions, as was Ripon further west. Whitby was part of the North Riding although it had its own wapentake, Whitby Strand.⁸⁸¹

The Quarter Sessions in 1770

As Eastwood has suggested, the Courts of Quarter Sessions had, by the late eighteenth century, become much more than the creature of their statutory origin. Required by law to sit in the four sessions of the year,⁸⁸² the Courts of Quarter Sessions in both Ridings had extended their business by adding a number of adjourned sittings to those required by law. The pattern and location of sittings in the two Ridings in 1779 can be seen in Table 2 below.

Both Ridings appear by the 1770s to have distributed much of their business around their respective jurisdictions. In the West Riding, sittings were divided into roughly three areas. The rural north received sittings of the sessions at Wetherby, Skipton and Knaresbrough three times per year. The southern wapentakes were served by two sessions, those in Sheffield and Doncaster, while the western parts of the county were served by sessions in Wakefield, Bradford, Leeds and Pontefract.

In the North Riding, the distribution across the county was less pronounced. Most of the sessions were held in the central belt of land, with sessions at Northallerton and Thirsk, in the central wapentake of Allertonshire, and Easingwold just further south in Bulmer. Sessions would be held for the outlying areas of the Riding on a seemingly rotating basis. The northern parts were provided sessions in Guisborough or Stokesley, the east with sessions in New Malton and the west with sessions in Richmond. The basis upon which this allocation proceeded is not

⁸⁷⁹ Knipe 4; Daunton, *Progress and Poverty*, 27

⁸⁸⁰ Knipe 5

⁸⁸¹ See Appendix 6.

⁸⁸² 2 Hen 5 C 4

particularly clear. Certainly by the time hearings were made more systematic in the first decade of the nineteenth century, there appears to have been a clear desire to make particular provision for the two edges of the county.⁸⁸³

	<i>North Riding</i>		<i>West Riding</i>	
Christmas	Easingwold	12 th January	Wetherby	12 th January
	Richmond	14 th January	Wakefield	14 th January
			Doncaster	20 th January
Easter	Northallerton	13 th April	Pontefract	12 th April
Midsummer	Guisborough	13 th July	Skipton	13 th July
	Thirsk	15 th July	Bradford	15 th July
Michaelmas	Northallerton	5 th October	Knaresbrough	5 th October
			Leeds	7 th October
			Sheffield	13 th October

Table 2: Sessions of the North and West Ridings 1779 (Sources: North Riding Quarter Sessions Minute Books 1778-92; West Riding Quarter Sessions Order Books)⁸⁸⁴

The Quarter Sessions were not simply criminal courts. They were not even simply a court in any traditional sense. The business of the Justices of the Peace at each sessions was governance of the county. Much of this was achieved, however, through the medium of the law. Punishments were levied on those who had failed to carry out duties of administration and management, such as those for inhabitants who failed to maintain local roads or bridges. Equally parochial administration of poor relief and rates was overseen by appellate system at the Sessions. Justice at both Petty and Quarter Sessions also oversaw the control of vagrants. Over the centuries, the Quarter Sessions had therefore become responsible for the state of repair of much of the infrastructure of the county, the social provision for the poor and a variety of economic matters.⁸⁸⁵

At the heart of this county governance, therefore, was the judicial practice of the sessions. It also involved the trial of those charged with assaults, misdemeanour and felonies. The jurisdiction

⁸⁸³ *North Riding Quarter Sessions Minute and Order Books 1778-92 (1778-92)*

⁸⁸⁴ *North Riding Quarter Sessions Minute and Order Books 1778-92 (1778-92); West Riding Quarter Sessions Order Books (1777-81)*

⁸⁸⁵ Eastwood, *Governing Rural England* 44-5. On the powers relating to highways and bridges see Burn, *Burn's Justice* (12th edn) 261-5 and vol 2 361-3, 385-7. Even in the 1772 the laws relating to the poor were so extensive that they took up over 220 pages of Burn's work: *ibid* vol 3, 297-520. By the 1810 edition the laws relating to the poor merited their own volume: Richard Burn, Charles Durnford and John King, *The Justice of the Peace and Parish Officer*, vol 1 (21st edn, 1810), vol 4

over crimes without benefit of clergy had been lost in the early eighteenth century⁸⁸⁶ but, as Beattie has shown, by a variety of practices, particularly in the devaluation of items, the Quarter Sessions acquired jurisdiction over a wide range of larcenies. They also tried violent offences, public order offences and a range of other specific statutory offences.⁸⁸⁷ The untidy state of the criminal law in the late eighteenth century meant that a number of potentially quite serious crimes remained within the jurisdiction of the Quarter Sessions as misdemeanours. These included attempted rapes or murders, which were deemed simply to be aggravated assaults.⁸⁸⁸ Even in relation to this purely judicial business, there was more than punishment as an aim. Some 'crimes' adjudicated by Sessions were as much civil as criminal in nature. A considerable number of actions for assaults entailed some sort of compensation to the victim rather than punishment for perpetrators. This practice was recognised and even encouraged by writers such as Burn.⁸⁸⁹ Equally, the possibility, however much frowned upon, of reaching compositions between victims and offenders, meant that even crimes such as larceny fulfilled compensatory rather than punitive functions.⁸⁹⁰

Because of this extensive, litigation-based jurisdiction, the justice of procedural formality mattered. Quarter Sessions prosecutions were commenced either by indictment or information. Until the early nineteenth century a prosecution could also, in theory, be prosecuted by the ancient process of 'appeal of felony' but it was commonly accepted that such a procedure could not be used at the Quarter Sessions.⁸⁹¹ Certainly no Standing Orders made provision for any such prosecutions, nor is there evidence of such prosecutions taking place.⁸⁹²

Prosecution by information was also possible. Burn considered them to be appropriate for 'a variety of crimes less than capital ... and also in very many cases wherein the offender is liable to a fine or other penalty.'⁸⁹³ Blackstone, however, argued that they should not be used to prosecute felonies because a felony prosecution required that the case would have been 'warranted by the oath of twelve men'.⁸⁹⁴ Prosecution by information was therefore less common. They featured far less in rules created under the Standing Orders and in the records

⁸⁸⁶ William Blackstone, *Commentaries on the Laws of England*, vol 4 (4th edn, 1770) 268

⁸⁸⁷ Beattie, *Crime and the Courts* 5-6

⁸⁸⁸ *Ibid* 129; Blackstone, *4 Bl Comm* (1st edn) 217 (specifically assault with intention to commit rape and assault with intention to kill)

⁸⁸⁹ Burn, *Burn's Justice* (12th edn), vol 2, 164

⁸⁹⁰ Beattie, *Crime and the Courts* 39-40; King, *Crime* 228-9, 240-1

⁸⁹¹ Burn, *Burn's Justice* (12th edn) 53

⁸⁹² The process was abolished in 1819: Appeal of Murder, etc Act 1819 (59 Geo 3 c 46), s 1; Bentley, *Criminal Justice 2*

⁸⁹³ Burn, *Burn's Justice* (12th edn) 473

⁸⁹⁴ Blackstone, *4 Bl Comm* (1st edn) 305

contained in the order books and indictment books generally. Informations do, however, appear to have been a frequent element of prosecution of the borough Quarter Sessions, which frequently also exercised petty-sessional jurisdiction⁸⁹⁵.

The usual way of starting cases at the Quarter Sessions, whether for felonies, misdemeanours and assaults, was therefore by indictment. Misdemeanours, at least until the 1830s, formed a substantial portion of Sessions business. Insofar as not expressly defined as a felony, assaults were, in theory, misdemeanours. In procedural terms, the precise boundary between these classes of offence was not always clear. Procedures in assault cases varied from court to court. In some, assaults were treated as a form of action distinct from other misdemeanours, in other courts as a procedural alternative to felonies.⁸⁹⁶ Although assault cases would be prosecuted on indictment alongside other cases, they would appear on the same trial list and even be heard by the same jury; however the means of disposal, the punishments imposed, the fees to be charged and sometimes even the procedures followed would often be different.

Road and bridge prosecutions were equally ambiguous. Roads or bridges in disrepair were the basis for prosecution at the Sessions of the parishioners of the local parish or owners of the relevant land. In the case of bridges, responsibility fell on the inhabitants of the county or Riding as a whole. Such defendants faced fines for their breach of duty and an on-going duty to make good the repair enforced through constant attendance at the Sessions and the possibility of distraint of goods.⁸⁹⁷ The rules of procedure for road disrepair was reformed in 1835 but prosecution before Justices remained the principal method of ensuring repairs were made.⁸⁹⁸ The content of Rules and Standing Orders relating to roads and bridges was in fact as profoundly focused on defining how such prosecutions proceeded as were the rules on notice or traverses (with which they occasionally overlapped).

Sessions meetings therefore varied in content. In this they were not unique; assize courts also dealt with civil and criminal actions but the assize courts were much more profoundly 'judicial'

⁸⁹⁵ *Minute Book of the Court of Quarter Sessions for the Borough of Scarborough* (1798-1801)

⁸⁹⁶ Of the 23 counties making returns to Parliament in 1842 regarding their fees, 10 specified distinct fees for assault cases, 13 specified distinct fees for felonies. The diversity of practice in this area is suggestive of the range of conceptions of the business of the courts. For example, the Huntingdon Sessions would charge 2s for a felony indictment, 3s 6d for a common assault indictment and 13s 6d for a nuisance or a misdemeanour indictment. The Essex Sessions did not charge any fee for indictments. The Kent Sessions categorised indictments as 'felony' (2s in the case of a simple larceny), 'bridge and roads' (no fee) and 'misdemeanours', which last category was subdivided into 'trespass' (4s) and 'special' (7s 6d per folio).

⁸⁹⁷ Highway Act 1773 (13 G3 c 78), s47; Burn, *Burn's Justice* (14th edn) 423-428, vol 4 47

⁸⁹⁸ The General Highways Act 1835 (5 & 6 Will IV, c 50); Burn, Chitty and Bere, *Burn's Justice* (29th edn), 588-599; the power for prosecutions to be commenced by presentment by one of the justices of the county was, however, abolished.

and more clearly categorised proceedings between the civil and criminal.⁸⁹⁹ Civil and criminal assize hearings would often be heard on different days or at different points. This was not the case at the Sessions, certainly in the eighteenth century. This was to change. There was an increasing tendency in Quarter Sessions orders and in legal literature to encourage a systematic procedure distinguishing different types or classes of judicial business. However, such reforms did not distinguish assault cases from other prosecutions until the mid-nineteenth century and, as Burn's explanation of Sessions shows, it was commonly accepted that assaults were a proceeding in which compromise and composition would play quite as much a part as punishment.⁹⁰⁰

An indictment would be put before the Grand Jury at the Quarter Sessions and they would decide whether there was sufficient evidence to proceed to trial. An alternative means of commencing crimes was by presentment, a method used mainly in relation to bridge and highway disrepair and public nuisances. In such situations, allegations were presented by an interested party (usually a Justice of the Peace) without being first put in the form of an indictment. If the Grand Jury found sufficient evidence on the matters presented, an indictment would then be drafted.⁹⁰¹

The Grand Jury was part of a process of filtering out evidentially weak (or potentially morally inappropriate) cases. It was in fact the second decision-making stage in most crimes. Most accused persons would first have been brought before a Justice acting as an examining magistrate. Although such Justices were expected to pass cases on for trial at the subsequent Sessions or Assizes, gaps and ambiguities in the legal regime under which they operated allowed many cases to be dealt with informally without proceeding as far as a further hearing.⁹⁰² They only heard evidence from the prosecution witnesses to determine whether there was sufficient reason to call upon the defendant to answer the charge. If at least twelve members of the Grand Jury decided that there was a sufficiently strong case, the bill of indictment presented would be endorsed a 'true bill' and delivered into court for further proceedings.⁹⁰³

Beattie has suggested that the Grand Juries at both Assizes and Quarter Sessions were surprisingly diligent in the filtering out of inappropriate cases. He has suggested that the Surrey

⁸⁹⁹ Halévy, *England in 1815* (2nd edn) 112-3

⁹⁰⁰ Burn, *Burn's Justice* (12th edn) 164; Burn at this point cites the Crown Circular as authority of the suggestion that compromises on such prosecutions would be appropriate. See King, *Remaking Justice* 228-9

⁹⁰¹ Blackstone, *4 BI Comm* (1st edn) 299; Burn, *Burn's Justice* (12th edn) 33, Burn and Chetwynd, *Burn's Justice* (23rd edn) 714; Beattie, *Crime and the Courts* 317-20

⁹⁰² D Gray, 'Making Law in Mid-Eighteenth-Century England: Legal Statutes and Their Application in the Juristic Notebook of Philip Ward of Stoke Doyle' (2013) 34 *Journal of Legal History* 211 227-8

⁹⁰³ Burn, *Burn's Justice* (12th edn), vol 2, 453-4; Blackstone, *4 BI Comm* (1st edn) 300

grand juries found 'No Bill', or ignoramus, for 16.9% of petty larceny cases, 25.7% of assaults and 16.1% of attempted rapes.⁹⁰⁴ The refusal of the Grand Jury to endorse the bill of indictment did not, however, finish proceedings as such a determination was not a judgment on the case. It was therefore possible for the indictment to be redrafted and the case represented either at the same sessions or subsequently.⁹⁰⁵

The process to be followed once the Grand Jury had found an indictment depended on whether the crime alleged was a felony or a misdemeanour. A defendant to a felony would plead at arraignment and trial would usually take place there and then. As the law stood in 1770, a felony defendant could, in principle, ask for his case to be adjourned to a subsequent sessions. In the case of a misdemeanour or assault, the traverse procedure generally allowed a trial to be adjourned to a later Sessions. The capacity to delay trials created a number of tensions within the justice of these courts. Adjournment created issues of delay as well as endangering the effectiveness of prosecutions. Courts of Quarter Sessions tried to resolve such challenges by their own rule-creation and so eighteenth century practices varied between different Sessions. It was also, however, an area where central initiatives had a significant impact from the middle of the nineteenth century. This process will be examined more fully in Chapter 7.

The trial process itself, at least in theory, was the same whether a defendant was on trial for a felony or a lesser offence.⁹⁰⁶ The indictment was put to each defendant in turn. If he or she refused to answer then the refusal was taken to constitute a confession.⁹⁰⁷ Much of the trial process was perceived to be antiquated even by the late eighteenth century. Defendants were asked how they wished to be tried even though rights to trial by ordeal and battle were widely accepted to have fallen into desuetude.⁹⁰⁸

There were, in fact, significant differences in the style and manner of felony and misdemeanour trials. Eighteenth century felony trials were conducted in a relatively informal lawyer-free way identified by Langbein and Beattie. Prisoners and jurors could intervene to ask questions at trial and cases were conducted swiftly, jurors often not retiring to consider their verdicts. Prisoners were, however, heavily dependent on the bench for the advancing of their case. The Justices presiding over trials were expected to act 'as counsel for the prisoner,' to ensure that the trial process involved a full examination of the prosecution case and the questioning of witnesses on

⁹⁰⁴ Beattie, *Crime and the Courts* 401-3

⁹⁰⁵ Blackstone, *4 Bl Comm* (1st edn) 301

⁹⁰⁶ Burn, *Burn's Justice* (12th edn), vol 4, 162-6

⁹⁰⁷ *Ibid* 163

⁹⁰⁸ *Ibid*

the prisoner's behalf where necessary.⁹⁰⁹ This process seems generally to have been accepted at the time as fairer and more accurate than trial processes involving the intervention of lawyers.⁹¹⁰ Whether defendants obtained much help, though, was probably a matter of good fortune. A considerable amount of discretion rested in the hands of those trying the case with the result that the extent to which a prisoner benefitted from judicial help depended on a range of factors, not least of which would be the attitude of the Justices towards the defendant and their view of the case presented.⁹¹¹

In this sense, the justice of the eighteenth century trial was profoundly influenced by a broad discretionary concept of justice in which the underlying logic that better evidence and therefore better factual justice would be obtained from putting the defendant under direct inquiry by the court rather than mediating it through lawyers. This presented a number of difficulties for defendants above and beyond the absence of reliable legal assistance. Even without the likely disadvantages of a potentially hostile bench, defendants were not formally presumed to be innocent, were often likely to be poorly informed about the case against them and, even where so informed, given the normative emphasis upon hearing the defendant's account of the crime, were not assisted in the securing of witnesses, a particular problem for those if detained in the county House of Correction or Gaol pending trial.⁹¹² As such, rules and systems on notice were far less developed than those at the centre.

Misdemeanour trials were potentially different. A defendant was entitled in theory to counsel and much of the business of the Quarter Sessions during this period *could*, therefore, have been conducted by lawyers.⁹¹³ In fact the extent to which Quarter Sessions hearings involved lawyers is unclear. The focus of examination has been concentrated on Assize courts, which provide much richer evidence of how trials were conducted. There, it seems that the presence of counsel to advise prisoners had become increasingly common by the 1770s.⁹¹⁴ Whether this was also the case for misdemeanour trials in the North or West Riding or elsewhere is not clear. Certainly, Lemmings has suggested that there were 'several' local barristers in the late eighteenth century: 'Lawyer Stanhope', the two Richard Wilsons, father and son, who served in turn as the Recorders

⁹⁰⁹ Langbein, *Adversary Trial* 167

⁹¹⁰ *Ibid* 48-66; Cairns, *Advocacy* 27-8

⁹¹¹ Beattie, *Crime and the Courts* 344-7

⁹¹² *Ibid* 343-52; Langbein, *Origins* 58-9

⁹¹³ The presence of lawyers at Quarter Sessions is very difficult to discern. It is highly likely that barristers appeared in relation to Removal Appeals and possibly also in relation to Road and Bridge prosecutions

⁹¹⁴ Beattie, *Crime and the Courts* 343-5; Cairns, *Advocacy* 27-55; Langbein, *Origins*; Allyson N. May, *The Bar and the Old Bailey, 1750-1850* (University of North Carolina Press 2003) 97-113; Burn, *Burn's Justice* (12th edn), vol 4, 167

for the Borough of Leeds, and Fairfax Fearnley of Birstall.⁹¹⁵ There were also seemingly attorneys and even solicitors present at trials, particularly for removal cases and highway prosecutions. As the decades progressed, both the North Riding and West Riding courts would attempt to regulate the way in which lawyers participated in Sessions business⁹¹⁶ as did other Courts of Quarter Sessions.⁹¹⁷ On the whole, however, it seems unlikely, and there is no clear evidence that lawyers systematically appeared at the Quarter Sessions to represent ordinary defendants for lesser misdemeanours or to provide advice in felony cases. Some of the matters proceeded with were more substantial and may have merited the fees that would attract the attention of counsel or other legal professionals, but for the most part, the trial processes at the hearings of the 1770s and 1780s were likely to be equally informal and as significantly controlled by the Justices as were felony trials.

Although the Quarter Sessions in the 1770s were not subject to the pressures they were later to experience, trials were quick processes. The busiest of the West Riding trials during the 1778 to 1781 period was that at Pontefract on 23rd April 1781 when five defendants were put on trial.⁹¹⁸ This certainly appears to contrast sharply with the Assizes where a full day's list could involve something in the region of 15 cases on a busy day.⁹¹⁹ There could, however, also be other forms of complexity, particularly in cases with multiple defendants. Even so, these were small relative to what would come later. At the Michaelmas sessions at Sheffield on 11th October, 1780, for example, the jury had to try five defendants on two counts of riotous assembly and at the Knaresborough sessions of 3rd October 1780, William Ridsdale brought a prosecution against Peter and John Harland and John and Jane Massey for the theft of a wagon load of hay and some wagon parts.⁹²⁰

Even so, the capacity of the courts to deal with such cases was constrained. The number of jurors summoned to serve on the petty juries in the West Riding this time were never enough to constitute an additional jury should the case load have necessitated it; the total number called

⁹¹⁵ Lemmings, *Professors of Law* citing M Miles, "Eminent Practitioners": The New Visage of Country Attorneys C.1750-1800' in G. R. Rubin and David Sugarman (eds), *Law, Economy and Society, 1750-1914 : Essays in the History of English Law* (Professional Books 1984), 487

⁹¹⁶ *North Riding Standing Orders 1801* (QSO 1/1) 6; *West Riding Standing Orders 1801* (QSO 16/1); *North Riding Standing Orders 1815* (QSO 2/3) 56, *North Riding Standing Orders 1833* (QSO 2/4) 10; *West Riding Practice 1834* (QSO 16/2) 12; *West Riding Practice* (WR QD1/721) 25; *West Riding Practice 1866* (ES QS/6/4); *West Riding Practice 1869* (ES QS/6/8) 14

⁹¹⁷ *Surrey Standing Orders* (QS/6/5) 51; *Shropshire Rules* (1867) 10; *East Riding Rules* (1869) 14; *Berks Proposed Rules 1871* (QS 6/1) 4

⁹¹⁸ *WR QS 4/40*, 216-9

⁹¹⁹ Beattie, *Crime and the Courts* 376-9; King, *Crime* 223

⁹²⁰ *WR QS 4/39*, 293-4; *WR QS 4/40*, 15; for distances and travel see William White, *History, Gazeteer and Directory of the West Riding of Yorkshire*, vol 1 (Robert Leader 1837), v, 496

never exceeding 18 in this period. No trials appear to have been adjourned to the next ensuing sessions, however, which would be the likely outcome if there was insufficient time for a hearing (and which did occur increasingly frequently in later years). There were, in fact, harsh practical constraints on the running of the Sessions, not least of which was the date of the next adjourned hearing. The adjourned Michaelmas session held at Leeds always commenced one or two days after the Knaresborough sessions. In 1778, three of the four Justices who had composed the bench at Knaresborough on 6th October, the Reverend Henry Zouch, Sir Rowland Winn and Sir John Goodricke, also attended the Leeds session on 8th October. In 1779 the Leeds session was the day after the session in Knaresborough and, of the six Justices in Knaresborough, only Sir Fletcher Norton managed to attend both. In 1780, the occasion upon which Ridsdale's prosecution took place, there were fifteen Justices in Knaresborough on 3rd October and four of them also attended the Leeds sessions two days later. This was likely to have been no mean feat; although only covering eighteen miles, the most direct route would have taken travellers over the high hills around Harewood, potentially in difficult October weather.⁹²¹

Attempts to localise the justice by spreading the sessions around the Riding, in fact, created a particular set of challenges to the willing core at the heart of the West Riding magistracy. Perhaps an easier challenge than the trip from Knaresborough to Leeds was attending the Skipton and then the Bradford midsummer sessions two days later, as this only required twenty miles of summer travel. The most gruelling feat of peripatetic magistracy, however, was the Epiphany sessions, which were held 21 miles apart, first in Wetherby and then in Wakefield in the second week in January in the years 1779 and 1780 and then a forbidding 41 miles apart in Wetherby and then Sheffield in 1781.

Many justices attended only some of the sessions as a result. Although Burn had suggested in his 1780 edition that justices were compellable to appear at the Sessions,⁹²² attendance was far from uniform. There was, however, an active core of the sessions magistracy, something Eastwood has termed the 'efficient secret' of the Quarter Sessions.⁹²³ Of the 27 West Riding sessions held from October 1778 to July 1781, for example, the Reverend Henry Zouch attended twenty and Henry Wickham attended thirteen.

Lieutenant-Colonel Henry Wickham was one of the county gentry and a member of one of the many dynastic magisterial families that provided a strong core collective identity to the

⁹²¹ *WR QS 4/39*, 219-221; *WR QS 4/40*, 332-3

⁹²² Burn, Durnford and King, *Burn's Justice* (21st edn) 183; Burn and Chetwynd, *Burn's Justice* (23rd edn) 195-6

⁹²³ Eastwood, *Governing Rural England* 55

magistracy in the West Riding, being the son of the Reverend Henry Wickham, who had also served as a West Riding magistrate.⁹²⁴ Wickham serves as a reminder of important features of the county magistracy that are central to understanding what its sense of justice was, its values constituted in Landau's model of both the patriarchal and patrician justice, a justice who was 'the gentleman volunteer, the administrator of the law who ruled under law though he knew not the law, the leader of his community who served for no reward other than considerable autonomy in leading his community.'⁹²⁵

The Reverend Zouch provides a similar perspective on the personnel effecting justice within these courts. Zouch served intermittently as chairman of the West Riding Sessions and was a leading member of the Proclamation society, active in Wyvill's Association movement, and wrote and campaigned on penal reform. As a magistrate he had been active in reforming the House of Correction in Wakefield and had actively promoted a number of steps to reduce crime and to reform the business of the magistracy.⁹²⁶ Zouch was one of a breed of activist clerical magistrates who became an increasingly important feature of the county magistracy in both Ridings and throughout the country.⁹²⁷

The North Riding had no such activists at this point. Of the eighteen sessions held from 1778 to 1781, Sir William Chaytor, Thomas Maulverer, the Reverend William Peacock and George Watson attended eight. Equally, the North Riding magistracy were less diligent in attending successive sessions. Only Lord Fauconberg, then the chairman of the sessions, made the trip from Guisbrough on 13th July to Thirsk for the recommencement of the sessions on the 15th July.⁹²⁸ On average seven magistrates attended the North Riding sessions although numbers varied considerably. While only three magistrates attended the Northallerton Easter Sessions in 1780, the following year there were 24 in attendance. In the West Riding, too, attendance varied. There were on average five magistrates at each Sessions although frequently there were fewer. Some Sessions could be relatively well attended. The Knaresborough Sessions in October 1780 was attended by fifteen Justices. The relatively low average attendance is explained by the fact that

⁹²⁴ *WR QS 4/39; WR QS 4/40; West Riding Quarter Sessions Indictment Book, July 1797 to January 1800 (QS 4/45, 1797-1800); West Riding Quarter Sessions Indictment Book, January 1800 to October 1801 (QS 4/46, 1800-1801); 'Births, Deaths, Marriages and Obituaries' Lancaster Gazette and General Advertiser (Ipswich, 20 October 1804) 4.*

⁹²⁵ Landau, *Justices* 362

⁹²⁶ RD Sheldon, 'Zouch, Henry (1725?-1795)' (*OUP*, 2004)

<<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/30298>> accessed 11 December 2013

⁹²⁷ Eastwood, *Governing Rural England* 78-81

⁹²⁸ *NR QSM/1778-92*, 244-5

some Sessions, particularly in rural areas, such as those at Wetherby, only had two Justices in attendance.

The outcomes and the justice that were delivered through these processes were, therefore, profoundly local. For some Justices this localism was very narrow. The Reverend Richard Thompson only attended sessions in Knaresborough and Wetherby although he attended all of these. The Reverend Thomas Collins attended five out of those same six sessions and appeared once in Skipton.⁹²⁹ A similar pattern may be seen in the North Riding. Sir William Chaytor, whose county seat was just to the north, attended four Northallerton sessions and chaired three in Richmond. He also travelled to Thirsk. He did not, however, attend any sessions in the east of the Riding. John Matthew of Tynemouth only attended sessions in Stokesley and Guisbrough in the north-east of the Riding. Other magistrates, such as Thomas Hayes and Ralph Jackson, showed a strong preference for eastern sessions.⁹³⁰ This was never absolute, however. Nearly all Justices who attended a sessions at any point would attend one at Northallerton. In this sense, the North Riding seems to have taken, or to be in the process of adopting, a different approach to the localism of its justice. It may have been assisted by the centrality and relative prominence of Northallerton. Unlike the West Riding, there was not a number of burgeoning cities that could place equal calls upon the time of the Justices. Northallerton, situated in the centre of the Riding and in relatively flat country, offered an accessible location for regular meetings. This fact would come to influence the nature of the way justice was practiced and delivered in the North Riding. In the West Riding, with a number of significant cities, no such capacity for centralisation existed.

In the period 1778-81, therefore, a particular environment can be seen in which justice was effected by particularly constituted benches of Justices. In both Ridings, justice was delivered on a localised and small scale. This practice of the courts suggests significant efforts were taken to ensure that this justice, ostensibly that of the Riding as a whole, was delivered at a more local level. Additionally it was delivered by a diffuse body of elite amateurs, who had, for all that, a solid core of diligent activists. These two Ridings differed, however. The West Riding combined, at this point, a stronger respect for localism with a more active core of magistrates. The North Riding had greater tendencies to centralise its business around Northallerton but relied upon a more diffuse body of willing magistrates to do so. It seems more than likely that these locally constituted milieus would vary even more considerably across the country.

⁹²⁹ *WR QS 4/39*, 195, 211, 304, 329; *WR QS 4/40*, 19, 84

⁹³⁰ *NR QSM/1778-92*

The Changing Nature of the Quarter Sessions: 1770 to 1870

This sense of a milieu of justice is important. Understanding justice as an experience to be delivered, moving beyond it simply as an abstract discourse and seeing it as a field of discursive practice, requires appreciation of the physical reality of the environments in which it was effected.⁹³¹ Most specifically, this requires understanding of the different groups or organisations within which cultures of justice were generated and between which ideas were shared. It also requires an understanding of the physical world within and onto which such concepts of justice were to be applied.⁹³² In the context of the Quarter Sessions and its conceptions of justice, the most immediate physical impact was the changing nature of the cases with which it dealt.

As the decades passed, these milieus changed dramatically. The work of the Quarter Sessions grew considerably in the period from the 1770s to the 1860s, a growth that was much more pronounced in the West Riding than the North Riding. Figure 2 below shows the number of hearings dealt with by each Sessions during the five periods under investigation. The figures do not include cases in which bills were not found by the Grand Jury. The figures include both cases that went to trial and those in which a guilty plea was entered or some other form of disposal, such as removal by certiorari, discontinuance or the quashing of the indictment occurred.

As the counting of cases is intended to illustrate the demands upon these courts, only matters for which the first defendant on each indictment was prosecuted have been counted. However, each count on the indictment has been included. This has two potentially distorting effects that should be noted. First of all, some crimes like receiving stolen goods may be slightly under-represented. At various points, but from the 1830s in particular, those who received stolen property were included in the same indictment as handlers rather than indicted separately. Usually, however, receivers were still prosecuted distinctly so the impact upon the figures is likely to be marginal. Conversely some crimes such as common assaults may be over-represented from the same point. This is because common assaults were commonly alleged as alternatives to a number of aggravated assaults and riotous assemblies. This will potentially distort some figures from the 1790s in the West Riding and 1818 in the North Riding, when alternative counts became more common.

⁹³¹ Sewell, *Logics* 333-44

⁹³² *Ibid* 132-42

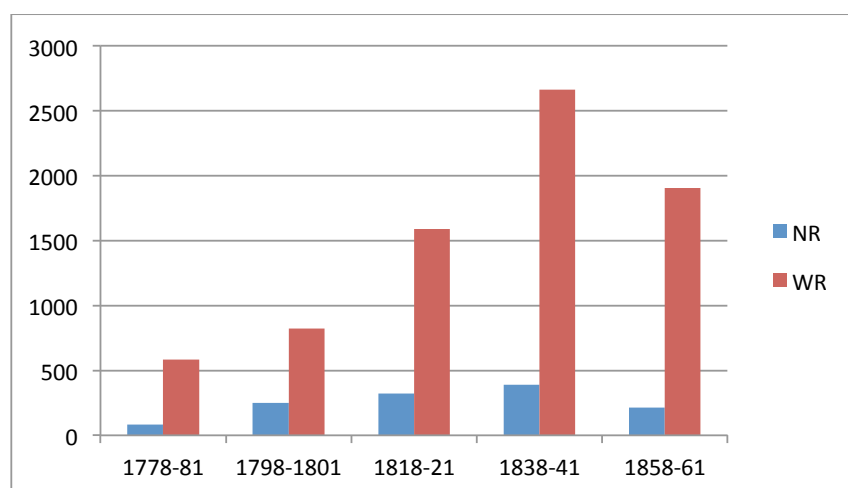


Figure 2: Numbers of cases determined in North Riding and West Riding Quarter Sessions, 1778-1861

The indictment books and Figure 2 show a steady increase in case loads into the nineteenth century, with a peak reached during the 1838-41 period. This can also be seen in Appendix 4. The difference in workload between the two Ridings is also apparent. In 1778 to 1781, the West Riding Court dealt with seven times as many cases as the North Riding Sessions.

	North Riding					West Riding				
	1778-81	1798-1801	1818-21	1838-41	1858-61	1778-81	1798-1801	1818-21	1838-41	1858-61
Assaults	56	87	77	22	34	182	197	427	110	115
Thefts	15	59	125	340	168	74	347	788	2351	1738
Conspiracy						3	4	1	2	0
Coining			15	6	2	1		23	17	1
Public Order	13	8	28	8	2	34	51	74	36	21
Offences in Public Offices		1	1			1	11			0
Poaching			9					31		
Keeping Disorderly Houses					1	4	11	6	13	4
Decency Offences				5	6			6	42	20
Administration of Justice		17	1			11	21	10	18	0
Economic Crimes						17	32	37	4	0
Nuisances, Highways and Bridges	34	77	68	1	2	248	148	187	68	8
Previous Felonies				8	12				262	306
Trials	84	249	324	391	215	584	822	1590	2661	1907
Not Found	2	25	41	54	20	15	35	149	136	56
Committals	56	81	15	23						

Table 3: Cases Before the North Riding and West Riding Quarter Sessions, 1778-1861

⁹³³ In the period from 1778-1781 misdemeanours were not identified specifically in the North Riding Minutes.

1798-1801

The increase in judicial business would create more pressure on the Sessions in both Ridings, and therefore on the nature of the justice the courts practised, into the nineteenth century. By the period 1798 to 1801, there had been a significant increase in the Sessions business of both Ridings. The amount of judicial business dealt with by both courts grew markedly between the periods 1778-1781 and 1798-1801. This can be seen in absolute numbers of crimes of each type dealt with by the courts in Figure 3 below. This is also expressed in terms of percentage growth in Figure 4. The raw data upon which it is based is set out in Table 3 above.

Comparing the figures for 1778-81 and 1798-1801, the changing nature (as well as quantity) of cases can be seen more distinctly. In both courts there was a considerable growth in the number of cases dealt with. The increase in the North Riding was over 50% and in the West Riding just over 40%. This was mainly due to increases in property crime prosecutions, particularly in the West Riding, where the increase was five-fold. In the North Riding, a quadrupling of theft prosecutions combined with a significant increase in assault prosecutions.

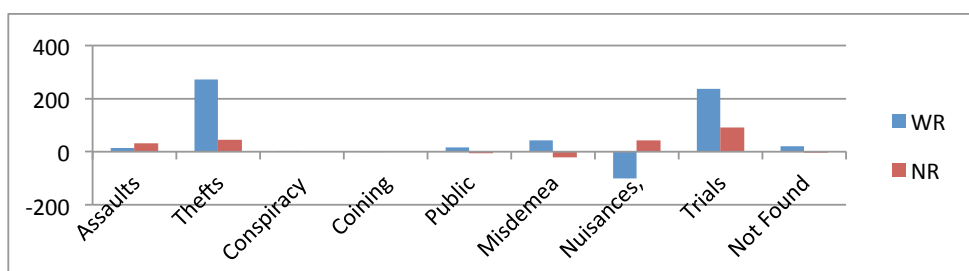


Figure 3: Changes in Numbers of Cases between Quarter Sessions in West Riding and North Riding, 1778-81 and 1798-1801⁹³⁴

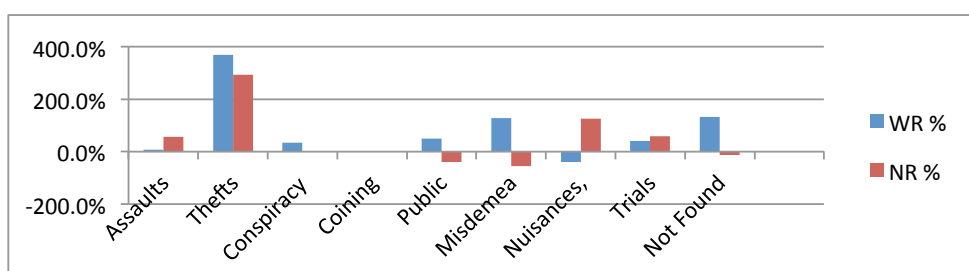


Figure 4: Percentage Change in Numbers of Cases at the Quarter Sessions of the West Riding and North Riding, 1778-81 and 1798-1801⁹³⁵

Cases also became increasingly complex as can be seen from the prosecutions for aggravated assaults in the North Riding. Furthermore, it is not just the number of prosecutions but the

⁹³⁴ Sources: NR QSM/1798-1804; WR QS 4/45; WR QS 4/46

⁹³⁵ Sources: NR QSM/1798-1804; WR QS 4/45; WR QS 4/46

number of defendants and appearances that effected changes in the nature of these courts and their practices. The return of cases for further hearings was likely to have increased the workload of the court significantly while also making proceedings more prone to difficulties. The particular impact of this practice of adjourning cases will be examined in Chapter 7.

1818-1821

The period immediately after the Napoleonic Wars was politically tumultuous and economically stark. The effects were felt in the two Ridings. The extent of social protest led the government to push the Six Acts through Parliament in 1819. Economic stagnation, radical protest and mass agitation in Halifax, Burnley, Huddersfield and Sheffield in the October and November of 1819 unnerved the West Riding magistracy.⁹³⁶ All the while, economic distress underpinned further increases in property crime. The absence of war caused major economic and therefore social disruption. Mass demobilisation and the readjustment to a peacetime economy was to have profound consequences for the Quarter Sessions.⁹³⁷

It is not therefore particularly surprising that the business of the Sessions in both Ridings was yet again significantly increased by the massive increase in theft cases dealt with (see Appendix 4 and Table 3 above). In both Ridings, property crimes doubled. In the West Riding this led to a doubling of the caseload of the Sessions, while in the North Riding it increased by roughly 50%. That crime figures did not increase more is explained by a general decline in assault prosecutions and highway and road cases. In the West Riding, in contrast, assault prosecutions reached their highest point in the periods under examination. Property crime came to amount to half of the business of the West Riding Sessions and 40% of that of the North Riding.

This increase was much more significant in the West Riding, almost certainly a reflection of the growing population in the county, but also possibly the result of more effective policing techniques at least in some parts of the Riding. In Sheffield and the surrounding parishes, the institution of a force under the Watching and Lighting Acts from the 1820s onwards, seems to have had a major impact upon the detection and prosecution of crime although, as Williams has suggested, the institution of this force was itself a result of perceptions of increased criminality.⁹³⁸ The impact of a core body of watchmen like Flather, Waterfall and Smith on the

⁹³⁶ Thompson, *The Making of the English Working Class* 752-60; Hilton, *England 1783-1846* 252-3, Briggs, *Age of Improvement* 207-8

⁹³⁷ Beattie, *Crime and the Courts* 218-9; V.A.C. Gatrell and T.B. Hadden, 'Criminal Statistics and Their Interpretation' in E.A. Wrigley (ed), *Nineteenth-Century Society* (Cambridge University Press 1972) 368-9; Eastwood, *Governing Rural England* 196

⁹³⁸ Chris Williams, 'Police and Crime in Sheffield, 1818-74' (Ph.D thesis, University of Sheffield 2000) 61-72, 176-7; Williams, 'Reforming Sheffield's Police'

prosecutions can be seen immediately in examination of the witnesses listed in the Indictment Books for the West Riding from 1818 to 1821. This can be seen on Table 4. Thomas Flather is listed as a witness in 16.6% of all crimes prosecuted in the Riding as a whole in this period. Thomas Smith is listed for 11.2% of them and John Waterfall for 9.6%.⁹³⁹

Much of this crime was industrial and in Sheffield, at least, constables and watchmen like Waterfall and Flather were active in prosecuting and testifying against some of them. Based on the items stolen, particularly the nature and quantity of what was taken, there appear to be, among theft prosecutions at this point, 79 offences that involved theft on an industrial scale. John Glave, for example, was prosecuted for having stolen 216 knives and 100 penknives on 24th August 1818 in Sheffield. He was presented at the Sheffield Sessions that following October where he confessed and was sentenced to transportation. John Langford and Thomas Armitage were prosecuted for stealing 87 table knives, 200 penknives, 200 pocket knives, 630 other knives, 99 forks, 288 razors, 15 pattern cards belonging to John Dickinson and Charles Rollison, and 200 pen knives, 200 pocket knives, 400 other knives, 14 pattern cards belonging to William Bagshaw and a linen apron also belonging to Charles Rollison. There is a need to be careful with the facts pleaded in these indictments. As shall be seen later, there was a recurrent practice of pleading items in the alternative within the same count of an indictment. Even so, the scale of theft of Langford and Armitage was quite impressive. Thomas Smith was on the case and they were prosecuted at the Rotherham adjourned Midsummer Sessions on 2nd August and sentenced to six months in the House of Correction.⁹⁴⁰

	Sheffield	Ecclesfield	Wakefield	Halifax
Number of cases:	69	8	1	1
Sheffield	16	0	0	0
Doncaster	20	4	0	0
Pontefract	13	0	0	0
Rotherham	20	4	0	0
Wakefield	0	0	1	0
Leeds	0	0	0	1
Total Attended by constables:	51	8	0	0
Thomas Smith	16	2	0	0
William Smith	1	0	0	0
John Waterfall	9	4	0	0
Thomas Flather	25	2	0	0

Table 4: West Riding Theft Prosecutions, 1818-1821

⁹³⁹ WR QS 4/54, 1818-1819; QS 4/55, 1819-21; QS 4/56, 1821-23

⁹⁴⁰ WR QS 4/55, 134-5

Not all of the cases in which multiple thefts of knives and blades were stolen were thefts from the South Yorkshire metal trades, but there is clear enough evidence to show that this was certainly a practice common enough to be noted by the Justices appearing in the southern parts of the County and this is exactly where these cases were prosecuted. In contrast to the North Riding, which by this time was holding all of its Sessions in Northallerton, the West Riding Sessions took place throughout the Riding. This allowed cases to be tried close to the locations in which the witnesses and the victims were located and almost certainly was intended to deal with the practical demands of such a significant increase in case loads. These members of the Sheffield watch appear to have been in almost constant attendance at the Sessions as a result of their duties. Of the 79 cases that involved theft of multiple knives or blades, the vast majority were committed in the steel heartlands of Sheffield and Ecclesfield. Two offences, Abraham Stanefield's theft of 16 scythe blades in October 1820 in Halifax and William Glover's theft in Wakefield, are likely not to be of the same kind (Glover took 11 silver table spoons, 18 table knives, 18 forks, carving knives, 2 carving forks, 1 tea caddy, 3 tea canisters, which therefore appears to be a theft from a building, although, as is generally the practice in the West Riding, not charged as such).⁹⁴¹

1838-1841

As again can be seen from the figures in Appendices 4 and 5, the number of cases had increased again significantly by the period 1838-41 (an increase of 172% in the North Riding and 198% in the West Riding). This change, again, was significantly influenced by rises in larceny and related prosecutions. This was more than an increase in business, it was a refocusing of the nature of their judicial practice. At the same time there was a significant decline in highway and bridge disrepair prosecutions. Equally, assaults became statistically less significant although the violence offences for which defendants were prosecuted seem to have become more serious. Theft and related property crimes therefore came to dominate Quarter Sessions trials during the 1830s to the 1860s. Comparison of Tables 29 to 32 in Appendix 4 shows that, while crimes of other types were prosecuted occasionally, by 1838 theft and other property offences were a regular feature of the Sessions, dominating judicial business to the extent that at some Sessions, such as the Northallerton Christmas Sessions of 30th December 1839, the court only dealt with such offences. These increases in the number of cases put the court under considerable pressure and radically transformed the nature of its decision-making. In 1834 the Sessions empowered itself to hold

⁹⁴¹ *Ibid passim* & 47 (Glover), 157 (Stanefield)

special sessions by adjournment if the House of Correction was too full.⁹⁴² By 1838, an additional adjourned sessions was being held at Sheffield at the end of each March for exactly this reason. These sessions dealt with an extra 72 cases, all of which came from the Strafforth and Tickhill and Staincliffe and Ewecross Wapentakes.

1858-1861

The falling away of judicial business at the Sessions by the 1850s was equally pronounced to the increases into the period of 1838. This is not likely to be the result of any decline in policing; the Ridings had police forces in place by 1858 under the County Constabulary Act.⁹⁴³ It is far more likely to be the result of jurisdiction changes following a number of statutory reforms of Criminal Courts in the middle of the century, particularly the extension of Petty Sessional jurisdiction over thefts in the 1840s and 1850s.⁹⁴⁴ Part of the significance of this change can be seen by examining the trends in prosecution across all four periods and by comparing them to theft prosecutions (see Table 5 below). This shows the close relationship between overall increases in trials and those for thefts. As the nineteenth century progressed, the Quarter Sessions became increasingly a court dedicated to the processing of larceny prosecutions. As the prosecution of these decreased, so did the work of the Sessions.

The amount of work at the Sessions was still, however, considerable. By 1858, the Riding was holding a Sheffield Interim Sessions for each quarter, a Bradford Interim Michaelmas Sessions and a Wakefield Interim Midsummer Sessions.⁹⁴⁵ It appears that this affirmation of localism, whether for convenience or out of a sense of the importance of local interests in the delivery of justice (or both), had solidified into an established practice even though original pressures for such changes had decreased.

What had, therefore, been a relatively small scale judicial endeavour in the 1770s and 1780s had become, at least by the 1820s and thereafter, an activity on a much larger scale. At the same time it had become far more profoundly focused on a narrow range of cases and, particularly, more profoundly judicial in a conventional sense of the word. Largely removed were the regulatory practices of the Sessions as was its engagement with relatively minor assaults and interpersonal conflicts.

⁹⁴² *Practice of the Court of General Quarter Sessions of the Peace for the West Riding of the County of York* (Office of the Clerk of the Peace 1834) 1-2

⁹⁴³ North Riding Constabulary, *The First Hundred Years of the North Riding Constabulary* (North Riding Constabulary 1957); David Taylor, *The New Police in Nineteenth-Century England: Crime, Conflict and Control* (Manchester University Press 1997); David Philips and Robert D. Storch, *Policing Provincial England, 1829-1856: The Politics of Reform* (Leicester University Press 1999) 235

⁹⁴⁴ Juvenile Offenders Act 1847, Larceny Act 1850 and the Criminal Justice Act 1855

⁹⁴⁵ *WR QS 4/67*196-214; *WR QS 4/68*; 151-173, *WR QS 4/69*, 165-193

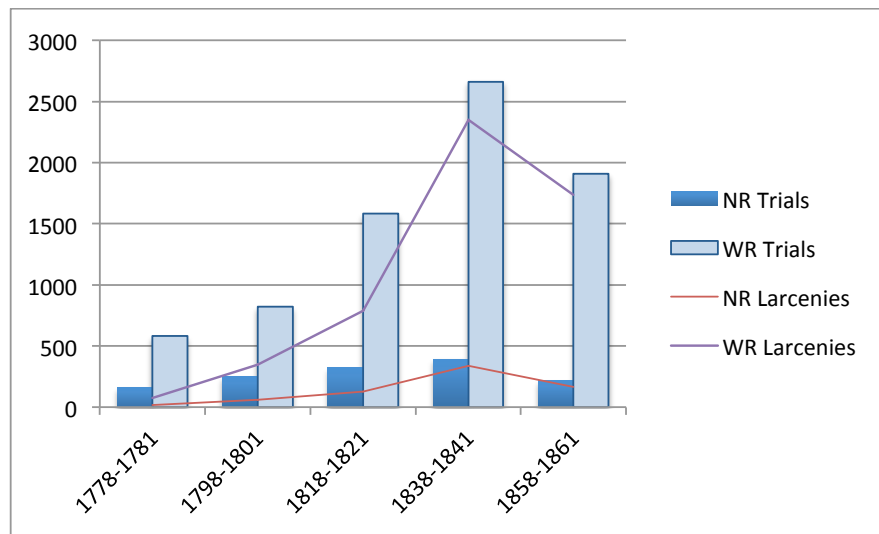


Table 5: Total Number of Trials Compared to Number of Larceny Trials, 1778-1861

The scale and nature of the courts had therefore changed across this 100-year period. This can particularly be seen with changes in the courts' use of juries. Until the 1820s the West Riding Sessions had managed its caseload with a single jury. The first occasion where more than one jury was used, was at the Wakefield Sessions of 11th January 1821. A second jury was also used at the Pontefract Sessions on 30th April 1821. By the late 1830s, second juries had become commonplace. Unfortunately, the records for the 1850s stopped recording the presence and activity of juries in 1858. Only the Knaresborough and Leeds Sessions of the 1858 to 1861 hearings identify which juries sat and what cases they heard. The period from 1838 to 1841, however, has both a full list of the juries (not just jurors) and identifies the cases they tried.

Based on an examination of those sources, it appears that juries in the 1830s and 1840s were each dealing with approximately fourteen cases every day. Some Sessions hearings were huge. The Pontefract Easter Sessions of April 1839 used eight juries to deal with 146 defendants being put on trial. At the Doncaster Sessions of January 1840, there were eleven juries dealing with 111 defendants. Trials were therefore likely to have been quick affairs but, even so, the court processes were under considerable pressure. One response was to sit on successive days, something sanctioned in law and accepted in Sessions practice.⁹⁴⁶ Although the number of cases was not as great, the North Riding Sessions had also put in place a system for using more than

⁹⁴⁶ 'Quarter Sessions for the West Riding' *The Bradford Observer* (Bradford, 12 July 1838) 2; *Practice of the Court of General Quarter Sessions of the Peace for the West Riding of the County of York* (QSO 16/2, Office of the Clerk of the Peace, Wakefield 1834) 19

one jury. Both Sessions had been in the habit of reconstituting a second jury in cases where there had been objections to some of the originally constituted panel. However, by the 1830s, juries in both Ridings were being constituted of twelve different men and, it would seem, trying cases in different rooms.⁹⁴⁷ By the 1850s this practice had become routine in the North Riding and was formally sanctioned in the West Riding in their Standing Orders.⁹⁴⁸

There remained, however, one Grand Jury and all new cases had to be filtered through them. It is not clear to what extent this affected their attitude towards their deliberations or whether the strains of determining so many cases affected their decision making one way or the other. They had less to do than petty jurors in scrutinising cases as they did not have to hear the evidence for the person accused. Nor was there any particular expectation that they would examine cases closely. In his charge at the Adjourned Bradford Sessions in July 1838, Francis Maude, the Chairman, told the grand jurors that they could find a true bill on the basis of the evidence of three or four witnesses but if they proposed to ignore a bill, they should consider all of the evidence.⁹⁴⁹ Quite how they responded to the quantity of business is not recorded although it is clear that they were encouraged to do no more than necessary in determining whether there was a case to answer. It does appear, however, as can be seen from Table 6, that the Grand Juries at West Riding Sessions were less willing to reject Bills presented than either their counterparts in the North Riding or those sitting on the West Riding Grand Juries twenty years earlier.

	North Riding			West Riding		
	Cases	Bills Not Found		Trials	Bills not Found	
1778	158	29	18.4%	584	15	2.6%
1798	249	25	10.0%	822	35	4.3%
1818	324	41	12.7%	1581	149	9.4%
1838	391	54	13.8%	2661	136	5.1%
1858	215	20	9.3%	1281	56	4.4%

Table 6: Cases Sent for Trial and Bills Not Found by North Riding and West Riding Grand Juries, 1778 to 1861

The Riding Sessions courts, therefore, had changed dramatically during the period from the 1770s to the 1860s. What had been a court of general governance dealing with a mixture of relatively minor personal disputes and issues of county governance had, as a court, become increasingly focused, in both Ridings, on the processing of a more restricted diet of theft and

⁹⁴⁷ NR QSM/1834-43; WR QS 4/87; WR QS 4/87; WR QS 4/89

⁹⁴⁸ *Practice of the Court of General Quarter Sessions of the Peace for the West Riding of the County of York* (Office of the Clerk of the Peace 1857) 32

⁹⁴⁹ 'Midsummer Quarter Sessions for the West Riding' *The Bradford Observer* (Bradford, 5 July 1838) 3

violence prosecutions. It had become far more substantially a criminal court in a more modern sense. To accommodate the significant growth of cases, both courts had developed processes, both in terms of the location of sittings and the use of juries, that detached these courts from the local patriarchal justice they had been delivering in the 1770s. They had become, if not more professional, at least more procedurally distanced from the localities in which they operated. This was so even in the West Riding where attempts were made, probably more for reasons of convenience than a deep-seated sense of localism, to try cases close to area of commission.

These changes were the physical manifestations of a system of justice. As will be seen, such changes were reflected in such of the practices of these courts as it is possible to discern.

The Normative Structure of the Sessions

The constitutional position of the Quarter Sessions was unclear. Justices of the Peace clearly held their power to keep the peace under a range of medieval statutes and by virtue of the royal commission. It was also equally clear that the court of Quarter Sessions had to meet regularly and that its powers to try crimes were limited.⁹⁵⁰ Over time, the powers of the Sessions had clearly also been profoundly extended in a distinctly ad hoc way.⁹⁵¹

Because of this lack of system and method underpinning the Sessions, its justice in the 1770s had a profoundly parochial feel. It was also, however, becoming increasingly constrained by the value system of the centre. The justice of the Quarter Sessions in the 1770s was delivered within a set of statutory and common law constraints which were promulgated by a growing body of legal literature.

The ambiguous influence of the centre

This legal literature reflected the growing tendency of the central courts to promote their values of decision-making (and therefore their notions of justice) to local and historically more distinct jurisdictions. This has been a part of the analysis of Part One. The King's Bench was particularly influential in this process given its use of prerogative powers to promulgate notions of justice and legality.⁹⁵² The impact of such review proceedings, at least in the eighteenth century, should not, however, be overstated. There were numerous obstacles to effective legal challenge of local decisions, cost not being the least. King's Bench judges also couched their willingness to review the decisions of Justices of the Peace in very narrow terms. Intent as they were on forms of

⁹⁵⁰ William Blackstone and John Frederick Archbold, *Commentaries on the Laws of England* (15th edn, M&S Brooke 1811) vol 1, 338-40, vol 4, 268-9; Richard Burn and George Chetwynd, *The Justice of the Peace and Parish Officer*, vol 4 (23rd edn, 1820) 207-8

⁹⁵¹ Landau, *Justices* 247-8, 263-4; Eastwood, *Governing Rural England* 43-48

⁹⁵² *Ibid* 350-8

legalism in preference to forms of broad justice, it was only, in essence, the illegality of an act rather than its wrongness that provided a basis for review,⁹⁵³ a restraint that in fact allowed a reconciliation of localised fact-based and discretionary conceptions of justice, on the one hand, and central rule-based justice values on the other. For all that, late eighteenth century Justices were becoming increasingly under the influence of national visions of justice as the new wave of legal literature shows.

By the 1770s, the practice at the Sessions had been coming increasingly the subject matter of legal guidance such as Burn's *Justice of the Peace*,⁹⁵⁴ Dickenson's *Practical Guide*⁹⁵⁵ as well as *Blackstone's Commentaries*. Such works were only some, although they would become the most significant, works that would form the basis of the work of the justices.⁹⁵⁶

Even assisted by this growing body of literature, local courts could and did adopt different understandings as to what national law required. This was, in part, because the national law's claims to offer a single normative framework were incomplete. The law provided not clarity but often vagueness and ambiguity. This in turn enabled or even required local legal systems to undertake processes of reinterpretation. The various legal systems each constituted an arena within which participants asserted, negotiated over and developed multiple meanings and interpretations of both central and local values, by which process they developed their own justice culture and practice. Legal literature was just one strand of this discursive and dynamic practice of the law. Standing Orders were another. For this reason, as legal understandings were not uniform, and as the values underpinning both national laws and local rules were neither universal nor static, the interplay between these various bodies of values created ample room for innovation, change and difference.⁹⁵⁷

⁹⁵³ Hay, 'Dread of the Crown Office' 29-30

⁹⁵⁴ The Reverend Richard Burn (1709-1785) wrote the first edition of the Burn's *Justice of the Peace* in 1755 and it was to continue after his death in 1785. The last edition, the 30th, was published in 1869: Norma Landau, 'Burn, Richard (1709-1785)' (*Oxford Dictionary of National Biography*, 2004) <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/4043>> accessed 26 June 2013

⁹⁵⁵ Dickinson was a barrister, a political activist and also an antiquarian. He published three editions of his work during his lifetime, in 1815, 1818 and 1822: Adrian Henstock, 'Dickinson, William (Bap. 1756, D. 1822)' (*Oxford Dictionary of National Biography*, January 2008) <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/7608>> accessed 26 June 2013. His book aimed to explain the law more fully than Burn had sought to do and sought to 'supply to our young Magistrates that information, respecting their *public* duty, as members of the Court of Quarter Sessions, which without some such guide, can only be acquired from previous professional pursuits, or gradually obtained by laborious attention and long experience.': William Dickinson, *A Practical Guide to the Quarter and Other Sessions of the Peace, Adapted to the Use of Young Magistrates* (1st edn, London 1815) vi-vii.

⁹⁵⁶ Norma Landau, *The Justices of the Peace, 1679-1760* (University of California Press 1984) 333-359

⁹⁵⁷ Sewell, *Logics of History* 138-140

Counterweights to these national discourses and values were therefore profoundly local factors and influences, manifestations of the oligarchical spirit of governance that courts of Quarter Sessions exemplified. In the later decades of the eighteenth century, Quarter Sessions had regained the significance they had lost earlier in the century, and become important once more to local elites. This was in part due to a resurgence of a civic humanist philosophy amongst those who were eligible to serve as Justices, which enjoined the exercise of local power by those best able to exercise it.⁹⁵⁸ Embedded as they were in the social structures of the county, the landed elites expected of themselves active involvement in (and control of) the business of county government.⁹⁵⁹ Each Sessions sat in the counties in which its Justices resided and dispensed the justice to their tenants, their servants and those with whom they dealt, whether the roles of these social inferiors was as jurors, defendants or parish officers. While the Justices did not therefore live among those for whom acted, they did live (for the most part) alongside them. For all the national constraints on their practice, therefore, such Justices were equally subject to powerful local influences.

The relationship between national value systems and those of each Quarter Sessions was therefore ambiguous. It was further complicated by a matrix of interactions between different Quarter Sessional courts, each applying national laws in its own way and creating or preserving its own rules and practices. Examination of the various Standing Orders of these courts will reveal that there was not simply a radiation of central legal rules and values but a diffusion of ideas and practices between localities. This is not surprising: many magistrates had experience of more than one county's justice. Dickinson, the author of *The Practical Guide*, was an active magistrate in Nottinghamshire, Lincoln, Middlesex, Surrey and Sussex over the course of his life.⁹⁶⁰ Furthermore, membership of a wider social class created a complex web of relationships that straddled county boundaries. Certainly by the 1770s, many justices were closely and immediately interconnected both within and across county boundaries. There were numerous opportunities for the multiple identities and experiences of these magistrates to encourage the sharing of ideas. Even those magistrates active in only one county interacted socially and domestically with wider social circles. As King has suggested, there were also numerous voluntary organisations

⁹⁵⁸ Landau, *Justices* 240-65; Langford, *Public Life* 390-7; Eastwood, *Governing Rural England* 70-1 and, on the concept of civic humanism, see Francis Dodsworth, 'Civic' Police and the Condition of Liberty: The Rationality of Governance in Eighteenth-Century England' (2004) 29 *Social History* 199, 204; J. G. A. Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge University Press 1985)

⁹⁵⁹ Roberts, *Paternalism* 54

⁹⁶⁰ Henstock, 'Dickinson, William (Bap. 1756, D. 1822)'

through which magistrates would potentially meet.⁹⁶¹ The channels for sharing ideas were many and prove difficult to trace.

Even so, the law did largely constrain their practices, and opportunities for innovation were not many. Local courts were not autonomous.⁹⁶² Their practice frequently changed to conform to normative developments by Parliament and the central courts. However, the centre exerted less power than one might expect. Change was not simply opposed (there is little evidence of any direct opposition to change in the content of these orders), but central initiatives were often accommodated within existing local justice practices.

Local norm creation through Standing Orders

There was in fact plenty of conceptual room within which the Justices of the Sessions could explore and develop their own particular form of justice. As has been seen in Part One, justice concepts informed both the development of new rules and also justified the adaptation of existing practices to fit new situations where the existing normative structure was incomplete. Although there are no records of the discourse of the Justices, instances of such innovation and development of distinct justice practices and values can be discerned through examination of the rules they created and the decisions they made.

The practices of the Courts of Quarter Sessions were far from wholly defined and determined by central laws and expectations. Each Sessions had been defining and creating its own rules for a long time. At some point in the eighteenth century, Sessions courts had started consolidating their rules of practice into Standing Orders.⁹⁶³ The Quarter Sessions courts had been making orders for hundreds of years. Although practices varied, the Sessions would usually record their conclusions as orders in Order Books. Most of these orders would consist of the determinations of individual cases, decisions to make particular payments, directions as to the conduct of county business, etc. Amongst these ad hoc orders, however, courts would also make orders of lasting effect to regulate the conduct of both their administrative and judicial business.

This practice was certainly established by the eighteenth century.⁹⁶⁴ It is not clear, however, when the Quarter Sessions began to place such rules in one single document for ease of access.

⁹⁶¹ King, *Remaking Justice* 53

⁹⁶² King, *Remaking Justice* 61

⁹⁶³ The various standing order documents have a number of different rules. 'Standing Orders' will be used as the generic term for these orders unless the particular context requires a different approach. Equally each set of orders will be referred to by its title (or a summary of its title) for the sake of clear distinction between them.

⁹⁶⁴ Landau, *Justices* 253-5

⁹⁶⁵ The precise basis upon which each Court was constituted and upon which it could alter its practices was in no way defined. Such practice of standing rule creation was not itself sanctioned by rules. At best it was a matter of custom and usage. Eastwood has suggested that it was the burden of work in the last quarter of the eighteenth century that had led to such codification in the early nineteenth century. He identifies Gloucestershire as having, in 1801, conducted first a review and then codification of the 'procedural innovations of the previous century'. This review led to the separation of judicial and administrative business and the setting in place of a more systematic and regular set of rules practices and procedures.⁹⁶⁶ It seems, however, that Eastwood has placed the origins of Standing Orders at too late a date. The earliest such set of rules or orders appears to be those created in Somerset in 1765.⁹⁶⁷ These are distinct rules of lasting application passed at various dates but digested into a single central record for ease of reference. The Somerset innovation, if such it was, appears therefore to have been an act of consolidation.

This was probably simply a pragmatic local response to the need for readily accessible rules. Given how long Quarter Sessions had been operating, it is perhaps surprising that it took this long for standardised rules to develop. Consolidating rules was far from new by the 1760s and 1770s⁹⁶⁸ and may have been inspired by the practice of other bodies with which many lawyers, clerks and justices would have been familiar. Both Houses of Parliament had been producing Standing Orders since at least the seventeenth century and these were frequently subject to judicial scrutiny.⁹⁶⁹ Standing Orders were also used by the Courts of Chancery⁹⁷⁰ and the King's

⁹⁶⁵ Tracing such a starting point is clouded partly by the varieties of titles given to such documents by different courts as much as by inconsistencies of archival classification. Although most such documents appear under the standard archival reference QSO (which relates to the practice of the court of Quarter Sessions) they are also sometimes understandably archived as documents of the Clerk of the Peace such as *Rules and Regulations of the Courts of Quarter Sessions for the County of Lancaster* (Addison 1826) or under as other local government documents such as *The Practice of the Court of General Quarter Sessions of the Peace for the West Riding of the County of York* (c 1850). Additionally it is clear that many such documents have not survived the years since they were individually replaced or reformed.

⁹⁶⁶ David Eastwood, 'Governing Rural England: Tradition and Transformation in Local Government 1780-1840' (Based on the author's thesis (doctoral), Clarendon University of Oxford 1994) 70-1

⁹⁶⁷ *An Extract from the Sessions-Rolls of the County of Somerset* (Q/SBO, Somerset 1765)

⁹⁶⁸ Landau, *Justices* 254-5

⁹⁶⁹ *Turner v Smith* (1715) 3 ER 5, 7 Bro P.C. 7; *Matthias Carters' Case* (1724) 88 ER 244, 8 Mod 340; *Blake v Blake and others* (1724) 2 ER 747, (1724) 5 Bro PC 384; *Ex parte Southcot* (1751) 28 ER 256, 2 Ves Sen 401; *R v Earl Ferrers* (1758) 97 ER 483, 1 Burr 631; *Casamajor v Strode* (1819) 37 ER 182, 1 Wils Ch 428; *The Cromford and High Peak Railway Company v Lacey* (1829) 148 ER 1101, 3 Y & J 80; *Hoile v Scales* (1829) 162 ER 958, 2 Hag Ecc.

⁹⁷⁰ *Vernon v Wells* (1771) 21 ER 345, Dick 452 and *Daniel v Mitchell* (1792) 30 ER 450, 1 Ves Jnr 484. Two other cases refer to the standing orders of the port of Gibraltar (*The San Antonio* (1804) 165 ER 751, 5 C Rob) and the Bank of England (*R v Gade* (1796) 168 ER 467, 2 Leach 732)

Bench also recorded its Rules of Practice and Procedure in a single document.⁹⁷¹ The Court of Session of the County Palatine of Chester, a court exercising a similar jurisdiction to the King's Bench in Westminster, consolidated its Standing Orders into a chronological list of its rules of procedure dating as far back as 1686 but also including a 'General Rule' dating from 1783, itself making provision for a variety of matters relating to notice, pre-trial and trial process.⁹⁷²

Quarter Sessions courts, therefore, appear to have adopted a more general pattern of systematising or consolidating their practices (and hence recording their conceptions of justice as practiced) into single accessible sources. A similar approach to that of the Somerset Sessions was adopted in the East Sussex Court by listing all the orders that were made from July 1776 to January 1822,⁹⁷³ although it is far from clear that this was a comprehensive list, this digest being focused (though not exclusively) on rules for cases of Poor Law removal appeals. These orders were recorded in different hands suggesting they were simply entered chronologically and annotated as and when rules were altered or abrogated.⁹⁷⁴ This practice of digesting rules passed at different times became common during the nineteenth century. Even the orders of the Court of King's Bench were a compilation of different rules and notices produced at different points in time.⁹⁷⁵

These early records suggest a desire to consolidate existing ad hoc practices of rule creation. There is no clear record of the reasons (and therefore of the justice values) inspiring such practices. However, such a practice, first of creating and then of consolidating rules, does suggest a strong identification with rule-fidelity and related values of consistency and predictability. It is probable that efficiency and clarity were also being sought.

There were other Sessions that, by the last decades of the eighteenth century, were looking to do more than just consolidate. The courts appear to have taken active steps to codify and redefine their rules. The system as it existed in 1770 was not without its problems, and it was in the seeking of solutions to some of these problems that a number of reforms would be undertaken. Landau has suggested that the closing decades of the eighteenth century may have been a

⁹⁷¹ *General Rules of the Court of King's Bench Regulating Proceedings on the Crown Side of the Said Court from Hilary Term 3 James 1* (KB 21/123, Unknown): the exact date of the recording process is not clear. Surviving records such as KB21/123 are written in a single hand and appear to date from the 1880s.

⁹⁷² *Rules of the Court of Session of the County Palatine of Chester* (J Poole 1783) 12-21

⁹⁷³ *Order Book Respecting Sessions* (QS/1 (East Sussex), 1776-1828)

⁹⁷⁴ *Ibid*; the county of East Sussex was divided into two divisions and orders made and recorded in this set of rules at a Sessions in one division had to be (or at least habitually seem to have been) re-ordered and re-recorded in the other division if the order was to be of universal application. The set of rules that replaced this Order Book are not longer to be found.

⁹⁷⁵ *Crown Office Rules*

watershed moment; the end of ‘a century less squeamish than its successors in acknowledging the connection between justice, its administration and political power – connections it viewed as natural.’⁹⁷⁶ Maybe so; the reforms to which Landau was referring, the creation of a professional stipendiary magistracy, were both a long way off in the 1780s, especially away from the capital, but as the nineteenth century began there appears to have been an active desire, at least in parts of the country, to rethink and redefine aspects of judicial practice.

The North Riding Quarter Sessions had, for example, passed an order regulating the order of business at its Sessions at the Easter Sessions in Northallerton in 1799.⁹⁷⁷ The West Riding produced a short set of general orders in 1801.⁹⁷⁸ An almost identical set of rules also appears in the North Riding in 1801,⁹⁷⁹ and these North Riding rules were further updated in 1809.⁹⁸⁰ Although the Ridings shared jurisdiction over the York County Gaol, they were distinct jurisdictions. Nonetheless in 1801 they developed almost identical rules. The same text appears in nearly all of the orders of both Ridings created in 1801, and nineteen of the twenty five areas about which rules were made in the West Riding Orders of 1801 appear in the North Riding Orders of 1801.⁹⁸¹ The Yorkshire rules show two significant trends. First of all, innovation was sometimes a shared endeavour. Different benches of Justices shared ideas about the justice they delivered. Secondly, being so similar, these rules were not the result of ad hoc development. They had been created systematically in 1801 for the purpose of developing a quasi-statutory code of procedure. In 1801, therefore, both Ridings appear to have cooperated to address questions about how best to deliver justice within their courts.

This similarity between the two Ridings runs into the North Riding Orders of 1809 and suggests on-going sharing of practices and values. The 1809 Orders also, however, show that local concerns and preferences, the values of each distinct set of justices as a social unit, led to divergence as often as convergence. Matters included in the West Riding Orders in 1801 were subsequently removed from the North Riding orders in its reform in 1809. For example, although

⁹⁷⁶ Landau, *Justices* 362

⁹⁷⁷ *North Riding Quarter Sessions Minute and Order Books 1809-1814* (1809-14), 53. There are also some documents I have yet to examine that are catalogued as Standing Orders but which may well have been misdescribed. One is located in East Sussex and catalogued as ‘Order Book respecting Sessions’ and dated 1776-1822. It is probable that this is collection of the extant standing orders into a single volume printed in 1822. Another is located in

⁹⁷⁸ *West Riding Rules of Practice* (QSO 16/1)

⁹⁷⁹ *Standing Orders of the North Riding Quarter Sessions 1801 with Manuscript Amendments* (NR QSO 1/1, Northallerton 1801-1809).

⁹⁸⁰ *The Names of the Noblemen, Gentlemen and Clergy of the Commission of the Peace for the North Riding of the County of York. Also of the Public Officers and Several Orders Necessary to Be Observed for Regulating the Proceedings of the Court of Quarter Sessions of the Said Riding* (QSO 2/1, Geo Sagg 1809)

⁹⁸¹ See, for example, the text on Appeals, which is examined more closely in Chapter 7

the 1801 orders of both Sessions made orders under the heading 'Bridges', 'Costs' and 'Counsel', these are each crossed out in an annotated copy of the 1801 North Riding Orders with the comments, 'This would be illegal', 'not needed' and 'useless' respectively. None of these orders then appear in the 1809 document.⁹⁸² Whose amendments and suggestions these were is not clear but the nature of the amendments suggest someone with some, at least, rudimentary legal training and a concern to reconcile North Riding justice with central legality.

In 1815 a *Guide to the Practice of the Court of Quarter Sessions for the County of Somerset* was produced by John Jesse, Clerk of the Indictments at the Sessions.⁹⁸³ More than a simple set of rules, this book was intended to solve 'the difficulty which the Young Practitioner often finds in consequence of being unacquainted with trivial points of Practice' but was also as 'the first attempt at an arrangement of the Practice of the County.'⁹⁸⁴ In the same year the North Riding revised its own sets of rules and these were again amended at some point around 1819.⁹⁸⁵ In 1819 the Wiltshire Quarter Sessions produced a brief set of rules.⁹⁸⁶

The Somerset *Guide* of 1815 seems different in aim and function from the orders created elsewhere. John Jesse's Somerset *Guide* was intended to be a manual containing explanation of steps and processes that the Yorkshire and Wiltshire rules omitted. It was, however, a body of rules including the verbatim text of bodies of standing orders made by the Somerset Sessions in 1811 and amended in 1815, but adding to these rules explanations of practical and procedural matters for the assistance of those appearing in the courts. Equally, the Yorkshire and Wiltshire orders, although focussed on the text of orders themselves, almost certainly had, as a central aim, the improvement of practice at the Sessions through the development of consistent and well-publicised orders. Given the lack of any legal obligation to produce such sets of orders, the courts creating them were free to innovate or develop in ways that served their immediate purposes. It appears that values such as consistency, clarification and rule promulgation were central to the rationale of publication. However, courts such as Somerset could and would go

⁹⁸² Ibid 5-6

⁹⁸³ John Jesse, *A Guide to the Practice of the Court of Quarter Sessions for the County of Somerset* (Som. Q/SBO, J Moore 1815)

⁹⁸⁴ Ibid, Preface

⁹⁸⁵ Two versions exist in the North Yorkshire Records Office: *The Names of the Noblemen, Gentlemen and Clergymen of the Commission of the Peace for the North Riding of the County of York. Also of the Public Officers and Several Orders Necessary to Be Observed for Regulating the Proceedings of the Court of Quarter Sessions of the Said Riding* (QSO 2-2, Thomas Goddards 1815) and *The Names of the Noblemen, Gentlemen and Clergymen of the Commission of the Peace for the North Riding of the County of York. Also of the Public Officers and Several Orders Necessary to Be Observed for Regulating the Proceedings of the Court of Quarter Sessions of the Said Riding (Amended 1819)* (QSO 2-3, Thomas Goddards, Malton 1815)

⁹⁸⁶ *Rules and Orders for the Regulation of the Practice of the Court of General Quarter Sessions of the Peace for the County of Wiltshire* (Browdie and Dowding 1819)

further than simple rulemaking. The Somerset *Guide* went on to explain the practice and expectations of the courts. Such guidance still had normative content and were as likely to have influenced the behaviour of those appearing before the courts.

In the period following the end of the Napoleonic wars, the process of revision and development of existing sets of orders became increasingly common. As Eastwood has suggested, the Hertfordshire Sessions developed rules in 1818, followed by Herefordshire Sessions in 1822.⁹⁸⁷ Surviving sets of rules and orders from the North Riding (in 1821 and 1833), Lancaster (in 1826), the West Riding (in 1833) and Cheshire (in 1838 and 1848) have also been located.⁹⁸⁸

The North Riding records of 1821 are particularly illustrative of attitudes and values at play in this process of reform. A number of surviving records shows that the North Riding undertook a systematic review of its rules with the aim of creating a comprehensive code for the delivery of its justice.⁹⁸⁹ Three justices were appointed at the Midsummer Sessions in July 1820 to form a committee for the purpose.⁹⁹⁰ They were Richard Peirse of Thimbleby Lodge, the Honourable Reverend Thomas Monson, the Rector of Bedale, and the Reverend William Dent of Thirsk. All were experienced magistrates, Peirse and Dent having qualified to the magistracy in 1807 and Monson in 1813.⁹⁹¹ The Reverences Dent and Monson are, in fact, part of an active core of clerical magistrates who, along with the Reverend John Headlam, came to dominate North Riding judicial practice in the first half of the nineteenth century.⁹⁹²

⁹⁸⁷ Eastwood, *Governing Rural England* 70-1

⁹⁸⁸ *Orders of the Court of General Quarter Sessions of the Peace for the County Palatine of Chester Relating to the Practice of the Court, Revised and Confirmed at the October Sessions 1838* (Ches. QCP/11, J Swinnerton 1838); *Orders of the Court of General Quarter Sessions of the Peace for the County Palatine of Chester Relating to the Practice of the Court, Revised and Confirmed at the Adjourned Sessions 14th February 1848* (Ches. QCP/9, The Courant Office 1848)

⁹⁸⁹ There exist at least two sets of manuscript amendments: *The General Rules and Orders for Regulating the Practice of the Court of General Quarter Sessions in the North Riding of the County of York (2nd Proposed Amendment)* (NR QSO 1/2, 1821), *The General Rules and Orders for Regulating the Practice of the Court of General Quarter Sessions in the North Riding of the County of York (1st Proposed Amendment)* (NR QSO 1/3, 1821). Based on examination of the text being altered in them, each appears to be an adaptation of the Orders made in 1815 (NR QSO 2/2)

⁹⁹⁰ *North Riding Quarters Sessions Minute and Order Books 1816-1825* (QSM/1821-1825, Northallerton 1821-1825), 3

⁹⁹¹ The Reverend Dent was to continue regularly serving at the Quarter Sessions into the 1840s and the Reverend Monson until 1840. Richard Peirse was a regular, if not constant, attender at the Quarter Sessions into the 1820s: *The Names of the Noblemen, Gentlemen and Clergymen of the Commission of the Peace for the North Riding of the County of York. Also of the Public Officers and Several Orders Necessary to Be Observed for Regulating the Proceedings of the Court of Quarter Sessions of the Said Riding (Amended Copy)* (Thomas Goddards 1815)

⁹⁹² The Reverend John Headlam of Wycliffe had been an active magistrate since 1799. He was a long serving and energetic chairman of the Sessions: *NR QSM/1820-24*.

Working from copies of older sets of orders, various additions, amendments and deletions of the existing rules had been proposed. Remains of the working documents in the North Yorkshire archives show something of the process although little remains to identify with any specificity the particular reason for the amendment of the Riding's orders in 1821. By April of 1821, a first draft document was sent to the justices in each of the wapentakes of the Riding for their approval.⁹⁹³ The Bulmer magistrates met at the Lobster House Inn just outside York and appear to have embraced this opportunity to participate in determining the normative basis of their decision-making, annotating their copy with a number of criticisms, amendments and comments, particularly in relation to notice provisions for adjourned proceedings.⁹⁹⁴ The justices of Gilling West, the wapentake wedged between Westmoreland and Durham in the far north and west of the Riding, also offered numerous amendments, again on this area.⁹⁹⁵ Other wapentakes' justices simply met and approved identical manuscript texts of the draft rules⁹⁹⁶. Some of these amendments are reflected in the final manuscript version of the rules, which is itself almost identical to a copy of the Standing Orders printed in 1833.⁹⁹⁷

The North Riding process suggests a significant engagement with the normative basis of their adjudication. These Justices were not simply the servants of a national legal order; both in small committees and in wider constituent assemblies of the wapentakes, Justices engaged with the detail of the rules they were to use in dispensing justice. This in fact was true of the ad hoc rule creations and consolidations of the other Sessions but in the North Riding exercise, it is possible to see more distinctly such an engaged and sustained attempt to create a basis for adjudication. This was common to all Courts of Quarter Sessions although the dynamic and systematic process of general rule reform was not. The Lancashire Sessions produced their own Rules and Regulations in 1826 but these again were simply consolidations of pre-existing rules.⁹⁹⁸

In other jurisdictions, such overhauls and improvements did take place. In 1834 the West Riding Sessions produced a new set of rules in the form of a fuller guide to the practice of the court.⁹⁹⁹ In fact, this was more than a reform of rules. As with the Somerset *Guide to Practice* of 1815, this

⁹⁹³ These versions are identified by the archival references to QSO 3/1 to QSO 3/4 and are located in the Northallerton archives because the magistrates in each of the respective Wapentakes returned them with their approval or, rarely, suggested amendments.

⁹⁹⁴ *Standing Orders of the North Riding Quarter Sessions (Bulmer Wapentake Draft)* (1821)

⁹⁹⁵ It may be a coincidence that this was also the wapentake in which the chairman of the session, the Reverend Headlam resided.

⁹⁹⁶ Copies of the orders sent to the wapentakes of Ryedale, Hang West and Pickering Lythe East were returned. There is no record of the responses from the remaining eight wapentakes.

⁹⁹⁷ *The General Rules and Orders for Regulating the Practice of the Court of General Quarter Sessions in the North Riding of the County of York (Later Amendment)* (Unknown); *Bulmer Amendments (QSO 3/1)*

⁹⁹⁸ CPV/5

⁹⁹⁹ QSO 16/2

West Riding Practice provided commentary and guidance on the practices of the court. The reasons for this were explained in the preface:

*Many Orders and Regulations having been made, from time to time, at different General Sessions, it was deemed advisable that a Committee should be appointed to methodize them and embody them in the General Practice of the Quarter Sessions, under proper heads, that they might easily be referred to.*¹⁰⁰⁰

As in the North Riding, a committee of three justices, the Reverend JA Rhodes of Horsforth Hall, Mr Armytage and Mr Morritt, undertook the revision. In fact, owing to the death of Morritt and the other duties of Armytage, Rhodes worked with the Clerk of the Peace, GH Elsley, to produce the resulting *Practice*, which Rhodes hoped had done much 'to facilitate reference, and to arrange a great number of Orders, which before were very miscellaneous and somewhat confused.'¹⁰⁰¹

It is tempting to see in these initiatives of the 1820s and 1830s something of a spirit of the time, a manifestation of perceived national tendencies towards codification and rule reform. It is possible to make a case for conformity with a national culture. There was probably something reassuring in this in a statistical age. Hilton has suggested in his comprehensive examination of the early nineteenth century that the ruling elites of the 1810s and the 1820s were 'steeped in evangelicalism, natural theology, utilitarianism [and] political economy'.¹⁰⁰² To some extent this spirit united intellectuals across party lines and created a form of orthodoxy from which it was difficult to resile. In opposing broad judicial discretions, Bentham and his liberal Whig successors and Peel and his Peelite successors, for example, were to occupy (although for different reasons) similar stances on the reform.¹⁰⁰³ Both Romilly and Peel pushed their arguments on statistical grounds.¹⁰⁰⁴ While there were those who would rail against the 'Age of Machinery' as Carlyle did in 1829,¹⁰⁰⁵ the fact of the complaints were as symptomatic of the dominance of such a mindset as were its manifestations in rules, regulations and tables.¹⁰⁰⁶

The reality is, however, a little more complicated. On the one hand there does appear to be evidence of an increasing tendency towards producing clear rules and guidance for use among

¹⁰⁰⁰ Ibid, preface

¹⁰⁰¹ Ibid

¹⁰⁰² Hilton, *England 1783-1846*, 439 and see for a more detailed analysis B. Hilton, *Corn, Cash, Commerce* (1977)

¹⁰⁰³ Hilton, *England 1783-1846*, 318-9; Cornish and Clark, *Law and Society* 576-8;

¹⁰⁰⁴ Radzinowicz, *History of English Criminal Law and Its Administration from 1750* 519-25; Emsley, *Crime and Society in England, 1750-1900* (3rd edn) 56

¹⁰⁰⁵ Thomas Carlyle, 'Signs of the Times' (1829) 49 *Edinburgh Review* 441, 442

¹⁰⁰⁶ Roberts, *Paternalism*, 60, 225-6

the participants in the court process. On the other hand, it is clear that there was no universal shift among Quarter Sessions courts towards codified sets of rules. The records in fact save this analysis from any totalising concept of a national culture. Some of this systematisation was well under way in the mid/late eighteenth century. Elsewhere full reform and codification was still not happening in the 1830s. The best that can be said (and it can be said) is that any national cultural trend towards greater system and method echoed a much more complicated series of local cultures and practices. Furthermore, such cultures and practices appear in places to have been significantly influenced by the initiatives of particular dynamic individuals like Elsley, John Jesse and the North Riding clerics. While it is clear, therefore, that there were national influences on local trends, these must be understood alongside profoundly regional variations both manifested in reform initiatives that predate the national trends (such as those in Somerset) or in forms of variation from such processes (such as those in Lancaster). Justice remained, therefore, a matter of profoundly local cultures.

This diversity of approaches prevents the presentation of teleology; there was no trend towards any particular modern way of being. Nonetheless there was, however uneven in form, some sort of trend: by the mid-nineteenth century most counties were in the process of creating distinct codes of practice and procedure to systematise and consolidate the justice they delivered. In this sense a core justice value, rule consistency, carried particular weight. The pressures of increasingly pro-active and effective central government agencies may also explain some of this process. It was, however, perhaps not only central pressures that fostered these developments from county to county. The pressure of Sessions business, not only (as Eastwood has suggested) of administrative business but increasingly as the earlier examination of the Yorkshire court reveals, of judicial business, meant that the processes the Sessions adopted had to be more efficient and easier to understand.¹⁰⁰⁷ Some of the particular implications of this need for further justice by bringing particular procedures under control will be explored more fully in the next two chapters.

Clearly at least some of these documents, such as the Somerset *Guide*, were explicitly aimed at practitioners, and others such as the West Riding *Practice* expressed their purpose as the ease of use by fellow justices. Even the more laconic sets of Standing Orders still enhanced the possibility of a well-informed court capable of handling the increasing burdens of litigation and governance. Values of predictability, clarity and efficiency were likely to be enhanced. Clerks were also likely to have benefited from such consolidation. One set of West Riding Rules of the 1850s and a set of

¹⁰⁰⁷ Eastwood, *Governing Rural England* 70-3

the Cheshire rules of the 1880s both show that Clerks possessed and used copies of such rules and orders.¹⁰⁰⁸ It would also appear from orders relating to publication that these orders were usually produced for a broad audience with the aim of establishing clear, efficient and regular procedures for the conduct of judicial and administrative business.

It was in this context that rule-creation and regulation of Sessions business developed apace from the 1850s onwards. By the middle of the century, the establishing of sets of consolidated rules for the sessions does seem to have become largely accepted practice. In fact by this point, if not earlier, some Quarter Sessions appear to have been swapping their rules to assist their rule creation. This suggests a sharing of ideas and attitudes across counties, not a process of harmonisation by central influence but by a diffusion of ideas across regions and, in fact, across the country. Many of the sets of rules identified already are in fact held in the East Sussex archives rather than in their native counties, sent in response to a request there for the rules of these other jurisdictions.¹⁰⁰⁹

Rules and Standing Orders were produced in Dorset in 1857¹⁰¹⁰, the West Riding Practice was updated in 1858¹⁰¹¹ (and again in 1866¹⁰¹² and in 1880¹⁰¹³) and the Cheshire Orders re-presented as Standing Orders, Rules and Regulations in 1860¹⁰¹⁴. Surrey printed new sets of Standing Orders in 1854, 1857, 1864 and 1880 and continued to do so (although not quite so often) into the early twentieth century.¹⁰¹⁵ Shropshire produced a set of rules in 1867¹⁰¹⁶, the East Riding in 1869¹⁰¹⁷

¹⁰⁰⁸ *Qd1/721; Chester Standing Orders (Hl Reade Copy)*

¹⁰⁰⁹ The orders located in the East Sussex Archives are those from Wiltshire (1819), Dorset (1857), Shropshire (1864), Surrey (1864 & 1867), the West Riding (1866), the East Riding (1869), Berkshire (1871) and Essex in 1881. If, as seems likely, the orders were obtained to provide guidance to the East Sussex justices on their own reforms, the 1819 Wiltshire rules present something of a mystery. It seems unlikely that such a set of orders, predating as it does many of the major administrative and judicial reforms of the early and mid-nineteenth century, would be held out as an example of how to run or order a Sessions in the 1870s.

¹⁰¹⁰ *Rules and Standing Orders of the Dorset Sessions with Appendices (Revised 1857)* (Thomas Scott 1857)

¹⁰¹¹ *Qd1/721*

¹⁰¹² *The Practice of the Court of General Quarter Sessions of the Peace for the West Riding of the County of York* (Office of the Clerk of the Peace 1866)

¹⁰¹³ *Practice of the Court of General Quarter Sessions of the Peace for the West Riding of the County of York* (Office of the Clerk of the Peace 1880)

¹⁰¹⁴ *Standing Orders, Rules and Regulations of the Court of General Quarter Sessions of the Peace for the County Palatine of Chester Relating to the Practice of the Court ... Revised and Confirmed at the Quarter Sessions December 31st 1860* (QCP/7, Hugh Roberts 1860)

¹⁰¹⁵ *Standing Orders of the Surrey Quarter Sessions as Revised 1857* (QS1/5/1, Batten Surrey Steam Printing Works, Clapham 1857); *Standing Orders of the Surrey Quarter Sessions as Revised 1864* (Batten Surrey Steam Printing Works 1864)

¹⁰¹⁶ *Rules and Regulations of the Court of General Quarter Sessions of the Peace for the County of Salop* (QS/6/4, Richard Davies, Shrewsbury 1864)

¹⁰¹⁷ *East Riding of Yorkshire Practice of the Court of Quarter Sessions* (1869)

and Essex in 1881.¹⁰¹⁸ It appears that Berkshire was revising its existing rules in 1871 as well.¹⁰¹⁹ Even when the rules were not changed, Standing Orders would frequently be reprinted, as had happened in the North Riding in 1833 and in Surrey in 1867, to update important information about the county that was coming to be recorded in them in increasing detail.¹⁰²⁰

The changing nature of the Standing Orders

In fact, this growing tendency to record reflects something else of the changing nature of these rules. Over the period of their development, the rules show an increasing tendency to regulate the administration rather than the judicial practice of their counties and Ridings. An examination of the titles in the rules provides some approximate indication of this and can be seen by examination of Table 7 below and Appendix 6, which shows all the titles of orders appearing in more than half of the sets of orders in three distinct periods (up to 1819, 1820-59 and after 1860). The earliest sets of rules were diverse. The Somerset rules were the most comprehensive, containing 46 different titles for the rules made. The North Riding rules of 1809 made provision for 19 subjects and the West Riding rules of 1801 for 25. The East Sussex rules, which were more specifically focussed on trial, had a much more limited range. It therefore seems that during this early stage of development there was a profound lack of uniformity or any particular expectation as to what such rules would or should contain. Whilst all four sets of rules made before 1810 made provision for the hearing of appeals, roads and highways, and the dates and times of the Sessions, they are otherwise varied in their content. The orders of the two Ridings and those for Somerset also all make provision for processing vagrants, the trial of traverses and the powers of coroners, as well as provision for particular jurisdictional rules for their regions.

In fact, the overall trends within the orders suggest a shared change in concerns across jurisdictional boundaries. Table 7 sets out the titles and headings that were most common in the 21 sets of the orders put into practice by courts. In the period from 1765 to 1880, the most likely areas for rule making were appeals and the ordering of Sessions business. Orders relating to bridges and highways appear in over three quarters of all orders as do other common, seemingly administrative subjects such as the regulation of accounts and finance. Across the whole period there was, therefore, a consistent emphasis on the regulation and control of the governance of the county as distinct from the trial process in its strictest sense.

¹⁰¹⁸ *The Standing Orders of the Court of Quarter Sessions for the County* (John Dutton 1881)

¹⁰¹⁹ *Berks Easter Sessions, 1871 - Proposed Rules of Sessions* (1871)

¹⁰²⁰ *QSO 2/4; Standing Orders of the Surrey Quarter Sessions as Revised 1864 (1867 Edition)* (Batten Surrey Steam Printing Works 1867)

Titles	All	to 1820	1820-60	1860-81
(Number of sets of orders)	(21)	(7)	(6)	(8)
Appeals	100.0%	100.0%	100.0%	100.0%
Sessions business	95.2%	85.7%	100.0%	100.0%
Bridges	81.0%	71.4%	83.3%	87.5%
Roads/Highways	76.2%	85.7%	100.0%	50.0%
Coroners	66.7%	57.1%	83.3%	62.5%
Accounts & Finance	61.9%	42.9%	66.7%	75.0%
Costs & Allowances (in trials)	57.1%	42.9%	66.7%	62.5%
Recognizances	57.1%	71.4%	100.0%	12.5%
Traverses	57.1%	85.7%	66.7%	25.0%
Vagrants & Paupers	57.1%	71.4%	83.3%	25.0%

Table 7: The ten main subject areas of Standing Orders 1765-1881
(The numbers in parentheses indicates number of documents in each period)

They were more significantly judicial, however, in the earlier phases than later on. In the earliest period (up until 1820), rules dealing with elements of trial process such as traverses and recognizances were as likely as rules relating to the disrepair of bridges and roads. At this point, rules on the administration and running of the Sessions were far from universal and financial orders quite uncommon. During the period from 1820 to 1859, while matters of county administration became more common (especially rules concerning county finances and the regulation of weights and measures), the commonest rules mostly related to trial procedures. In contrast, orders created from the 1860s show a marked tendency towards purely administrative matters, while orders that relate to trial processes became almost non-existent.

Titles in Standing Orders		To 1819	1820-1859	1860-1881
Judicial	Appeals, Attorneys, Costs, Counsel, Felonies, Indictments, Jurors, Notice, Prosecutors, Recognisances, Traverses	4 (36%)	8 (50%)	5 (29%)
Quasi-judicial	Bailiffs, Bridges, Constables, Coroners, Police, Roads	5 (45%)	3 (19%)	4 (24%)
Administrative	Accounts, Adjournments, Asylums, Chairmen, Committees, Gaols and Prisons, Militia, Sessions Business, Vagrants, Weights and Measures	2 (18%)	5 (31%)	8 (47%)
Number of titles in over half of the Standing Orders:		11	16	17

Table 8: Categories of rules appearing in over half of the Standing Orders made from 1765 to 1881

This can be seen further by examining Table 8 above, which shows the *types* and *categories* of orders dominating the orders made in those same three periods. They have been divided into three categories: judicial, quasi-judicial and administrative. The columns on the right relate to the three periods used in Table 7 and identify how many types of orders in each category appear in over half of the sets of Standing Orders made in each period. For example, there were four types of orders in the judicial category appearing in over half of the Standing Orders made up until

1819 (i.e. an examination of Table 8 shows that orders relating to appeals, felonies, recognizances and traverses appear in over half of the orders made in that period). By dividing the subject areas of the rules made into these three categories, preponderance can be seen more clearly. The first category, the 'judicial' rules, relates to those matters that directly concerned the conduct of court business (i.e. its rules about who did what and when in various types of cases). Another category relates to orders that can legitimately be considered purely administrative.¹⁰²¹ There is also an intermediate category, the Quasi-judicial, which consists of those subject areas that in one of two ways defies categorisation into either the simply judicial or the purely administrative.¹⁰²² The first 'quasi-judicial' category relates to administrative matters such as bridges and roads that were regulated by judicial processes at the time by prosecuting and punishing inhabitants of the county or parish found to be in default for disrepair.¹⁰²³ Even after reform in 1835, this remained the means by which highways and bridges were maintained.¹⁰²⁴ The content of these rules were focused on judicial activities but for administrative purposes. The second type of quasi-judicial category relates to orders for the payment of court officers but which did not legislate as to their roles and functions.

Of course, the categorisation of any of these sets of orders by title is a matter of interpretation and therefore of debate,¹⁰²⁵ and what is intended here is not to make any stark positivist statements of fact. Nonetheless, using these categories as guides, it appears reasonably clear that a shift towards a more administrative focus took place from the 1860s onwards. What Table 8 shows is a frequency of preponderance, in other words, the most likely category of order to

¹⁰²¹ Some matters in the administrative category could have had but simply did not in fact have judicial content. None of the rules on vagrants, for example, which could have regulated the legal processes under which vagrancy matters were determined, included any such provisions. Rather all of the rules on vagrants related to the rate to be paid to county officials for conveying vagrants following such determinations.

¹⁰²² On the danger of over-categorisation of orders into the simply 'judicial' and 'administrative' see Landau, *Justices* 241

¹⁰²³ Highway Act 1773 (13 G3 c 78), s47; Burn, *Justice* (14th edn) 423-428, vol 4, 47; Landau, *Justices* 41-2; Eastwood, *Governing Rural England* 84-5

¹⁰²⁴ The General Highways Act 1835 (5 & 6 Will IV ,c 50); Richard Burn, Thomas Chitty and Montague Bere, *The Justice of the Peace and Parish Officer*, vol 3 (29th edn, 1845), 588-599; the power for prosecutions to be commenced by presentment by one of the justices of the county was, however, abolished.

¹⁰²⁵ This can be seen, again by the example of the rules on vagrants which have been categorised as administrative in contrast to those on bailiffs, which are quasi-judicial. Both generally relate to the reimbursement of county officials. The basis of categorisation in such cases is that those orders that relate to the enforcement of processes after determination (such as payments for vagrants and, by the same token, gaols and gaolers) are classed as administrative while those that relate to payment for steps taken during the trial process, such as reimbursement to sheriffs and bailiffs for acts of arrest or process service, related to the judicial process, at least in part. In fact the business of Justices of the Peace in dealing with vagrants was profoundly judicial in that what they did was aimed at controlling and reducing crime: Eastwood, *Governing Rural England* 26; King, *Crime* 77-8, 159-60; William J. Chambliss, 'A Sociological Analysis of the Law of Vagrancy' (1964) 12 *Social Problems* 67

appear more often than not in the Standing Orders of any given period. Of those orders appearing in over half of the Standing Orders made up until 1819, 36% were judicial in nature and only 18% purely administrative. Administrative orders become more frequent from the 1820s onwards and are, by the period starting in 1860, the focus of these sets of rules.

These figures suggest that as the nineteenth century progressed, Quarter Sessions refocused rule-making energies on administration. They had, by the 1770s, established practices that combined the administrative and the judicial. Such a clear distinction may not have been apparent to those exercising such powers. Functions like crime control and prevention were as much matters of the good governance of the county as were weights and measures and the levying of the rates. Judicial processes secured the maintenance of roads and the provision of funds for the poor. However, across the decades there was a clear shift in focus. In the rule making after 1860, what is most striking is the growth of the committee and the sub-committee. The Quarter Sessions came to be the body that regulated how institutions were run in the county, how officers were to be appointed, how committees governing gaols, prisons and asylums were to be conducted and constituted, and how the police were to be managed. This was a long running development and frequently driven by Parliamentary reform but it was one that increasingly shifted the emphasis from the judicial to the administrative.¹⁰²⁶ Such developments are outside the scope of this piece save to note that while the Sessions came to define rules increasingly about county administration they came to be increasingly silent about judicial practice.

The concepts of justice that informed the judicial practices of the Quarter Sessions are not explicitly stated. They can only be gleaned by observing, indirectly, the rules under which they operated and what they did under these rules. Doing so provides a different perspective on justice from that presented in Part One, but one which is based on the sorts of values that were examined there. It will not be a complete picture of the practices that related to achieving justice at the Sessions. Rather, the purpose of what follows is to investigate some of the particular tensions and dynamics in the practice of justice that these particular sources reveal. There are certainly others that merit investigation and further research into a wider range of sources. There is little evidence of what was happening during Quarter Sessions trials themselves, for example, and further exploration of the archives to this end is needed. Rather two particular areas of the wider judicial process will be examined and the tensions within the practice of justice there investigated.

¹⁰²⁶ David Eastwood, *Government and Community in the English Provinces, 1700-1870* (Macmillan 1997) 99-100, 146, 160-5

The first area relates to the concepts of justice that informed the use of the indictment. Here the main tensions will be between the expectations of formality, on the one hand, and accurate and appropriate outcomes on the other. It will be seen that the practices of Sessions around the creation and use of the indictment suggest that the courts and those within them aimed to navigate the constraints of rules and formality in a variety of ways for the sake of achieving the most appropriate results on the facts before them.

Secondly, the practices of the Sessions arising from the adjournment of hearings and particularly the conceptual ambiguity of the traverse process will also be examined. As will be seen, rules about traverses created challenges to the Sessions. Achieving effective timely trials that produced the right evidence required the development of rules relating to notice. Here the rules were not simply concerned with the evidential benefits that notice garnered as was explored in Part One. Rather, the main concerns seem to have been the efficient and effective running of processes. Adjournments of the sort accepted in the 1770s threatened the viability of prosecutions. Rules were needed to ensure effective trial processes while balancing the liberties of suspects, concerns about costs, the overburdened timetable of the sessions and the need to prevent failures of justice. These needs created a variety of local responses. Ultimately Sessions did not, however, manage to solve these problems, and Parliament produced the ultimate solution by repealing of defendants' entitlements to delay proceedings. In this sense, a central notion of justice prevailed. However until it did, and even to some extent after it did, each Sessions developed its own justice culture; each constructed and acted on its own solutions. In the absence of the sort of discourse evident in the central courts that explains the basis of Quarter Sessions such decisions, it is suggested that it is also possible to identify and evaluate justice values within the practice of the courts (although with greater caution). It is with this that the next two chapters will engage.

Chapter 6

Indictments and Pleading: Formality and Accuracy

One of the main areas in which justice values can be seen in the practice of the Quarter Sessions is in relation to the drafting of indictments. Here, it will be seen that the Sessions and those practicing in these courts had to navigate between justice as formality and justice as accuracy. Here, it was not the rules of the Quarter Sessions themselves but the central values that defined and dictated the possibilities of practice. In responding to these constraints, however, participants acted in particular ways to achieve particular ends. It is in this sense that this chapter (and also the one that follows) is concerned as much with the practice of justice as with its discourse. The discourse, both central and local, mattered in creating this normative framework, but what was said and what was decided forms only part of any understanding of a concept of justice.

The Concept of the Indictment

The nature of the criminal trial and therefore its justice rested heavily on the form and content of the indictment. Those writing about the legal process like Burn, Blackstone, Stubbs and Talmash had much to say on the matter of indictments.¹⁰²⁷ Burn's *Justice*, Stubbs' *Crown Circuit Companion*¹⁰²⁸ and, from 1816, Chitty's *Practical Treatise*, provided extensive lists of indictment precedents to follow. In the 1770s and 1780s, these sources reflected a set of practices which were then seen as constant and enduring. Burn's explanation, for example, was heavily based on existing legal literature such as Coke's *Institutes of the Laws of England*, Hale's *Pleas of the Crown* and Hawkin's *Treatise of the Pleas of the Crown*.¹⁰²⁹

Precedents and books both constrained and enabled the provision of justice at the Sessions; enabling by offering new options and techniques, constraining by reinforcing the legal limits and boundaries of judicial practice. Landau has suggested that Burn's work contributed considerably to redefining the self-perception of Justices, reminding them that they were servants of the law

¹⁰²⁷ W Stubbs and G Talmash, *The Crown Circuit Companion* (4th edn, London 1768) 86-100; Blackstone, *Commentaries* (3rd Edn, 1769) vol 4, 313-4; Burn, *Justice* (12th Edn) vol 2, 449-466

¹⁰²⁸ *Crown Circuit Companion*: Stubbs and Talmash, *Companion* (4th Edn, 1768) 100-531; Joseph Chitty, *A Practical Treatise on the Criminal Law; Comprising the Practice, Pleadings, and Evidence Which Occur in the Course of Criminal Prosecutions* (Printed by A. J. Valpy ... Sold by Messrs. Butterworth and Son ... ; Longman and Co. 1816)

¹⁰²⁹ Burn, *Justice* (12th Edn) vol 2, 449-66

first and foremost. This is undoubtedly true and the trajectory across the decades was one in which the judicial business of the Sessions became more rule-bound and legally regulated.¹⁰³⁰

For the most part, such texts contained little explanation of the normative logic of drafting pleadings. Practical in their aims, they simply identified the matters that had to be included, without engaging with any underpinning theory of the nature or function of the indictment. Burn's approach was to use a sample indictment to explain its requirements of form.¹⁰³¹ His explanation reveals concerns of two types: those matters necessary to establish the validity of actions under indictment and, secondly, those elements that had to be included to ensure that a full and proper investigation of the allegations contained in it had been undertaken. This, however, was not a distinction of aspirations that Burn or any other commentator made explicit.

References to the indictment referred to more than the document itself. According to Burn, an indictment was 'an accusation found by an inquest of twelve or more upon their oath ... and afterwards reduced to a formed indictment.'¹⁰³² Baker has suggested that 'whatever the original meaning ... by the fourteenth century it had become a technical expression for a written accusation which was ... the outcome of a solemn enquiry into the commission of offences'.¹⁰³³ This equates with Blackstone's definition of 'a written accusation of one or more persons of a crime or misdemeanour, presented to, and presented upon oath by, a grand jury'.¹⁰³⁴ Writing in 1819, Chitty adopted Hale's description of the document as 'a plain, brief and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature.'¹⁰³⁵

While Blackstone and Chitty saw the indictment in terms of the document of accusation, Burn's definition was wider in its reference to the accusation. His definition encompassed both the fact of accusation and the document resulting from it. It was in the nature of Burn's work,

¹⁰³⁰ Peter King, 'War as a Judicial Resource: Press Gangs and Prosecution Rates, 1740-1830' in Norma Landau and J. M. Beattie (eds), *Law, Crime and English Society, 1660-1830* (Cambridge University Press 2002) 333

¹⁰³¹ Burn, *Justice (12th Edn)* vol 2, 454-65

¹⁰³² Burn, *Burn's Justice* (14th edn) 542

¹⁰³³ Baker, *English Legal History* (4th edn) 505

¹⁰³⁴ William Blackstone, *Commentaries on the Laws of England*, vol 2 (1st edn, printed at the Clarendon Press, 1766) 299; this was a definition that was to persist in later editions of Blackstone's work into the later nineteenth century: William Sir Blackstone and Robert Malcolm Kerr, *Commentaries on the Laws of England: A New Edition, Adapted to the Present State of the Law, by R. M. Kerr*. (20th edn, John Murray 1857) 358

¹⁰³⁵ Joseph Chitty, *A Practical Treatise on the Criminal Law* (Riley's edition ... With additional notes of decisions in the courts of the United States ... by R. Peters. edn, Edward Earle 1819) 111

encyclopaedic in its structure, to define any term before providing guidance to the readership on related matters of form, function and procedure.¹⁰³⁶

Burn's broad definition and his treatment of indictments more generally does suggest a wider sense of what the indictment meant to the process and justice of Quarter Sessions trials as a whole than a mere document, however formal. The document in which the accusation was recorded and from which the defendant could be arraigned, formed the core of a field of meanings to which the word 'indictment' was attached. It was both the process of accusation and the document in which that accusation was recorded.

The polysemic nature of the indictment, as Burn's explanation illustrates, can be understood as part of the central ambiguity of the English Common Law, its fundamental relationship with the pleading of causes, something examined already in Chapter 3. One result of this was that legal literature was substantially structured around such procedures. Although, therefore, Blackstone distinguished between private and public wrongs in composing his work, much of his writing on procedure had to straddle this divide.¹⁰³⁷ Although other features of substantive law such as the felony/non-felony distinction also influenced the nature of proceedings, there was a tight association between the normative validity of a trial and its formal, documentary and procedural origin. This association was as important in cases where the outcome was criminal punishment as those in which it was a civil remedy.¹⁰³⁸

The literature about indictments and prosecutions under them was dominated by two main concerns that cohere with the justice values examined in Part One: factual (and thus moral) accuracy and formal legitimacy. It was important that the indictment made accusations that supported a morally correct outcome. It was also important that those outcomes were legally sanctioned by the indictment ensuring a proper jurisdictional basis for the trial and related processes. Recognising these multiple meanings is important in tracing the quality and the quantity of justice flowing from prosecutions under indictment.¹⁰³⁹

Texts such as Burn's therefore explained not only accuracy-related concerns about the document of accusation, but also concerns about formal validity and legitimacy of the indictment as a formal record of the trial process. An indictment took different forms, depending on its use. In

¹⁰³⁶ Landau, *Justices* 341

¹⁰³⁷ Lieberman, 'Mapping the Criminal Law' 146

¹⁰³⁸ Beattie, *Crime and the Courts* 475; Norma Landau, 'Indictment for Fun and Profit: A Prosecutor's Reward at Eighteenth Century Quarter Sessions' (1999) 17 *Law and History Review* 507, 508-10

¹⁰³⁹ William Dickinson and Thomas Noon Talfourd, *Dickinson's Guide to the Quarter Sessions, and Other Sessions of the Peace* (3rd edn, London 1829) 104

one sense it was simply the document used at arraignment to allege the offence and from which the plea would be taken and to identify the facts to be proven to constitute guilt. It was also, however, the formal record of the proceedings that took place under the indictment. In this sense it included or was associated with a 'caption', which, Burn explained, was:

*No part of the indictment itself, but is the style or preamble, or return that is made from an inferior court to a superior, from whence a certiorari issues to remove; or when the whole record is made up in form; for whereas the record of the indictment, as it stands upon the file in the court where it is taken, is only thus, The jurors for our lord the king upon their oath present; when this comes to be returned upon a certiorari, it is more full and explicit.*¹⁰⁴⁰

The caption provided the record of how the trial had reached its verdict and what that verdict was. This was not simply a record of what the defendant had been accused of but a careful identification of the process by which the outcome was reached so that challenges to the legal validity of the decisions reached could be examined in the King's Bench.

Sessions records were historical; their function was to identify not to justify the trial outcomes. They were therefore relatively brief in form. The power of oversight by superior courts under the certiorari procedure, however, necessitated a fuller document with greater formal content. In such cases, the question was not the accuracy of the decisions reached but the legitimacy of that verdict. This would turn not on the evidence presented at trial or even on the verdict reached as such, but on the forms and processes followed in reaching that outcome. As has been seen, in Chapter 4, this aspect of the indictment had a profound impact on the inclination of the senior judiciary to review proceedings. It was this formal characteristic of the indictment as a record of process that underpinned the unwillingness of the minority in *R v Mawbey*¹⁰⁴¹ and, in part, of the majority in *R v Mellor*¹⁰⁴² to permit a retrial in those cases. Having been constituted as the formal record of proceedings and thus associated with a particular conception of justice as formal validity, the document became, thereby, an obstacle to other justice concerns, not least, in each of those cases, the justice of actual or procedural accuracy. To this end, the justice of criminal prosecutions under indictment could therefore depend as much on the nature of the record in

¹⁰⁴⁰ Burn, *Burn's Justice* (14th edn), 547-8

¹⁰⁴¹ *R v Mawbey, Liprott, Leycester and Cooper* (n 711)

¹⁰⁴² *R v Mellor* (n 807)

the caption as either the content of Blackstone's 'formed indictment'¹⁰⁴³ or matters proven at trial.

The indictment was therefore a multifunctional element of the trial process; not one document but two. It would be composed differently for different purposes and was intended to achieve three functions: the making of clear provable accusations to support factually accurate verdicts; the forming of the basis of a reliable historical record of the verdict of the trial; and the justification of the trial as a process.

Prosecutions, based as they were on trial by indictment, founded their claims to be just on the validity of this particular document and its associated meanings and practices. The aim in doing so was to reconcile justice as rule-conformity with the justice of accurate and effective outcomes. Rule-conforming justice was itself normatively underpinned by concerns for liberty, authority, stability and consistency while the aspiration towards effective outcomes was often motivated by concerns for factually and morally accurate verdicts as well as effective crime reduction and punishment. As has been seen in Part One, even the aspirations towards accuracy itself could be motivated by different concerns. In *Mellor*,¹⁰⁴⁴ given the unknowability of past events, accuracy had to be secured from a position of uncertainty. Liberal concerns in such circumstances conceived factual accuracy as imposing a minimum required before punishment was justified. Countervailing concerns, which prevailed amongst the majority and which could not necessarily be defined as illiberal, conceived doubt and uncertainty as the basis for limited interventions where formal processes were shown to have secured particular results.

In this complicated normative maze, there was therefore no broader alliance or association of values, no simple contrast between rights and truth or between models of crime control and due process.¹⁰⁴⁵ There was certainly no single dominant ideology at the beck and call of a powered elite.¹⁰⁴⁶ There was a dominant discourse with deeply embedded notions, values and constraints but such dominance was not absolute. Accurate verdict aspirations could as easily conflict with libertarian or authoritarian concerns, or with justice seen as consistency with settled rules. In attitudes to indictments, tension and conflict in justice values might appear as readily as in other areas of the criminal justice system.

¹⁰⁴³ Such cases would be removed by certiorari. For detailed consideration of the certiorari process see Hay, 'Dread of the Crown Office' 19-21; Douglas Hay, *Criminal Cases on the Crown Side of King's Bench: Staffordshire, 1740-1800* (N.J. Tringham ed, Staffordshire Record Society 2010) 343-451

¹⁰⁴⁴ *R v Mellor* (n 1042)

¹⁰⁴⁵ For which, see, in a modern context, Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1969), chapter 8 and generally.

¹⁰⁴⁶ cf. Hay, 'Property'

Justice Values Promulgated From the Centre

It is possible, therefore, to identify an important distinction in Burn's explanation between concerns about trial legitimacy and the accuracy of outcomes. His analysis shows the importance of a number of elements of the indictment in establishing jurisdictional and formal validity. To this end, whether it had been appropriate to decide the case at all had to be shown on the face of the caption. It was therefore necessary that the indictment identify the court conducting the trial, the town and county in which the crime occurred, the monarch under which the Sessions was held and at least one magistrate 'of the quorum'. It was also necessary to specify that the magistrates had been commissioned 'to hear and determine divers felonies, trespasses, and other misdemeanors', because, Burn suggested, 'without this clause (by the commission) they cannot proceed by indictment'. The formal recitation of the proper constitution of the tribunal also extended to the Grand Jury and its presentment. If the presentment was not recorded as being 'by the oath', the indictment, and therefore the trial, was invalidated because, as Burn stated, 'if the caption concluded that *it is presented* without saying *on their oath*, it shall be quashed; for their presentment must be upon oath, and so returned'.¹⁰⁴⁷

This tendency to identify and stress the requirements of formality increased during the nineteenth century. In contrast to the entry on indictments in the 14th edition printed in 1780, the 23rd edition printed in 1820 provided further detail on formal requirements, not simply due to developments in case law, although these played their part, but also because of the content of *Justice of the Peace* which grew to encompass the legal knowledge and expectations of the barristers who succeeded Burn as its author.¹⁰⁴⁸ It also reflected the growing sense of the normative significance of technical pleading,¹⁰⁴⁹ which in turn, perhaps, echoed wider social concerns about predictability, precision and system.¹⁰⁵⁰ Formalism continued to be a pressing concern of the courts, as can be exemplified by *R v Fearnley*, where an indictment had been struck down due to the mis-recording of the date of an adjourned hearing of the Quarter Sessions dealing with the case.¹⁰⁵¹

While the 14th edition, one of the last written during Burn's lifetime, merely recorded the need for the county to be cited in the margin of the indictment and the caption, therefore, by 1820

¹⁰⁴⁷ Burn, *Burn's Justice* (12th edn) 455-7; Stubbs and Talmarsh, *Companion* (5th edn) 88-92

¹⁰⁴⁸ Burn, *Burn's Justice* (14th edn) 549-551; Burn and Chetwynd, *Burn's Justice* (23rd edn) 30-33

¹⁰⁴⁹ Lobban, *Common Law* 215-8; Bentley, *Criminal Justice* 134-7

¹⁰⁵⁰ Briggs, *Age of Improvement* 217-8, 274-6; Hilton, *England* 330-2, 348-50, 607-9

¹⁰⁵¹ *R v Fearnley* (1786) 1 Term Rep 316, 99 ER 1115: although 'July' had clearly been written in error rather than 'October', the Court of King's Bench because 'by the caption of the indictment it appeared that the Court of Quarter Sessions had no jurisdiction'

under the authorship of George Chetwynd, barrister, MP and Chairman of the Staffordshire Quarter Sessions, a further two paragraphs had been added to explain the distinctive importance of the entries in the margin and the body of the indictment's caption. Rather than reflecting any change in the law, this was the re-emphasis of values of formalistic rectitude.¹⁰⁵²

The close attention to the words used on the caption of the indictment, as explained by Burn and other authors, was more however than a sterile obsession with formalism and certainty. Rather, it reflected a concern to ensure that trials and resulting legal outcomes were properly sanctioned. This was more than a libertarian concern to restrict the powers of the state; the importance of proper adherence to forms provided the normative sanction of punishment and condemnation.¹⁰⁵³

Some details of the caption, such as the fact that jurors were 'good and lawful men of the county aforesaid' or that they were 'sworn and charged to inquire', were Burn explained, 'requisite' but not, he suggested, necessary to ensure the validity of the processes. Furthermore, it was only necessary to identify in the caption as many of the justices 'of the quorum' present at trial as would ensure validity. Burn also occasionally offered explanation as to why some formalities were required. The identification by name of all of the Grand Jurors presenting the indictment was justified, for example, on the grounds of ensuring that the tribunal was properly constituted.¹⁰⁵⁴ This was formalism with a function therefore, a set of rules that had a clear purpose of validating not the factual decision of the trial process but the conduct of the process itself. By showing the trial to have been conducted on the right basis by the right people at the right time, the trial itself was made legitimate, not in the sense of it being acceptable, but in the sense of its being normatively justified.

The significance of the indictment, and more to the point, its proper drafting, was not simply a matter of establishing the validity of the trial as a normative act, however. The indictment was also the basis of ensuring the accuracy of the outcome of that process too. In theory, if drafted properly, the indictment would ensure a verdict against a defendant that the conclusion of the trial was factually and therefore morally justified. In addition to showing that a trial was

¹⁰⁵² Burn and Chetwynd, *Burn's Justice* (23rd edn) 31, reliance was placed, for example on *R v Austin* (1724) 8 Mod 309; 88 ER 220, which had established that the recording of the county of prosecution in the margin would not be sufficient to justify the allegation that the crime was committed in the county but only that it was the county of origin of the grand jury.

¹⁰⁵³ Burn, *Justice (12th Edn)* Vol 2, 464

¹⁰⁵⁴ *Ibid* 457; Burn suggested that it was necessary to identify a full list of grand jurors to show that interested parties or outlaws had not sat in judgment and that the jury had been properly composed of 12 members.

jurisdictionally valid, therefore, the indictment had to make appropriate answerable allegations upon which a trial of the facts could proceed. Defects in the indictment could be, and were expected to be, remedied before trial took place. Unfortunately, the technicality of rules could get entangled with interests of accurate outcomes. The law seemed to suggest stringent requirements as to what could be pleaded without necessarily then requiring proof of those facts for a conclusion. This came to be the subject of some trenchant criticism. Talfourd, for example, in drafting the 3rd edition of Dickinson's *Practical Guide*, having echoed Hale's suggestion that an indictment should be a 'plain, brief, and certain narrative of an offence committed by some person, and of the necessary circumstances that concur to ascertain the fact and its nature,' wrote:

*It is, however, extremely difficult to trace any thing like principle in the application of this rule; for though we find it generally alleged that the charge must be certain, in order that the party charged may know the particulars of the accusation which he is called to answer, it is remarkable that the niceties required on this ground may be wholly untrue in fact, and yet the prisoner may be convicted.*¹⁰⁵⁵

The correct pleading of the name of a defendant, for example, was such a matter as were debates on localism. The name of a party 'indicted regularly ought to be inserted and inserted truly in every indictment.' However, whereas 'no person can take any advantage of a mistaken surname ... notwithstanding such surname hath no manner of affinity with its true one, and he was never known by it ... the mistake of a Christian name is pleadable, and the party shall be dismissed from the indictment.'¹⁰⁵⁶ Equally, where outlawry was possible, it was necessary to plead the 'additions' in the indictment ('their estate, degree, or mastery, and of the towns, or hamlets, or places, and counties where they were conversant').¹⁰⁵⁷ Equally the indictment had to make accurate allegations of the location of the crime. Where a county had been pleaded in the margin to the indictment, it was enough that the location of the trial was recorded as 'in the county aforesaid.' It was only where there was room for doubt owing to previous pleading of more than one county that it would be necessary for the indictment to contain more specificity.¹⁰⁵⁸ The year of the crime had to be included as well as the day or the month, but the precise manner of identifying the year was not a matter of significance and so to simply state that

¹⁰⁵⁵ Dickinson and Talfourd, *Dickinson's (3rd Edn)* 104

¹⁰⁵⁶ Burn, *Justice (12th Edn)* vol 2, 458 although Dickinson's Guide suggested that mistakes of both names invalidated the indictment Dickinson and Talfourd, *Dickinson's (3rd Edn)* 107

¹⁰⁵⁷ Burn, *Justice (12th Edn)* 458; Dickinson and Talfourd, *Dickinson's (3rd Edn)* 108-9

¹⁰⁵⁸ Burn, *Justice (12th Edn)*

a crime had taken place in the specified month 'last past' was sufficient for the purposes of identifying the year.¹⁰⁵⁹

This complicated web of rules and regulations regarding the content of the indictment was generally engaged to ensure that specific allegations were made that could form the basis of a precise investigation of the facts constituting the crime. It was both more and less than a need for formal accuracy as an end in itself. Strictly, the pleading of additions (i.e. the name, status and mastery of the person named), for example, was necessary to establish the identity of a person facing outlawry, the long and complicated procedure by which process could be enforced against an unwilling defendant.¹⁰⁶⁰ Looked at from within the law, there was therefore practical value beyond mere formalism in identifying the additions of the defendant. However, the process of outlawry was becoming increasingly obsolete. Outlawry was restricted to the treasons, felonies, indictments for trespass with force and arms and (probably) 'any other crime of a higher nature than a trespass with force and arms.'¹⁰⁶¹ In most such cases and especially in felony cases, practice had long since adapted to the use of warrants of arrest, commitment and recognizances to ensure the attendance of defendants at trial. Outlawry was practically, if not legally, a dead letter. As Baker has suggested, it was an 'elaborate rigmarole' which had come to be 'not much of an inconvenience'.¹⁰⁶² Nonetheless, additions were regularly and systematically included on the indictments presented at the Quarter Sessions. Quite why this was so was not explained. Although the functional utility of retaining names and additions for the purposes of actual accuracy should not be discounted, it seems more likely that risk averse adjudicators and court personnel conceivably retained practically defunct but technically required elements of the indictment to protect it against subsequent challenge.

It is, of course, not necessary that it be simply one or the other and it would be foolish to discount the third possibility: that such matters were included simply because this was what was required under the rules system under which those drafting indictments operated. In this sense, each Court of Quarter Sessions, as a field of justice culture, was operating both under wider constraints and established expectations. As such, the normative content of such rules was not always being considered and applied but rather constituted the habits of behaviour. It was only when doubt arose when errors occurred, for example, or when challenges were required by the particular circumstances of a particular defendant's case, that any consideration of the normative

¹⁰⁵⁹ Ibid vol 2, 459; Dickinson and Talfourd, *Dickinson's (3rd Edn)* 110

¹⁰⁶⁰ Burn, *Justice (12th Edn)* vol 4, 43-47

¹⁰⁶¹ Ibid 43

¹⁰⁶² Baker, *English Legal History* (4th edn) 65

basis of these practices would arise. Even then, consistency to established practices, to the contents of formularies and the precedents set out in aging texts, are as likely to have prevailed as the most just outcome over any rationalisation of the necessary or more appropriate content of an indictment. In other words, stasis and continuity was the most likely state of affairs until the randomness of human interactions put such stasis under pressure.¹⁰⁶³

Nonetheless many requirements of form did sustain or enhance accurate and appropriate decision-making. Undoubtedly aspects may have become divorced from their original purpose. Nonetheless they did have purpose and the primary purpose, one that had transcended all others and to which many indictment rules had adapted themselves, was the identification of the matter upon which the trial was to proceed. Details therefore mattered. If there had been an error in the indictment, there was a requirement and an expectation that this would be raised by the plea of abatement and corrected while the Grand Jury was sitting. It would then be possible for a new and accurate indictment to be put before the Grand Jury.¹⁰⁶⁴ This requirement of correction was more than a procedural hurdle. The process for producing an accurate indictment ensured an accurate allegation of crime against the defendant, which in turn ensured that the trial verdict fully reflected the wrong that had occurred. Accurately citing the defendant's name on the indictment therefore was a matter of great importance. While in many cases the evidence of commission of the crime would not turn on the name of the person alleged to have committed the crime, on other occasions it could do so. It would matter that a defendant had a particular name, for example, when allegations were made that a person of that name had committed the crime in question.

The validity of trial did not therefore turn on the accuracy of the details about the defendant entered onto the indictment in any purely technical way. Errors in the name were not an absolute bar to a conviction. Burn in fact advised, again drawing on Hale, that the safest course where the name on the indictment was challenged was to require a plea of misnomer 'for he that pleads *misnomer* of either [first or surname], must in the same plea set forth what his true name is, and then he concludes himself, and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gave

¹⁰⁶³ Sewell, *Logics* 212-3

¹⁰⁶⁴ Burn, *Justice (12th Edn)* 458; William Hawkins and Thomas Leach, *A Treatise of the Pleas of the Crown; or, a System of the Principal Matters Relating to That Subject, Digested under Proper Heads ... To Which an Explanatory Preface Is Prefixed, and New and Copious Indexes Are Subjoined. By Thomas Leach*, vol 2 (6th edn, London: the editor, sold by Thomas Whieldon 1777) 245; Dickinson (or rather Talfourd) openly expressed doubt as to the utility of this procedure: Dickinson and Talfourd, *Dickinson's (3rd Edn)* 110-1

himself.¹⁰⁶⁵ Corrective processes therefore existed. Furthermore, where a defendant had entered a plea on an indictment and then alleged there to be errors in relation to the name or the addition, the fact of entering a plea was taken to have accepted the indictment as an allegation of the crime against his or her person.¹⁰⁶⁶ Nor would errors on the face of the indictment relating to the location of the crime prevent a proper verdict being entered either because, as Burn explained, 'if the offence were committed in the same county, tho' at another time, the offender ought to be found guilty ... because the jury are to find the indictment on their oaths.'¹⁰⁶⁷ Equally, wrongly pleading the location would not invalidate the conviction if the crime alleged took place elsewhere albeit in the same county.¹⁰⁶⁸

There were therefore ways in which pleading inaccuracy could be corrected or did not invalidate outcomes. What made a difference, however, was the jury's engagement with the indictment. The jury oath in fact formed the central principle upon which the accuracy and thus the justice of the trial process was based. There was a complicated normative relationship between the plea of the defendant, the oath of the jury and the content of the indictment. The defendant pleaded to the indictment, the jury were under their oaths to 'well and truly try, and true deliverance make, between our sovereign lord the king, and the prisoner at the bar, whom you shall have in charge and a true verdict give according to the evidence.'¹⁰⁶⁹ The trial was not a test of the accuracy of the indictment as such, rather the indictment was the basis of the allegation of criminality against the defendant. The response to the defendant's plea put the matter before the jury for their determination 'according to the evidence'. This had been the view taken by the majority in *R v Bird and Bird* in refusing to accept that what was alleged in the indictment, as opposed to adduced in evidence, could have put the defendant at risk of conviction during a previous trial.¹⁰⁷⁰

This relationship between defendant, indictment and jury contained its ambiguities. It was therefore possible, following Hale, to convict despite an error in the date (although, implicitly where the crime was found to have been committed), while at the same time Burn found it necessary to advise that it was:

*best to lay all the facts in the indictment as near the truth as may be; and not to say,
in an indictment for a small assault (for instance) wherein the person assaulted*

¹⁰⁶⁵ Burn, *Justice (12th Edn)* 458,

¹⁰⁶⁶ *Ibid* 458; Dickinson and Talfourd, *Dickinson's (3rd Edn)* 109

¹⁰⁶⁷ *Ibid*, 459

¹⁰⁶⁸ *Ibid*, 460-1; Blackstone, *4 Bl Comm* (1st edn) 302

¹⁰⁶⁹ Burn, *Burn's Justice* (12th edn)

¹⁰⁷⁰ *R v Bird and Bird* (1851) 2 Denison 94; 169 ER 431 (see Chapters 1 and 4)

*received little or no ... hurt, that such a one with swords, staves, and pistols ... bruised and wounded, so that his life was greatly despaired of ... which kind of words, as they are not at all necessary, so they may stagger an honest man upon his oath, to find the fact as so laid.*¹⁰⁷¹

This, written in the 1760s and confirmed in the 1770s, reflects the principles we have seen in the central courts reiterating their justice discourse during the nineteenth century.¹⁰⁷² Attempts by central courts to enforce principles of pleading that focused on factual issues were not therefore a nineteenth century innovation. They were rather a return to essential justice principles that had been clouded in the century's early decades by tendencies towards a species of technicality that had encouraged risk averse prolixity over the simpler and more limited form of technical precision favoured by the likes of Denman. His views on the nature of pleading rather reflected the interests of accuracy or even a formality more closely related to normatively valid outcomes.

Invited as they were to determine the dispute, the jury were in fact expected to look beyond the technicality of the indictment to reach an accurate verdict. The indictment itself needed to be drafted in a way that allowed the case against the defendant to be presented with sufficient clarity to permit a meaningful plea. This required that there be a clear identification of the case being alleged. The tensions, however, between precision and factually accurate verdicts were inherent to the case law at the end of the eighteenth century. Too much precision presented courts with the risks of verdicts against the evidence. Therefore while detail mattered, jurors were expected to deal with the allegations actually raised. Convictions were therefore theoretically possible despite differences between the content of the indictment and the offence as presented at trial. As ever, however, it was the relationship between the practice and the theory of indictments that defined the nature of justice at trial.

Justice by Rule Making at the Quarter Sessions

The rules on indictments promulgated in literature and through case law were, therefore, adapted to two main functions: the establishment of the normative validity or legitimacy of the trial and the securing of accurate outcomes. In these matters the Quarter Sessions provided little guidance or control. In relation to other aspects of the securing of just outcomes, the Quarter Sessions would exercise much greater control and this was particularly so in ensuring timely and prompt hearings at minimal expense and inconvenience.

¹⁰⁷¹ *Ibid*, 459-60

¹⁰⁷² For example, Lord Denman in *Francis v Steward* (n 356)

This literature on indictments was detailed and complicated, and over the nineteenth century it became increasingly so. There was therefore little need for detailed rules in the Standing Orders. As a result, the Quarter Sessions Standing Orders remained brief on such matters. In fact they became more so as national legal literature grew in extent. To define what was required in the drafting of indictments, it appears that local justices and practitioners relied on a combination of national precedents and those kept by their clerks in their formularies.¹⁰⁷³

The result is that rules under the headings of 'indictments' are found in only nine of the sets of Standing Orders.¹⁰⁷⁴ Even where such headings appeared, the content of the orders frequently related more to the process to be followed than requirements as to their content.

Although the Somerset *Guide* of 1815 provided guidance to its audience as to the content of simple indictments and of which offences were indictable, most Sessions provided very little guidance or direction on matters relating to the form of the indictment. Insofar as indictments were dealt with in the Standing Orders, their concern was simply with the process of obtaining a proper indictment. Delay was a factor although not necessarily for the sake of preventing the injustice of loss of liberty to defendants. As early as 1731, the Somerset Sessions had ordered that all indictments had to be put before the Grand Jury on the Wednesday of the sessions at the latest, 'that the Grand Jury be not detained from their private Affairs.'¹⁰⁷⁵ This rule was refined in 1811 to require that felony indictments were ready on the Tuesday of the Sessions and that other indictments 'in the course of the following day in order that business may not be unnecessarily protracted'.¹⁰⁷⁶ The most stringent requirement was that of the Chester Sessions, which required instructions for indictments to be drafted a week before the sessions.¹⁰⁷⁷ Additionally, to encourage the prompt action of prosecutors, the Sessions frequently ruled that cases would be dealt with in the order the indictments were presented.¹⁰⁷⁸

Here then, the Sessions manifested a different set of values, a different conception of justice, one mainly concerned with managing a process significantly conducted by a variety of unpaid professionals and experienced amateurs. This can be seen with other orders under the title 'Indictments'. The Dorset Rules of 1857, for example, regulated the order of proceedings, the

¹⁰⁷³ Such as the Formulary kept by the anonymous Lancashire clerk and archived at CPV 1.

¹⁰⁷⁴ Somerset Extract (Q/SBO 1763) 51; Somerset Guide (Q/SBO 1815) 82; Lancaster Rules (CPV/5 1826) 5, 25, 29-30; West Riding Practice (QS 16/2 1834) 15; Cheshire Orders (QCP/11 1838) 14,28; Dorset Rules (QS/6/2 1857), 25; Cheshire Rules (QCP/7 1860); East Riding Practice (QS/6/9), 15; West Riding Practice (QS 16/3) 28

¹⁰⁷⁵ *Extract from the Somerset Rolls* 51

¹⁰⁷⁶ Jesse, *Practice of the Sessions*, 82

¹⁰⁷⁷ *Chester Orders* 10; *Chester Orders* 14

¹⁰⁷⁸ Jesse, *Practice of the Sessions*, 83; *Chester Orders* 10; QS/6/2 *ibid* 25

requirements of notice under traverses and how to deal with recognizances under its 'indictments' section.¹⁰⁷⁹ This was also the case with the East Riding Practice although it also made provision for making copies of the indictment available to the defendant in traverse cases.¹⁰⁸⁰ The Lancashire Rules of 1826 also regulated matters of procedure under these headings rather than content, specifying how the trial should be conducted¹⁰⁸¹ and duties of notification in traverse cases.¹⁰⁸² That this was the focus rather than form and function of the indictment says much about the nature of rule writing at the Sessions: there was little value and probably little need for local rules on how indictments should be drafted: a combination of the precedents in the extensive national literature and personal formularies of specific court personnel provided the guidance and structure to the drafting of indictments. Sessional rule-making was reserved for areas where other sources of rules and practice ran out.

It does not appear that the purpose of the rules and orders was to assist in the drafting of indictments. Even the Somerset *Guide* of 1815, the most comprehensive of all the documents, was more concerned to achieve regularity and consistency of behaviour among those appearing at the Somerset Sessions. Although it did provide some guidance on the practice of drafting, including a list of likely indictable offences and specific advice on the drafting on nuisance actions, even here the preference was to direct its audience to counsel where it was necessary, 'to introduce a count, setting forth special circumstances.'¹⁰⁸³ That this is so is not surprising: the intended audience of the *Guide* was the litigants and practitioners presenting information or draft bills for use at court. While simple indictments might have been within the capabilities of some of those using the courts, especially if assisted by attorneys, the creation of indictments was the business either of the clerks (whether of the Clerk or of the Indictments) and of counsel, who in turn took their guidance from Burn and Blackstone.¹⁰⁸⁴

That the Quarter Sessions courts would legislate more on matters of process illustrates something of the nature and values of their rule making. Operating under the influence of national law, where legal literature was rich, Quarter Sessions remained relatively inactive on issues amply provided for. Their rulemaking rather operated within the interstices of the law, filling gaps and guiding discretions where they existed. Where there were matters relating to the delivery of justice on which the national law was silent, however, and about which the Sessions

¹⁰⁷⁹ Dorset Rules (QS/6/2 1857), 25-8

¹⁰⁸⁰ East Riding Practice (QS/6/9), 16

¹⁰⁸¹ Lancaster Rules (CPV/5 1826) 5, 29-30

¹⁰⁸² *ibid* 25

¹⁰⁸³ Jesse, *Practice of the Sessions*, 83-4

¹⁰⁸⁴ Jesse, *Practice of the Sessions* 82-5

felt impelled to act, they would do so. Nowhere was this more so than in the areas relating to the timing and the management of trials, where the Sessions actively devised rules to effect justice through rules establishing clear timetables and expectations of effective notice. Even here, however, it is possible to detect differences with the values shown through discourse at the centre. Concern at the Sessions about the justice or injustice of delayed proceedings was in many instances far more aimed at reconciliation between the needs of effective prosecutions and the interests of participants in the process other than the defendant. The limited records providing reasons for rules, such as those reproduced in the *Somerset Guide*, do not record concerns for defendants so much as Grand Jurors. This was not, however, always so and a fuller examination of delay will be conducted in the next chapter.

Justice as Practice: The Drafting of Indictments

By the early decades of the nineteenth century, some discourse on pleading, such as that of Bentham, was increasingly critical of what was perceived as excessive formalism.¹⁰⁸⁵ There does appear to have been tendency towards greater formalism and technical accuracy in pleading during the middle decades of the century.¹⁰⁸⁶ In fact it appears, at least so far as the literature relating to the Sessions was concerned, that even into the 1820s, the picture was more complicated. Some matters appear to have led to failure of the indictment while others, based generally on interpretations of historical sources such as Coke and Hale, might be overlooked.¹⁰⁸⁷ At the heart of the problem of indictments, that impacted upon the practice of justice at courts like the Quarter Sessions, was that there many rules but not, as Talfourd pointed out when editing Dickinson's Guide, any apparent principles.¹⁰⁸⁸ Perceived tendencies to formalistic responses by the central courts were responded to at Sessions by innovative practices that navigated the potential injustices of technical acquittals and insufficient proof.

Alternative Verdicts

One such response in the nineteenth century was the resort to alternative verdicts. They were nothing new. The validity of joined counts on an indictment was another attempt to reconcile concerns for formal validity and factual accuracy. Misjoinder, the inappropriate combination of counts on an indictment, could not be the basis of arrest of judgment but could be used to quash some of the counts while the defendant was on trial. This therefore was something that had to

¹⁰⁸⁵ Bentham and Dumont, *Treatise* vol 2, 425-34; Twining, *Theories of Evidence: Bentham and Wigmore* 47-51; Lobban, *Common Law* 147-51, 207-10

¹⁰⁸⁶ Lobban, *Common Law* 213-4; Bentley, *Criminal Justice* 134-5

¹⁰⁸⁷ Richard Burn and George Chetwynd, *The Justice of the Peace, and Parish Officer* (23rd edn, T. Cadell 1820) 31-47; Dickinson and Talfourd, *Dickinson's (3rd Edn)* 104-8

¹⁰⁸⁸ Dickinson and Talfourd, *Dickinson's (3rd Edn)* 104-8

be spotted and dealt with before arraignment. Quashing in this way sought to protect the defendant's right to challenge the case against him, it being feared that inappropriate joinder could endanger the participation of the defendant in the trial (and therefore undermine the factual justice of the outcome) because it might 'confound the prisoner in his defence, or prejudice him in his challenge of the jury.'¹⁰⁸⁹ In practical terms, as the nineteenth century progressed, the formalism of indictments and the complexity of indictment rules created a challenge for those drafting indictments, given the lack of certainty about the case¹⁰⁹⁰ and the unpredictability of the evidence. On the one hand, choosing the wrong factual basis to allege in the indictment presented a danger of the injustice of wrongful acquittals due to failures of proof. On the other hand, attempts to allege all the possible ways in which the crime might be committed, one of which might be proven, ran the danger of technical acquittals. In many cases, such concerns about technical rules of interpretation of indictments led to over-pleading in the form of lengthy allegations in which the material differences between the counts was marginal.¹⁰⁹¹

The solution that came to be adopted at Sessions (and likely at the Assize too) was the use of multiple counts on an indictment, the pleading of alternative allegations. As can be seen from Table 9, the West Riding courts had entertained a significant number of alternative counts among the indictments from the 1790s. However, in both Ridings, this willingness grew into the nineteenth century. Again, however, the extent of such developments suggests that local practices and cultures may have impacted upon the extent of such developments. While the West Riding indictments included second counts on over a third of all indictments by 1838 to 1841, this was true of only 13% of North Riding indictments. By the 1850s, significantly more West Riding indictments would have second counts on them than not, while it was still the case that the majority of indictments in the North Riding were contained in a single count.

The use of alternative counts in indictments as a means of navigating technical and legal formalism can be seen in the responses to the Night Poaching Act 1817 in the Sessions cases from 1818 to 1821. Poaching laws were not, of course, anything new. This was the latest response to the ongoing social conflict over land use. The Act provided for the prosecution of entry on 'any Forest, Chase, Park, Wood, Plantation, Close or other open or inclosed Ground,

¹⁰⁸⁹ Starkie, *Treatise* 36-38; William Dickinson, Thomas Noon Talfourd and Robert Philip Tyrwhitt, *Dickinson's Guide to the Quarter Sessions, and Other Sessions of the Peace* (4th edn, London 1845) 189-91

¹⁰⁹⁰ See Chapter 1, p [x-ref]

¹⁰⁹¹ Bentley, *Criminal Justice* 134; Lobban, *Common Law* 216-8

with the Intent illegally to destroy, take or kill Game or Rabbits'.¹⁰⁹² This created challenges of definition and categorization, and the evident response among prosecutors at the Sessions was to cover all possibilities. The challenge was, however, to apply the law's formalities to local geographies that had neither been named nor cultivated (or allowed to grow) with such legal precision in mind.

		Number of Counts			2 nd and 3 rd counts as % of all indictments		Most counts
		1	2	3	2	3	
1778 to 1781	North Riding	121	1	0	0.8%	0.0%	2
	West Riding	373	18	2	4.8%	0.5%	3
1798 to 1801	North Riding	286	3	1	1.0%	0.3%	3
	West Riding	719	77	16	10.7%	2.2%	3
1818 to 1821	North Riding	398	31	6	7.8%	1.5%	8
	West Riding	1060	156	28	14.7%	2.6%	9
1838 to 1841	North Riding	370	49	9	13.2%	2.4%	4
	West Riding	2016	696	80	34.5%	4.0%	8
1859 to 1861	North Riding	205	71	9	34.6%	4.4%	6
	West Riding	1133	843	126	74.4%	11.1%	4

Table 9: Numbers of Counts in Indictments, 1778 to 1861

Richard Hayhurst, for example, was found at 3 a.m. on 30th December 1819 in possession of a gun and was prosecuted under the Act, various counts alleging that he was found possibly in a place called Hollins Close, which was 'enclosed ground', or on unnamed 'enclosed ground' or on unnamed 'open ground'.¹⁰⁹³ Long Royd's Wood was alternatively 'a wood', 'a close', 'a plantation', or unnamed 'enclosed ground' when Edward Prince and Joshua Broomhead were prosecuted for being found there. The indictment against them contained seven counts, the prosecutor evidently not being entirely sure whether they were there to hunt on their own account or to help someone else. They were tried, convicted and judgment was respited but the flat guilty verdict did little to define the status of the wood (or the nature of their participation) for posterity.¹⁰⁹⁴

These expectations of legal exactness could also conflict with land ownership that was in reality far less precise than the law assumed. Michael Burdett and Joseph Newton were found on land at 1 am on 8th January 1819 armed with a gun. When prosecuted at the Doncaster Sessions on 20th January, nine counts were used to cover all eventualities. If where they had been found had been

¹⁰⁹² Night Poaching Act 1817 (57 Geo 3 C 40), s 1

¹⁰⁹³ *WR QS 4/55*, 39

¹⁰⁹⁴ *WR QS 4/54*, 193

as a matter of law in Stephen Green Stray, then the counts alleging they were in 'a wood' or on 'enclosed ground' with that name would cover the crime. If on the other hand they were legally in Brotton Park, the counts alleging they were in a place so named being either 'parkland', 'a wood', 'a close' or 'enclosed ground' would provide the legal basis for their conviction. The use of such legal belts and braces achieved their purpose, however. Probably not legally represented and therefore unmoved by such legal niceties, the defendants both pleaded guilty and were convicted to six months in the House of Correction.¹⁰⁹⁵

Alternative counts were more, however, than simply responses to excessive formalism. The second count on an indictment provided the jury with the option, in principle, of entering a verdict for a lesser offence to that charged. As such, an alternative count would increase a prosecutor's chance of securing a conviction. They were therefore a means of navigating legal complexity and factual doubt as much as ways of responding to requirements of formal validity, and could therefore be a sensible tactical option for a prosecutor. As such, alternative verdicts offered a second-best second chance of a conviction. Indictments were, therefore, aspects of the trial as a negotiated process; prosecutors were offering options for jurors by including multiple counts. As a matter of strict law, however, such lesser alternative offences were not in fact necessary. A jury was entitled to find a defendant guilty of any lesser offence that was in fact alleged in the special description in the indictment. So a jury could find a defendant guilty of a simple larceny on an indictment alleging a robbery because the larceny was an essential element of the robbery.¹⁰⁹⁶

In this sense, the use of alternative counts and verdicts constituted the navigation not of legal complexity but of factual uncertainty. Such possibilities were a result of the gradual dismantling of the capital code. In extending the reach of secondary punishments, a greater range of offences came to be dealt by the Quarter Sessions. Although larceny was an alternative to robbery or burglary, while the Sessions did not exercise jurisdiction over these, more serious offences, the lesser verdict was irrelevant. When the Quarter Sessions took jurisdiction over these more serious offences, from the 1820s onwards, it not only became possible for more such cases to be dealt with in the Sessions, but also made it tactically useful for lesser offences to be included in indictments. Therefore, as the offence range of the Quarter Sessions extended, so too did the opportunity for alleging and finding alternative counts. Equally, the increasing diversity of specific thefts created the possibility of simple theft being pleaded in the alternative. By the 1830s, it had

¹⁰⁹⁵ Ibid, 212

¹⁰⁹⁶ Starkie, *Treatise* 37

become fairly settled practice to plead simple theft as an alternative to theft from the person or theft by servants.

To take simple larceny first, in 1838 in the West Riding, 252 indictments included a theft as the first count on the indictment and 34 included theft as a second count. This was usually where the theft was being included as a lesser alternative to a more specific crime but it was not always the case. In some cases, pleading of theft as the second count could negotiate the factual difficulties with a case. A particular problem being confronted was that of ownership of the stolen goods. This had been a problem that indictment drafters had been facing for some time before the 1830s, and counts were used to negotiate the strictures of property law, as with the poaching prosecutions. In August 1818, for example, Morris Hughes had been indicted for simple larceny of 2 wood models, 1 iron centre, 1 iron pump handle, 8 chisels, 5 pairs of tongs, 2 hammers, 2 swages, 1 pair of calipers, 7 cast iron weights and 10lb iron. He was alleged in the first count to have taken them from John Irwin, William Rayner and Thomas Harris, and in a second count to have taken them from John Irwin, William Rayner, Thomas Harris and Samuel Darwin. The circumstances of the case suggest the theft was from the workshop of the victims.¹⁰⁹⁷

In other cases, the first count might plead the theft of goods from more than one owner and an alternative count pleading only one of those items from a single owner. This was a practice that is evident in the West Riding courts in 1838 to 1841 but not earlier and not in the North Riding courts at that time. Enoch Barker, for example, was prosecuted for the theft of 140lb mutton from Abraham Greenwood and another, and 6lb beef from Abraham Greenwood in the first count. In the second count he was charged with the taking of the beef from Abraham Greenwood.¹⁰⁹⁸ It seems here that the second count therefore served as a safety net. In situations of doubt as to the precise ownership, the lesser verdict offered the jury the possibility of convicting on a less serious basis. It would then be a matter of the court's discretion as to what sentence would then be imposed. It would probably be less serious but the prosecutor would, at least, secure a conviction instead of an acquittal.

Until the 1850s, there is little evidence that pleading alternative counts in property cases made a difference to the outcome. There was no record until then of any theft being subject to a conviction on the second count only. This was certainly happening in traverse cases like instances of obtaining by deception and also in assaults, where lesser alternative verdicts are distinctly

¹⁰⁹⁷ *WR QS 4/54*, 126; for the dangers of falling foul of the technicalities of pleading see Beattie, *Crime and the Courts* 284-6; David Bentley, *English Criminal Justice in the Nineteenth Century* (Hambledon 1998) 134-

6
¹⁰⁹⁸ *WR QS 4/67* 155

recorded. Of course, that such an outcome was not *recorded* does not mean that it did not happen, but the fact of distinct records of alternative counts in other cases heard at the same Sessions suggests that had there been a partial verdict in a theft case, it would have been noted.

1099

In contrast, in both the North Riding and the West Riding in the period 1858 to 1861, there is clear evidence that juries were returning partial verdicts in theft and related cases. For a start they are much more distinctly pleaded. The practice of pleading distinct alternative lesser offences was well established, particularly in the West Riding, and explains the large number of multiple count indictments. Such verdicts were still not common. There were four cases in which defendants were convicted of receiving the stolen goods instead of stealing them (amounting to just over 1% of all theft prosecutions). There were also three cases in which defendants charged with breaking and entering were convicted instead on the third count of receiving the stolen goods. On one occasion, a defendant was convicted of simple larceny rather than theft in the course of employment.¹¹⁰⁰ However it seems clear that adding alternative counts onto the indictment was coming to be the acceptable way of proceeding.

Specific and General Accusations

The navigation of the course of justice by the drafting of indictments can also be seen in a practice that flourished in the period from 1818 to 1821 but appears not to have occurred at any other point. This was the practice, in making allegations in indictments, of pleading the same stolen item (it was always in theft prosecutions) both specifically and in some general form.

John Westerman of Methley was convicted of theft at the Leeds Sessions on 21st October 1818, it having been alleged that he had stolen '1 leather bellyband' (worth 3d), '2lb leather' (worth 3d), '1 iron backband' (worth 2d) and '2lb iron' (worth 2d).¹¹⁰¹ It is possible, on the face of this count, that he did in fact steal the items and the raw materials. However, a pattern of pleading both the specific item and the material from which it was made, was a standard feature of the drafting practice of both Riding courts during this period. Thomas Turner was tried for stealing '2 dozen files' (6d) and '10lb steel' (4d) and Aaron Paramore for '50 horn lanthorn lights' (3d), '1/2 lb horn' (3d), '50 other lanthorn lights' (3d), '1/2 lb horn' (2d) at the Sheffield Sessions on 28th October 1818.¹¹⁰² The clearest evidence that this is not a coincidence of pleading, however, is the prosecution of James Shaw of Stannington, who was prosecuted at the Doncaster Sessions of

¹⁰⁹⁹ Beattie, *Crime and the Courts* 420-4

¹¹⁰⁰ *WR QS 4/87* 125, 256; *WR QS 4/89*, 6

¹¹⁰¹ *QS 4/54*, 65

¹¹⁰² *QS 4/54* 112 (Turner), 123 (Paramore)

1819 for the theft of '1 pack of cards' (6d) and '52 other cards' (4d).¹¹⁰³ The practice even seems to have involved breaking the some goods into their component parts as the prosecution of John Gosling for stealing (and in fact handling as an alternative) 2 dozen 'penknives', 1lb steel and 1/2lb horn seems to suggest.¹¹⁰⁴

This also appears, occasionally, to have been the practice at the North Riding Sessions during the same period. John Brough, for example, was prosecuted for stealing '1 iron bolt' (2d), '1 iron wedge' (2d), '1 iron plough sock' (2d) and 3lb iron (2d) at the Midsummer Sessions of 1821. Edward Kneeshaw was prosecuted for stealing 2 'iron plough socks' (2d), 3 'iron bolts' (2d), 1 'iron key' (1d), 1 'iron shackle and bolt' (2d), 6lb iron (3d) at the same sessions.¹¹⁰⁵ This was not universal practice, however. Mary Leighton, to take but one example, was prosecuted at the Northallerton Michaelmas Sessions for stealing 1 'linen towel', 1 'cotton handkerchief', 2 'linen and cotton checked child's slips', 1 'linen checked bed valance' and 2 'iron ladles', without the indictments specifying quantities of iron or cloth as part of the indictment.

The reasons for this pleading practice are not clear. It seems on the face of it that the pleading of such double loss of the same item might offend principles of clarity and precision. In fact, the ambiguities of the technicality and laxity of indictment pleading may have enabled this innovation. According to *Dickinson's Guide* the description of goods:

*must be accurate as to the kind of goods; for the prisoner be charged with stealing one thing, and be proved to have stolen another, he must be acquitted; but it need not be accurate as to the number; and if he stole any one of the articles enumerated, or any part of the quantity alleged, the charge will be sustained.*¹¹⁰⁶

Looked at in this way, pleading the same item twice in different forms in the same count on an indictment would be a counsel of caution. Unsure whether items stolen could be proven to be an iron plough sock or one or more lantern lights, pleading the goods also as iron or horn maximised the possibility of a (factually just) conviction while avoiding (formally unjust) misjoinder of counts or (factually unjust) failures to prove.

The focus of this research into the practices of the Sessions unfortunately does not allow an investigation into the origins or the dissemination of this peculiar practice. Nor is it clear without further investigation of other archival sources how extensive the practice was. The matter was

¹¹⁰³ QS 4/54 112, 202

¹¹⁰⁴ QS 4/54 112, 221

¹¹⁰⁵ QSM 1816-1832, 329

¹¹⁰⁶ Dickinson and Talfourd, *Dickinson's (3rd Edn)* 136

considered in the context of the receiving of stolen metals in *R v Mansfield* (1841), which had applied a report of *R v Stott* (1799), which had been reported in *East's Pleas of the Crown*,¹¹⁰⁷ and by 1845, the 6th edition of *Dickinson's Guide* had altered the advice in the previous edition to:

*Articles manufactured of iron should not be singly described in the indictment as so many pounds' weight of iron. So sovereigns or rods of iron should not be called 'gold' or 'lbs of iron'.*¹¹⁰⁸

This did not, however, directly address the issue – the goods in the Riding courts did not 'singly' identify issues in such terms. Furthermore, this was perhaps a misreading of the cases, which had in fact only concerned cases of receiving. In fact, the basic principles of pleading had not changed. The 6th edition still informed its readers that:

*The number of things stolen, and if of different kinds the number of each should be stated under a scilicet; but if so laid need not be accurately proved; and if a party stole any one of the articles enumerated, or any part of the quantity alleged the charge will be sustained.*¹¹⁰⁹

The essential principle under which this practice could be valid appears, therefore to have lingered. By the 1838 to 1841 period, however, such pleading had ceased in the West Riding courts. In no case is it apparent that any such pleading of the material from which goods were made was included alongside the pleading of the specific item. The practice does appear to have lingered at the North Riding, however. John Taylor was prosecuted at the Easter Sessions at Northallerton for stealing '2 pieces of cart harness called stretchers', '2 pieces of wood' and '14 lb iron' and James and Thomas Keddy for theft of '1 road drag' and '2lb iron'.¹¹¹⁰ It is difficult to be sure, but the practice may even have become more developed in the North Riding, extending to a wider range of goods. Alice Mooring was prosecuted, for example, for stealing 1 leg of mutton and 4lb of mutton and James Wood for 1 piece of ribbon and 4 yards of ribbon from John Tweddle the Younger and also 2 pieces of ribbon and 8 yards of ribbon from George Stephenson.¹¹¹¹ Again, however, this was not the practice in all cases. Many prosecutions proceeded on a fairly specific allegation without recourse to this particular form of alternative pleading. William Warrenner could be comfortably prosecuted (and in fact convicted) for theft of 2

¹¹⁰⁷ *R v Stott* 2 East PC 752-3; *R v Mansfield* (1841) Car & M 140, 174 ER 445

¹¹⁰⁸ Dickinson, Talfourd and Tyrwhitt, *Dickinson's* (4th Edn) 251

¹¹⁰⁹ *Ibid*

¹¹¹⁰ QSM/MIC 116, 358-9

¹¹¹¹ *ibid* 296 (Mooring), 297 (Wood)

silver tea spoons without any further pleading of the goods¹¹¹² and while William Gilson may well have only stolen four birds in his prosecution for ‘3 tame domesticated hens, 1 tame domesticated cock and 4 tame domesticated fowls’, it is fairly clear that John Lythe’s prosecution for theft of ‘3 tame fowls, 3 chickens and 3 hens’ almost certainly involved theft of nine.¹¹¹³ Even the North Riding had abandoned this procedure by the 1850s, however.

These peculiarities, the history and the extent of this pleading practice, certainly merit further examination although for now it is sufficient to note a couple of points. First of all, this appears to be something local and distinct, a form of pleading that was neither suggested by national courts nor exemplified in precedents created in national literature. It appears to be local, if not only to Yorkshire than at least not national. Secondly, being other than national, it therefore appears to be a locally generated response to locally perceived concerns. These concerns were almost certainly those that have been identified in the courts of this analysis – the need to reconcile the effective prosecution of crimes with the restrictions imposed by a national body of law. Thirdly, that such a response was possible was a result of the ambiguities of that national legal code. Burn had nothing specific during this period to say on the matter, and Dickinson’s explanation of pleading practice seems to have understood the drafting of indictments that made the allegation of the same property in different forms possible.

In this way, then, the local courts were forging their own practices to achieve particular ends. In the absence of clear statements of purpose and intent from those acting in these courts, it is only possible at best to infer those intentions and to interpret the concepts of justice that were manifested. This is the occupational hazard of analysis of the practices of the Quarter Sessions and, for now, these very provisional conclusions, advanced as such are useful, at least as starting points for understanding some of the justice values of these courts. In the context of the drafting of indictments, it appears that the core values were the justice of formal, legal validity, a value that had held such weight in the courts of the centre throughout the period in question and the equally significant value of factual accuracy. These appear to be the aims that informed the nature of legal practice at the Sessions. There were also, at least in the rules they formed, concerns about the efficiency and promptness of their processes. It is these values that will be examined next.

¹¹¹² *ibid* 492 (Warrener)

¹¹¹³ *ibid* 271 (Lythe), 415 (Gilson)

Chapter 7

The Flexibility of Governance and Issues of Justice

In the previous chapter, the practices in which justice values of formality and accuracy may have been in tension were considered. These were not the only justice values of importance to Quarter Sessions decision-making. The complicated procedures arising out of trial processes made adjournment and therefore issues of promptness, effectiveness and efficiency of importance too.

Adjourned Trials and the Justice of County Governance

An examination of the records of both West and North Riding Sessions shows that, certainly until the 1840s, adjournments were a significant aspect of Sessional Practice. This was because of the uses to which Quarter Sessions put their trial processes, uses that went beyond the simple business of determining guilt and issuing punishments. To achieve these ends, Quarter Sessions exploited, but then had to govern, existing rules about adjourning proceedings.

Adjournments were not, however, a significant feature of felony prosecutions. In such cases, there was a clear expectation that the defendant's attendance be secured following examination by the process of committal to prison or recognizance. Felony adjournments appear to have been very rare. In the period from 1778 to 1781, among the West Riding cases, there were eleven trials for property felonies that were adjourned. There frequently appear to be unusual circumstances surrounding such cases.

One such case concerned Joseph Armin, presented for the theft of a hive of bees at the Sheffield Michaelmas Sessions on 11th October 1780. He was not asked to plead until the following Doncaster Sessions on 17th January 1781. The cause of delay is not recorded but it is unlikely to be due to the defendant, who is recorded as being 'late of' the Castle of York and therefore likely to have been in custody at this point. This may be confirmed by the fact that he was discharged without any further punishment possibly because his time in custody will have influenced the sentencing decision.¹¹¹⁴ It is certainly the case that his situation was unusual. The other delayed theft prosecution, the case of Joseph Owler, was presented in October 1777 and not tried until October 1778. Again he was let off relatively lightly (with a whipping) for his offence.¹¹¹⁵

¹¹¹⁴ *West Riding Quarter Sessions Indictment Book, October 1780 to January 1784* (QS 4/40, 1780-4) 12

¹¹¹⁵ *West Riding Quarter Sessions Indictment Book, July 1776 to October 1780* (QS 4/39, 1776-80) 173

Delay may also have been due to matters of complexity in cases. Martha Hyde, for example, was presented for two related thefts, first at the Wetherby Sessions of 12th January 1779 for theft of a pair of leather shoes from John Priest. This matter was then adjourned and she was presented at the adjourned Wakefield Sessions on 14th January 1779 on a second indictment for theft of a copper tea kettle from Thomas Wilson. The exact circumstances of the adjournment are not clear, although Priest and Wilson are recorded as witnesses in both cases and Martha Hyde pleaded guilty to the first indictment and ‘confesseth’ is recorded against the second, indicating that she admitted the offence but was not distinctly punished for it, rather being recorded as receiving the sentence of a month in the House of the Correction for the offence on the first indictment.¹¹¹⁶

Where a prosecution for an assault or other misdemeanor had been commenced, however, it would be defended by the process of a traverse. Quite why traverse processes were limited to misdemeanors was not clear even in the eighteenth century. This confusion was compounded by the ambiguities surrounding assaults as a type of case.¹¹¹⁷ Nor was the misdemeanor process itself precisely defined, an ambiguity that facilitated developments of expectation and practice within Quarter Sessions legal culture.

Burn defined the traverse as the challenge to the indictment, the putting of the other side of a case. Once a bill of indictment alleging a nuisance, assault or misdemeanour was found by the grand jury, the defendant could enter a traverse. In this sense the traverse was a document through which a counter-argument was put.¹¹¹⁸ The exact process of ‘entry’ was not specified but it seems that it would have involved the Clerk of the Peace rather than necessarily the full court.¹¹¹⁹ Once the traverse had been entered, the defendant to the action could take his trial. This association of the term with the act of challenge was central to uses of the term and explains why, somewhat confusingly, defending a case once a traverse had been entered was called ‘prosecuting the traverse’.¹¹²⁰

On the other hand, traversing meant more than simply the formal challenge to the case. The term had outgrown its limited technical origins and came to be the term of reference for a particular trial procedure, one in which the defendant pleaded not guilty and obtained the

¹¹¹⁶ QS 4/39, 202

¹¹¹⁷ King, *Crime* 228-9, 240-1

¹¹¹⁸ *Ibid*, vol 4, 288

¹¹¹⁹ A number of the rules seem to assume this and the rules in the Somerset Guidance of 1815 are certainly predicated upon this: Jesse, *Practice of the Sessions* 114

¹¹²⁰ *Ibid*, vol 4, 163

deferral of trial to a later date.¹¹²¹ 'Traverse' therefore came to refer both to the process of challenging a non-felony indictment and the document by which such challenge took place. Legal literature had therefore come to deal with both the eligibility and the formal requirements of such a process in one place.¹¹²²

Requests for adjournments had led, by the 1770s, to some ambiguity as to what sort of burden the court was under. Burn suggested there was inconsistency within the canonical works as to whether a defendant had to show cause for such an adjournment or was entitled to it as of right.¹¹²³

In fact adjournment seems to have become an expectation. Burn's edition of 1772 adopted the view on such cases stated in *Bumstead's Case* that a justice could not 'inquire, try, and determine civil offences, in one and the same day'.¹¹²⁴ Quite why the traverse's delaying procedure was limited to misdemeanors (i.e. the 'civil offences') was not clear. Burn had questioned the justice of allowing those on trial for potentially capital crimes to be required to take their trial immediately while those who were charged with potentially less serious crimes could delay and prepare.¹¹²⁵

As such, the concept of the traverse occupied an ambiguous place in the judicial lexicon somewhat ambiguously. Whether this was commonly the case by 1770 or became so later on, the word came at some point in some jurisdictions to mean the whole non-felony prosecution process. This was, in part, because the concept of a 'misdemeanor' itself, and therefore the related process, was not precisely and fully dictated by national laws.

Burn, for example, described misdemeanors as 'those crimes and offences for which the law has not provided a particular name'.¹¹²⁶ Blackstone's general definition of crimes also shows some of the problems with this residual category of offence:

*A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law
... This general definition comprehends both crimes and misdemeanors; which,
properly speaking are more synonymous terms: though in common usage, the word*

¹¹²¹ Joseph Chitty, *A Practical Treatise on the Criminal Law; Comprising the Practice, Pleadings, and Evidence Which Occur in the Course of Criminal Prosecutions* (AJ Valpy) 483-4; Bentley, *Criminal Justice* 41-2

¹¹²² Burn, *Burn's Justice* (12th edn), vol 4

¹¹²³ Burn, *Burn's Justice* (12th edn), vol 2, 162

¹¹²⁴ Richard Burn, *The Justice of the Peace and Parish Officer*, vol 4 (12th edn, Strahan and Woodfall 1772) 169; the fact that 'civil offences' could be used to define misdemeanors shows some of the ambiguity as to their legal status

¹¹²⁵ *Ibid*, vol 2, 162

¹¹²⁶ *Ibid*, 209.

*“crimes” is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of “misdemeanors” only.*¹¹²⁷

Blackstone did not, however, draw a distinction between felonies and misdemeanours and such a distinction would not be drawn until inserted into a footnote by Coleridge as editor of the 16th edition in 1825. Even here, the misdemeanour was a residual category consisting of ‘all offences which are not felonies, whether against common or statute law, whether indictable or subject only to summary punishment.’¹¹²⁸

Such ambiguities facilitated (and possibly even ensured) various approaches in different courts through the varying possibilities of interpretation and implementation. For want of any definitive code or clearly un-enunciated principles, different Quarter Sessional Courts could categorise cases and respond to the challenges presented in a number of different ways.

Some of this confusion can be seen in the Standing Orders. Six of the seven sets of rules and orders made up to 1820 made orders under a ‘traverse’¹¹²⁹ heading. This was generally a blanket term for all non-felony trials, only occasionally leading to distinct rules for different aspects of misdemeanour procedures. Of those made before 1820, only the comprehensive Somerset *Guide* of 1815 also included distinct rules for misdemeanours and assaults.

It is also possible to see a pattern of decline in rule making about this aspect of judicial practice. This decline is central to the narrative of this chapter, one in which Sessions had been, until the second decade of the nineteenth century, exploiting the ambiguity of these concepts to support a form of governance by trial that exemplified a conception of justice far removed from any core understanding of adversarial criminal processes consisting of adjudication and punishment. This decline can be seen from the fact that while six of the seven pre-1820 orders made provisions in this area, only four of the six sets of orders created between 1820 and 1860 made such rules¹¹³⁰ and only two of the eight after 1860.¹¹³¹ In the Dorset Rules of 1857 there were rules for misdemeanours alongside traverses, as there were in the Chester rules of 1848 (but not those of

¹¹²⁷ Blackstone, *4 BI Comm* (1st edn) 5

¹¹²⁸ William Blackstone and John Taylor Coleridge, *Commentaries on the Laws of England*, vol 4 (16th edn, A Strahan 1825) 5

¹¹²⁹ *Somerset Extract* (Q/SBO 1763) 70; *West Riding Practice* (QS 16/2 1834) 16; *North Riding Orders* (QSO 2/1 1809) 61; *Somerset Guide* (Q/SBO 1815) 113; *North Riding Orders* (QSO 2/3 1815) 62; *Wiltshire Rules and Orders* (QS/6/7)

¹¹³⁰ *Lancashire Rules* (CPV/5 1826) 24; *North Riding Orders* (QSO 2/4 1833), 21; *West Riding Practice* (QS 16/2 1834) 20; *Cheshire Orders* (QCP/9 1848) 25, 28

¹¹³¹ *Cheshire Rules* (QCP/7 1860) 17; *Shropshire Rules* (QS/6/4 1867) 52

1860).¹¹³² This shows a general decline from an almost universal practice of regulation of traverses under distinct, locally produced orders towards a relatively minor tendency to create rules in this area. That this was the case was, to a large extent, the result of central reforms of the trial process from the 1820s onwards.

By the 1770s, adjournment of non-felony cases had become the norm. Of the 371 West Riding cases of this type during the 1778 to 1781 period, 194 were adjourned at least once. Of these, 75 were highway and bridge proceedings. This left, however, a further 119 including numerous riots, assaults, contempts and cheats. There were 105 prosecutions for various assaults. Of these, 34 were traversed at least once after being presented and 12 would be heard two sessions later. Only two defendants, Matthew Haigh at the Epiphany Wakefield Sessions in 1780 and John Simpson at the Midsummer Bradford Sessions of 1781, took their trials immediately.¹¹³³ This may not have proved a sensible option for them; both were convicted.¹¹³⁴ Those taking their time to come to trial had a better chance of success. Of those who traversed and took their trial on a later date, eight were convicted and ten were acquitted. The remainder withdrew their traverse and submitted to the court for punishment, possibly following agreement with the prosecutor.

In the North Riding, adjournments were less common. From 1778-81 there were 120 non-felony cases. Of these, 71 were adjourned including 52 cases that were not highway or bridge prosecutions. The North Riding Minute Books only record 15 cases as traversed. None of them were disposed of at the same sessions. Of these 15 cases, 5 were common assault prosecutions.¹¹³⁵

This therefore suggests that Quarter Sessions accommodated delay in many of their cases. That they did so was a function of the traverse process. Felony trials in the 1770s tended to proceed quickly and were only ever delayed in exceptional circumstances. In misdemeanor cases in the 1770s, delay was the norm whether or not officially recorded as 'traverses'. In fact these delayed proceedings were central to the way in which the Quarter Sessions governed their jurisdictions. The flexibility offered by adjournments was central to this practice.

¹¹³² Jesse, *Practice of the Sessions* 6-7; *QS/6/2* 54; *Chester Orders* 25

¹¹³³ *WR QS 4/39*, 195-334; *WR QS 4/40*, 1-84

¹¹³⁴ Simpson was, however, convicted only of assault not battery, the only instance of this verdict in all the records of the two Ridings. Haigh was fined 6d where as Simpson was fined 40s and threatened with imprisonment in the House of Correction if he did not find a surety for his good behaviour: *WR QS 4/39*, 278; *WR QS 4/40*, 69-70

¹¹³⁵ *Nr QSM/1778-92*, 257-284. There were 39 assault prosecutions in total of which only four were tried at any point.

This chapter will explore the ways in which the Quarter Sessions courts sought to tackle the challenges presented by this flexibility in an environment with the context of an essentially non-professional judicial system. This was a challenge to 'justice' in that it raised a number of normative issues about how to conduct cases in the right way. It was also, however, central and natural to the particular and distinctive way in which justice was practiced by these Courts.

The practice of the Sessions, however, was not destined to last. The rationale of accepting such delay in judicial processes was not clearly stated and would, ultimately, come into conflict with perceptions from the centre that such practices offended essential justice values, particularly promptness, efficacy and efficiency. As has been discussed in Chapter 5, the one hundred year period from 1770 to 1870, and the later half in particular, saw profound change in the environment in which this justice was practised. What had started the period as a relatively small peripatetic forum for dispensing local justice became, as a result of the changing nature of its case load and initiatives from outside, a much more distinctively 'criminal' court, more profoundly dedicated to the prompt adjudication of a large number of cases. In such circumstances, as shall be seen, the flexible system of justice that had been the distinctive feature of Quarter Sessions justice into the first quarter of the nineteenth century could not last.

Traverse Practices and Justice

The nature of traverse proceedings in the early decades of this period can be seen by examining some of the cases from the 1798 to 1801 period. These are the cases for assaulting public officials. One such is a prosecution by John Brotherton, who alleged he had been assaulted while acting as a bailiff on 11th October 1800. He proceeded against Richard Thornton, Richard's wife Dinah, Thomas Thornton, and Thomas' wife Margaret at the Richmond Sessions but there no bill was found. As this did not dispose of a case, however, Brotherton presented the case again at the Easter Sessions. This time the Grand Jury accepted his case and returned a true bill. The four defendants traversed proceedings at the July Sessions in 1801 and the two men entered recognisances of £40 each to ensure the appearance of all four at the next Sessions. For some reason not apparent on the record, the case was not, however, heard again until January 1802 at Richmond. Here the defendants on this occasion withdrew their traverses and submitted. They were fined 6d.¹¹³⁶

Two other such cases dealt with by the Sessions during this time had already commenced by October 1798. William Seaton had been indicted in April 1797 for an assault in the course of rescuing his livestock from the pound. Having had the bill found against him at that Sessions, he

¹¹³⁶ NR QSM/1798-1804 288, 295, 407

traversed it at the October Sessions in 1798. This therefore entitled him to have the case adjourned to the next Sessions for trial of the issues. At that next Sessions, in Easingwold in January 1799, he withdrew his traverse, submitted to the prosecution and was fined 6d. It is likely that he also paid some costs, although costs were not in fact recorded during this period. William Lawson, William Bulmer and John Cock, colliers from the parishes of Ellerbeck, Hutton Bonville and Deighton towards the northern end of the North Riding, were also prosecuted for violence while rescuing impounded horses. An indictment was found against all three at the Northallerton Sessions in July 1798. At the October Sessions, Bulmer and Cock submitted and were each fined a shilling. Lawson, however, chose to traverse and his case, too, was adjourned. Like Seaton, he too withdrew his traverse at the next Sessions, (Richmond on 17th January, 1799). Like his two accomplices, he was fined a shilling. As can be seen, therefore, many defendants faced with prosecution for a misdemeanour regularly exercised options to delay proceedings by traverse process. Not everyone did so: Mary Reimer and Anthony Aysley, each separately prosecuted for assaulting a bailiff, submitted at the hearing immediately after the one in which the indictment was found. Even so, such was the traverse practice at the time that submission would be at the subsequent, not the same sessions.¹¹³⁷

A similar pattern of behaviour can be seen in relation to pound rescues, the rescuing of impounded animals. Impounding straying animals that were depasturing land was an element of the civil right of distraint. An individual could impound animals or take them to a common pound until compensation was obtained.¹¹³⁸ The frequent attempts to rescue such impounded animals constituted offences tried at the Sessions. Such cases were a regular feature of late Hanoverian Quarter Sessional practice. In the 1770s there had been eleven prosecutions for simple pound rescue in the West Riding and four in the North Riding. Twenty years later there were nine pound breach prosecutions in the West Riding and seven in the North Riding. Such cases could be relatively time consuming and complicated. Like assaults, rescues frequently involved more than one defendant and would often be dealt with across multiple Sessions: the West Riding breaches in the 1790s all took at least two hearings, often three.¹¹³⁹

Dealing with cases of this sort was a core feature of the justice with which Quarter Sessional county governance was effected. Acting as pound keeper presented risk. There were numerous instances of prosecutions for assaults on pound keepers or their families. They were prosecuted as distinct offences rather than an assault in the execution of a duty. One such prosecution was

¹¹³⁷ *Ibid*, 124 (Seaton), 169 (Cock, Bulmer and Lawson), 245 (Aysley), 295 (Reimer).

¹¹³⁸ Richard Burn, *The Justice of the Peace and Parish Officer* (14th edn, 1780), vol 1, 443-67

¹¹³⁹ *Ibid* 270, 293-5; *WR QS 4/45* 245, 428-30; *WR QS 4/46* 32-3, 63

that of John Witt who found himself in the unfortunate position of being the apprentice to a man whose horse had been impounded and who was prosecuted for an assault on the wife of the common pound keeper of Thirsk. He was indicted at the July Sessions of 1800 and chose to submit at the next Sessions and was fined 5 shillings. Thomas Tyerman was indicted at the October Sessions in 1800. There is no record of him having traversed and his case was next recorded at the Easter Sessions in 1801. He was then 'discharged on the instance of the prosecutrix on paying fine'.¹¹⁴⁰

Such assault and pound rescue prosecutions therefore constituted an ordering and arranging of disputes in a way that operated differently to a simple trial and punishment model of criminal justice. Typical of these types of cases were ongoing hearings, some of which ended in trial, in submission. Although more serious fines were possible, the most common disposal was the 6d fine. Trials were not central to the business of the Sessions. Quarter Sessions rather constituted a process of ongoing ordering and dispute mediation. It is in this context that a tolerance and even an encouragement of adjournment needs to be understood. Adjournments enhanced rather than undermined this species of justice.

This can also be seen even more clearly with road and bridge prosecutions during these early periods. As can be seen from **Table 10** below, bridge and highway prosecutions nearly always required more than one hearing. The general pattern in both Ridings was that road and bridge prosecutions retained a similar character. As **Table 10** shows, road and bridge prosecutions were matters of ongoing county governance rather than instances of specific adjudication. This ongoing characteristic became more pronounced (in terms of adjournments) until the 1818-21 period, with more recurrent hearings being the norm up until then and continuing to be so in the West Riding into the 1830s. Such cases could be brought back before the court on numerous occasions while the bridge or stretch of road was being repaired.¹¹⁴¹

Although proceedings under indictment, these were not processes seeking to adjudicate and determine culpability and punishment in a single hearing. Strictly, Special Sessions were to be held for highways business although courts were also empowered to deal with the matter 'from time to time, whenever they judge proper'.¹¹⁴² This appears to have led Sessions to incorporate

¹¹⁴⁰ *NR QSM/1798-1804* 256 (Witt), 270 (Tyerman); the only other assault related to pound rescue prosecuted in the North Riding during this period was that of John and George Sayer, who both submitted at the Sessions after the finding of the indictment and were fined 6d.

¹¹⁴¹ The exception here for bridge prosecutions in the North Riding from 1798 to 1801 is explained by the fact that there were only two presentments for bridges during that period, one of which was 'Not Found' and the other was taken by certiorari to the King's Bench after presentment.

¹¹⁴² Burn, *Justice* (12th edn) 358

road and bridge cases into normal sittings. Proceedings against inhabitants of the parish (for roads) or the County (for bridges) were usually commenced by the surveyor of the county or Riding or by a Justice of the Peace. Trial was possible under the traverse although this in fact happened infrequently.¹¹⁴³ The usual disposal of such proceedings was instead by early submission by the defendant inhabitants. Proceedings were then respited across successive Sessions until the highway or bridge was certified as repaired. From 1801, both the West Riding and North Riding sessions set detailed rules for when it was or was not appropriate for such certifications to have been made.¹¹⁴⁴ It may be that the use of traverse procedures for such cases was locally innovated: Burn does not suggest such a process and, other than mentioning presentment to start proceedings, is quite silent on how such cases were to be resolved.¹¹⁴⁵

	North Riding				West Riding			
	1778-81	1798-01	1818-21	1838-41	1778-81	1798-01	1818-21	1838-41
Bridges								
Number of cases	10	6	13	8	22	16	26	11
Most hearings	3	2	4	2	5	4	14	7
Average number of hearings	1.9	2.0	2.5	1.1	2.3	2.0	5.3	3.9
Usual number of hearings	2	1	3	1	2	1	2	3
Highways								
Cases	14	40	32	2	67	121	61	38
Most hearings	4	5	6	1	10	9	8	7
Average hearings	2.4	2.5	3.1	1.0	3.2	3.1	3.6	2.6
Usual number of hearings	3	2	3	1	2	2	2	2

Table 10: Bridge and Highway Proceedings 1778 to 1841¹¹⁴⁶

The respite process explains the recurrent hearings at the Sessions. While such hearings probably did not take up considerable time, they were numerous and on each occasion, those acting as defendants had to attend under recognisances, and procedures had to be undertaken to secure the continuance of the case. The Orders of the Riding Sessions requiring detailed evidential bases for decisions suggest a preference for thorough proceedings and full information over the avoidance of delay or even expense. In fact considerable judicial time was devoted to this aspect

¹¹⁴³ In the North Riding there were no trials from 1778-81, 4 in the period from 1798-1801, 5 from 1818 to 1821 and no trials from 1838 to 1851 but one case was removed by certiorari. In the West Riding, there were 4 trials from 1778-81, 4 from 1798-1801 (and one was removed by certiorari), 4 from 1818 to 1821 (and two were removed by certiorari); there are no records of trials in the period 1838-41.

¹¹⁴⁴ NR QSO 1/1, 7-9; WR QS 16/1, 8-10

¹¹⁴⁵ Burn, *Justice* (12th edn) 387-8, NR QSO 1/1, 7; WR QS 16/1, 8

¹¹⁴⁶ *North Riding Quarter Sessions Minute and Order Books 1778-92 (1778-92); West Riding Quarter Sessions Order Books (1777-81)*

of Sessions business: respites were only to be obtained on motions made in open court and none were to be allowed until a bridge had lasted a winter.¹¹⁴⁷

Even before these orders were put into effect, the data suggest that the courts took their time to ensure that the right decision was being made in circumstances where the work of repairing and then approving repairs was necessarily undertaken by appointed amateurs. Inefficient as such practice may now seem, it almost certainly ensured a form of effective administration of county communications in an era when such things were conducted on an essentially private and individualistic basis.¹¹⁴⁸

The way Sessions dealt with assaults, pound rescues, roads and highways, suggests that the judicial practice of these courts was something other than a formalized process of determining guilt and imposing punishment. Although punishment was central to all of these procedures, it was used to secure other ends. The active roles of victims and county officials as prosecutors and the resulting use of punishment to secure remedies or wide managerial discretions, created a different form of justice practice, one far removed from trial as the final determinant of moral culpability and blame.

Assault prosecutions were particularly ambiguous within the justicing practices into the first quarter of the nineteenth century, being constituted, to differing degrees in differing localities, far more as civil than as criminal matters.¹¹⁴⁹ Furthermore, even when cases merited punishment, the Justices could use such punishments to achieve wider purposes of governance. The result was that broad discretions were exercised in relation to those convicted of crimes to achieve wider social purposes. Even in felony cases, punishment, or the threat of it, was used to assist national or regional endeavours.

Prosecutions, for example, helped recruiting sergeants. Among the 74 property felony convictions at the West Riding Sessions from 1778-81, three defendants were threatened with imprisonment unless they enlisted and one other, perhaps successfully anticipating his options, was given leave to enlist. In addition, five more were simply recorded as 'enlisted'. King has shown that war provided a good opportunity for recruitment in pre-trial or even pre-prosecution stages, and it is therefore quite probable that others suspected of crime had already been

¹¹⁴⁷ NR QSO 1/1, 7; WR QS 16/1, 8

¹¹⁴⁸ Eastwood, 'Governing Rural England: Tradition and Transformation in Local Government 1780-1840' 33-4, 40-1

¹¹⁴⁹ King, *Crime and Law* 257-61

recruited rather than face prosecution.¹¹⁵⁰ Trial itself may therefore have been part of a negotiation strategy. Four of the five 'enlisted' men all had pleaded guilty already. In contrast, those who were either granted leave to enlist or threatened with substantial imprisonment unless they did enlist, had all pleaded not guilty. The final enlisted man was Thomas Bream, on trial at the Sheffield Michaelmas Sessions of 1778 for theft of ferrets and rabbit nets. He had pleaded not guilty but is then recorded as having enlisted. It seems likely that enlistment was the result of a plea bargain either with the prosecutor or, more probably, the magistrates. This may not have been a systematic punishment strategy, however. The fact that five of the enlistments happened at the same Sessions (Doncaster, 12th January 1779) suggests that the presence of active recruitment in an area at the time influenced resort to it as a disposal. Nor was it always an option open to those convicted. George Parkin, convicted of taking a pair of leather breaches at the Doncaster Sessions in 1779, was 'delivered back to his master who is present in court, the sergeant having refused to take him for a soldier being unfit'.¹¹⁵¹

The North Riding Sessions adopted similarly instrumental responses to crime. Marmaduke Bosomworth was given the option of impressments into the navy or three years' service on the Thames for the theft of two great coats.¹¹⁵² The extent to which each Riding used such methods varied: it was a feature of the distinct culture of each. In the 1798-1801 period, the North Riding Quarter Sessions continued, occasionally, to use processes, to recruit for the merchant marine. John Wade was given the option of taking an apprenticeship at sea instead of suffering a six month period of imprisonment.¹¹⁵³ However, no defendants were sent to assist military recruitment at this time. This may partly be due to local sensibilities. In the North Riding, there was considerable hostility to forced impressment with violent attacks on press gangs occurring in Whitby in the 1790s.¹¹⁵⁴ In such circumstances, it is possible that the Justices acted with more circumspection than they had in the 1770s.

In the West Riding courts, both being sent to sea and enlistment did continue as alternatives that the courts were willing to adopt. George Norman was threatened with six months imprisonment

¹¹⁵⁰ Peter King, 'War as a Judicial Resource. Press Gangs and Prosecution Rates, 1740-1830' in Norma Landau (ed), *Law, Crime and English Society* (Oxford University Press 2002)

¹¹⁵¹ *WR QS 4/39*, 205, 223, 229, 329. Only one other prisoner was enlisted: Samuel Thompson, convicted for obtaining 9 guineas from a recruiting sergeant of the 45th Regiment of Foot by pretending he was free to do enlist when he was in fact an apprentice. With a suitable sense of irony, Thompson was allowed to escape imprisonment by enlisting in a different regiment, the 78th Regiment of Foot. The record does not show what happened to his apprenticeship.

¹¹⁵² *NR QSM/1765-1798*, 250

¹¹⁵³ *NR QSM/1798-1804*, 287

¹¹⁵⁴

if he did not agree to enlist.¹¹⁵⁵ Even here, however, the Sessions acted with more circumspection than it had previously. As can be seen from Table 11, of the 213 defendants punished at the Sessions from 1799 to 1801, only seven were enlisted or sent to sea. As many were passed as vagrants (another aspect, in fact, of this broader conception of governance). It is likely that the willingness to use such punishments, being an aspect of a much wider social purpose, reflected much broader considerations than the purely punitive. What constituted justice at the Quarter Sessions had to be understood more broadly than could be encompassed by adversarial criminal adjudications.

	Imprisonment only	Some solitary confinement	Enlistment	To be sent to Sea	Passed	Publicly	Whipped
1 day	1	0	0	0	0	0	0
7 days	0	5	0	0	1	1	0
13 days	1	0	0	0	0	0	1
10 days	0	2	0	0	0	0	0
12 days	0	0	0	0	0	1	0
14 days	3	15	0	0	3	1	1
3 weeks	1	0	0	0	0	0	0
1 month	15	33	1	0	2	2	2
6 weeks	0	3	1	0	0	0	0
2 month	1	9	0	0	0	0	0
3 months	3	26	0	0	0	5	0
4 months	0	1	0	0	0	0	0
6 months	4	27	0	0	0	1	0
12 months	8	5	0	1	0	0	0
18 months	0	2	0	0	0	0	0
2 years	2	0	0	0	0	0	0
7 years transportation	15	0	0	0	0	0	0
No custody		0	1	3	1	5	0

Table 11: Punishments imposed for Theft and Property Offences by West Riding Quarter Sessions, 1798 to 1801

This broader use of Quarter Sessions processes explains, if not the rationale, then at least the uses made of traverse processes. More flexible governance required time before the final determination trial: opportunities to negotiate accommodations and agreements outside of the formal trial.

There was more than the simple resolution of interpersonal disputes too. The time and effort expended on many of the cases seems considerable considering the outcomes. This seems

¹¹⁵⁵ *WR QS 4/39, 23*

particularly apparent with pound rescues. Burn justified the punishment for pound breaches on the grounds that the breaking of the pound 'greatly offendeth against the peace, doth trespass to the king, and to the lord of the fee, and to the sheriffs, and hundredors, in breach of the peace, and to the party, and to the delaying of justice.'¹¹⁵⁶ Pound breaches were therefore offences against the administration of justice and the authority of the crown. This hardly explains, however, the great trouble that prosecutors went to secure convictions in these cases. It may be that a recognizance had been entered out of the Sessions, but recognizances were an unreliable tool for securing the commitment of parties to initiate prosecutions, given the cost and other burdens they faced.¹¹⁵⁷ In both Ridings, even the closest hearings would be some distance from many litigants. Adjournments exacerbated that difficulty. The anonymous prosecutor of Seaton for pound rescue would have to have travelled 38 miles from the parish of Skelton to the Northallerton Sessions and 10 miles for the adjourned session at Easingwold.¹¹⁵⁸ John Smith, the prosecutor of the three colliers, Lawson, Bulmer and Cock,¹¹⁵⁹ would only have to have travelled 6 miles to the first sessions to present the Bill of Indictment and then to have made the trip again for the second sessions, given that the defendants might have pushed for trial then. As they did not, a third trip had to be made, this time the 17 or so miles to Richmond.¹¹⁶⁰

Individual victims do seem to have been willing to incur such inconvenience. Prosecution will have offered advantages in any negotiation of their local disputes, but drawn out proceedings that took parties, largely at their own expense, across the Riding for the sake, ultimately, of a 6d fine, seems irrational. This is not, however, likely to be how those pursuing such prosecutions saw the matter. The role of pound keeper was somewhat ambiguous. Although the status of the pound had been established by medieval and Tudor legislation, the status of pound keeper was less clearly settled. Although legal texts had much to say about the offences of pound rescue, they had far less to say about the pound keeper.¹¹⁶¹ Charged with maintaining the local *pound overt* and appointed, it would seem, for the county, the pound keeper was not, for all that, an official sufficient to sustain an action for prosecution for an assault in the execution of his duty.

¹¹⁵⁶ Burn, *Burn's Justice* (14th edn), vol 1, 463

¹¹⁵⁷ Beattie, *Crime* 46-7; Eastwood, 'Governing Rural England: Tradition and Transformation in Local Government 1780-1840' 216-8; King, *Crime* 18-9, 47-49

¹¹⁵⁸ NR QSM/1798-1804 124

¹¹⁵⁹ See page 10 above

¹¹⁶⁰ NR QSM/1798-1804, 169

¹¹⁶¹ Burn, *Justice (12th Edn)* vol 1, 462-4, Dickinson and Talfourd, *Dickinson's (3rd Edn)* 227; William Woodfall and Samuel Bealey Harrison, *Woodfall's Practical Treatise on the Law of Landlord and Tenant* (3rd edn, London 1837) vol 2, 330-4. On the voluntary officials of the county see: Eastwood, 'Governing Rural England: Tradition and Transformation in Local Government 1780-1840' 51-70; Eastwood, *Government and Community* 42-57: Eastwood does not explicitly engage with the role of pound keepers as an aspect of local government

Certainly, in the two Ridings, assaults on pound keepers were charged in different form to those on bailiffs or constables.¹¹⁶² The justice of the Sessions was, as King has suggested, an aspect of both a multi-use right and an arena of struggle.¹¹⁶³ In this arena bailiffs and pound keepers occupied an ambiguous position, although not likely to be of the poorest classes, nor were they likely even to amount to the middling sorts. Not only this but they were also, however remotely and thanklessly, in acting in these capacities, putting themselves into positions of conflict with their neighbours. It is probably not surprising then that they chose to rely on the protection of the law and even went to some trouble to obtain it, nor that the Justices of the Sessions saw it as part of their duties to provide such protections.

Conduct of prosecutions at the Sessions was much more, therefore, than merely adjudication and punishment. It was part of a much wider conception of justice, one in which the orderly governance of the Riding and indeed the county was at stake. This involved ensuring the public order and the maintenance of infrastructure as much as blame and punishment. To achieve these ends, the Quarter Sessions used traverse proceedings and adjournments more generally to effect their aims. Doing so, however, raised tensions within the conceptualisation of adjudicative justice.

Regulating Traverses and Adjournments

The significant practice of adjourning cases, as least in the late eighteenth century, required courts to make provision for effective trial processes by ensuring parties had notice of proceedings. This was not only a concern to ensure participation, as seen in the central courts, but also (and possibly more so) a concern that processes ran smoothly and efficiently.

The earliest orders sought to specify when, within the session, parties should be ready to try traverses. The rules in the Somerset extracts of 1765 in fact date from 1740 and 1759, and show a clear concern with delay and informality. The order made in 1740 required that defendants should be ready to try their traverses on the Wednesday of 'every' Quarter Sessions after the traverse had been entered and also that defendants therefore be notified of this obligation both when entering the traverse and in the venire.¹¹⁶⁴ It therefore appears that the early Somerset rules expected parties to be in attendance at each Sessions from the date of traverse until the matter was resolved at some later Sessions.

¹¹⁶² This, again being distinct from the prosecution for the pound breach itself: see for example NR QSM/1798-1804, 256 (John Witt: prosecuted at the Midsummer Sessions 1800 for assault on a poundkeeper and rescue) and NR QSM/1798-1804, 270 (William Walker: prosecuted at the Michaelmas Sessions 1800 for pound breach)

¹¹⁶³ King, *Crime* 360-1

¹¹⁶⁴ *Somerset Extract* (Q/SBO 1763) 70

With the flexibility required for governance through adjudication came the danger of unnecessary delay. In the hopes of controlling such delay, Sessions tried to ensure that parties had proper notice of trial. This cohered with national expectations of just dealing. Burn had identified in his 1780 edition that traverses should provide 8 days' notice in assize cases but had only noted that 'at the Sessions, it is usual to give two or three days' notice.'¹¹⁶⁵ National literature was otherwise relatively silent on what was expected in this respect.

In this ambiguous environment, the pattern of government by adjudication could continue into the nineteenth century although it came under increasing pressure as central expectations of a particular type of procedure with a particular conception of justice came increasingly to bear on local practices.

The orders for both the North and the West Ridings of 1801 set in place more sophisticated systems for dealing with traverse trials, ones that clarified the extent to which parties could control or alter the standard rules about the timing of trials. A defendant already bound by a recognizance to appear and answer to an indictment could notify the prosecutor of an intention both to enter a traverse and to take trial at that same Sessions. In the absence of such notice, the traverse could only be tried at that Sessions with the prosecutor's consent. Where a defendant had not yet been bound to appear by a recognizance when the Grand Jury presented the indictment, he or she could then traverse the indictment to a subsequent Sessions. In effect this meant that the indictment would be put before the grand jury at one Sessions and if found to be a true bill, the defendant would only be under an obligation to enter their traverse at the following Sessions. The matter would then only fall to be tried at the next subsequent Sessions (i.e. two Sessions after the bill had been found).¹¹⁶⁶

The Somerset Sessions had similar rules in place by 1815, specifically in relation to those indicted for assaults. Any defendant who had been held in custody for at least eight days before the Sessions in question could elect either immediate trial or trial at the next Sessions. This represents something of a shift in emphasis from the earlier Somerset Orders, which had simply required the defendant to be ready.¹¹⁶⁷ The 1815 rule also placed particular burdens when defendants were in custody. In such cases, prosecutors were required to be ready for trial by having their witnesses present to appear before the Grand Jury and also, if necessary, for full

¹¹⁶⁵ Burn, Durnford and King, *Burn's Justice* (21st edn) 337

¹¹⁶⁶ *QSO 16/1* 16-17; *NR QSO 1/1* 13. Again the text of *NR QSO 1/1* before amendment is almost identical to that of *WR QSO 16/1*

¹¹⁶⁷ *Somerset Extract* (Q/SBO 1763) 70

trial. Furthermore, where counsel was likely to be employed, a brief had to be prepared in readiness should the defendant elect immediate trial.¹¹⁶⁸

The rules under the North Riding, West Riding and Somerset orders reflected the underlying flexibility of the trial process; given that there was no clear rule of law that a party could require trial at any point, the Sessions courts felt compelled to impose a degree of regularity on the traverse process. While general notice rules were retained by the Yorkshire and Somerset courts, to such rules were added a facility for parties to force the date of trial. In doing so, particular justice values were being reconciled. The orders of the two Ridings suggest a desire to reduce delay in the trial process but show a particular concern about delay on the part of prosecutors. Equally, concerns about the liberty of defendants can be seen from the special rules allowing for faster procedures for those in custody (in Somerset) or under recognizance (in Yorkshire). However, while the Yorkshire concern seems to have focused on prosecutorial delay, the Somerset rules were more even-handed in the justice they dispensed, making particular provision allowing prosecutors to require trial at any Sessions after that at which the defendant had in fact appeared.¹¹⁶⁹ Equally, the original form of the 1801 Yorkshire orders clearly presented problems of rigidity. The North Riding order of 1809 had been amended to allow the prosecutor to delay trial 'under special circumstances allowed by the court' despite any request by a defendant that it proceed.¹¹⁷⁰

In so ordering, the Sessions also continued to regulate the notice requirements imposed on parties. The Somerset Sessions had, by 1815, incorporated similar notice provision, which specified:

*The party of parties (or his or her attornies) who by due course of law is or are to give notice of trial by due course of law is or are to give notice of trial of any appeal shall deliver such notice in writing to the party or parties (or his or their attornies) to whom the same ought to be given or leave the same at his, her, or their respective dwelling house eight clear days prior to the day of the commencement of the general Quarter Sessions, and prove the same at the trial of the appeal if required to do so.*¹¹⁷¹

¹¹⁶⁸ Jesse, *Practice of the Sessions* 6-7

¹¹⁶⁹ *Ibid* 114; appearance would, of course, often be controlled, at least in theory, by the use of recognisances.

¹¹⁷⁰ *North Riding Orders* (QSO 2/1) 15

¹¹⁷¹ Jesse, *Practice of the Sessions* 1

However useful in supporting the broader aims of governance, these were, as can be seen from the ordering of these Sessions courts, pressures to regulate these proceedings as purely inter-parties matters. This was certainly how they were seen from the centre. As a result, the regulation and efficiency of traverse proceedings became the subject of central legislative initiative during the early decades of the nineteenth century.

The Pleading in Misdemeanors Act of 1819 was passed because ‘great Delays have occurred in the Administration of Justice, in Cases of Persons prosecuted for Misdemeanors by Indictment or Information ... by reason that the Defendants in some of the said Cases have, according to the present Practice of such respective Courts, an Opportunity of postponing their Trials to a distant Period.’¹¹⁷² Under the Act, a person held in custody or under a recognizance at least twenty days before a Sessions had to plead and take trial on an indictment at the Sessions at which the bill was found. If the person had been put under a recognizance or held in custody or given twenty days’ notice of an indictment having been found, plea had to take place at the next Sessions.¹¹⁷³ In other words, in nearly all cases, defendants would be tried at the next sessions after they were detained or notified of the prosecution. If parties and courts complied with the 20-day notice requirements, this would be the same session as that at which the Bill was found.

The Act of 1819 might be seen as part of a wider shift in national expectations of local governance, something that originated in concerns about the administration of the poor but that would gather pace to support more profound shifts in ideas about the nature of local governance.¹¹⁷⁴ These changing ideas were reflected in the development of rules across the ensuing decades. The 1833 Orders for North Riding sought to accommodate this change of practice and expectation by retaining its pre-existing rules ‘subject to the provisions’ of the 1819 Act. In effect, therefore, the position in the North Riding by 1833 was that those who were charged with a misdemeanor and who had been on bail or in custody for at least twenty days before the Sessions, had to take their trial at the Sessions at which the bill of indictment was found. Anyone else on bail or in custody for a shorter period could, but did not have to, require trial at this point. Those who were not bailed or in custody could delay the trial until the following Sessions. Any further delay would only be possible if the defendant was not in custody, not

¹¹⁷² Pleading in Misdemeanor Act 1819 (60 Geo 3 C 4), Preamble

¹¹⁷³ *Ibid*, ss 3, 5; it is worth noting that so far as the Act was concerned, the meaning of ‘Misdemeanor’ was sufficiently clear that there was no need to define it.

¹¹⁷⁴ Eastwood, ‘Governing Rural England: Tradition and Transformation in Local Government 1780-1840’ 174-9, 261-2; Frank O’Gorman, *The Long Eighteenth Century : British Political and Social History, 1688-1832* (Arnold 1997) 286-8; Eastwood, *Government and Community* 121-34;

subject to a recognizance or no indictment had yet been returned to the court. This combination of factors was, however, unlikely.

The West Riding *Practice* of 1834 also retained rules very similar to those for the North Riding but they removed any reference to situations where defendants might choose to take trial immediately.¹¹⁷⁵ In a sense this is surprising in running against a trend towards prompt adjudication, given that the effect was to reduce the possibility of immediate trial. Conversely, the Chester Sessions adapted and extended the obligations under the 1819 Act in the rules set out in the Chester *Book of Practice* for 1838. In addition to the immediate trial the Act mandated, the Chester Sessions considered it 'reasonable to give to Defendants, who shall have been committed to custody, or held to bail more than ten clear days before any such Quarter Sessions, an option of proceeding to Trial at such Quarter Sessions.' A defendant therefore held to bail under a recognizance for at least ten days (but fewer than twenty) could require trial on ten days' notice at the next Sessions while any person actually in custody to could 'call upon his Prosecutor to proceed to Trial instanter, as he is entitled to do according to the present practice of the Court.'¹¹⁷⁶

Given the effect of the rules in the 1819 Act, prompt trial in cases of misdemeanour seems to have become the normative expectation rather than the expectation, perhaps even to the extent that such rules were deemed unnecessary in the West Riding.¹¹⁷⁷ The changing pattern of prosecutions and adjournments can be seen by examination of Appendix 8, which shows the extent of adjournments in four types of cases: property crimes, assaults, road and bridge prosecutions and other types of cases. There is, in fact, an overlap between felonies and misdemeanors, particularly in relation to property crimes. This has been necessary for the purposes of comparison between these different eras: as crimes were reclassified, technical capacities to adjourn them changed. This, therefore, explains the relatively high rate of early property adjournments compared to the analysis above: property crimes in these figures include the cheats and swindles that, in the 1770s and 1790s, could be adjourned under the traverse procedure whereas thefts generally could not.

¹¹⁷⁵ *West Riding Practice* (QSO 16/2 1834) 70

¹¹⁷⁶ *Chester Orders* 22-23

¹¹⁷⁷ T.N. Talfourd, *Dickenson's Guide to the Quarter Sessions, and Other Sessions of the Peace, Adapted to the Use of Young Magistrates and Professional Gentlemen, at Their Commencement of Practice* (5th edn, Sweet, Stevens, Norton, Maxwell, Butterworth & Richards & Co 1841) 484; in addition to noting that persons at large and without notice were able to rely upon the traverse system, Talfourd did suggest that where the nature of the allegation had changed during the specified periods, a defendant could still elect to traverse his case to a later Sessions.

In fact this overlap does not invalidate this analysis. As has been suggested already, many assaults, most road and bridge proceedings and some other misdemeanors, particularly those relating to economic crimes, as set out in the figures on Appendix 4, were dealt with by way of this justice-as-governance. These classes of cases were regularly adjourned for the sake of further determinations. This also happened, as has been suggested with the recruitment cases, with property crimes but this practice was, throughout this hundred-year period, far less common. As Appendix 8 shows, property crimes were much more likely to be dealt with at the first available hearing. In fact across this century, that tendency became much more pronounced. Other types of offences were far more likely to be adjourned. Up to the period 1818 to 1821, by when, of course, the 1819 Act was only being put into effect, there was a fairly consistent pattern. In the West Riding then, and during the two preceding periods, almost a third of assault cases would be dealt with after the sessions at which it was presented. In the North Riding courts the figure was, at least from the 1790s onwards, closer to a half of the cases being adjourned. Highway and Bridge prosecutions in both courts were disposed of at the first hearing by exception.

However, by 1838-1841 this pattern had changed. Both property and assault prosecutions were dealt with much more promptly, with almost all such cases being dealt with at the first Sessions. Only in the West Riding court were on-going proceedings retained and then only in relation to highway and bridge prosecutions.

By the mid-century, then, the nature of Quarter Sessions business had changed dramatically. The advent of a regular County Courts in 1846, providing reasonably ready access of individuals for civil disputes, removed some of the pressures which had impelled the mediated nature of Quarter Sessions traverse cases.¹¹⁷⁸ As the trends within the subject matter of the Standing Orders shows,¹¹⁷⁹ the concept of government through judicial processes, one in which patriarchal, personal and (at least to the minds of those operating it) locally informed justice was in significant retreat.¹¹⁸⁰

Under the pressure of such changes the Quarters Sessions became much more the institution of specific criminal trial adjudication. This was reflected in 1851 when Parliament further restricted the ability of defendants to postpone trial. Repealing the provisions of the 1819 Act, the Criminal Procedure Act 1851 instituted a rule that no person indicted for any offence could postpone trial

¹¹⁷⁸ Baker, *Legal History* 26; Lobban, 'Old Wine in New Bottles': The Concept and Practice of Law' 133-4; Patrick Polden, 'The County Courts' in William Cornish and others (eds), *The Oxford History of the Laws of England: Volume XI: 1820-1914 English Legal System*, vol 13 (Oxford University Press)

¹¹⁷⁹ See Chapter 5 above

¹¹⁸⁰ Eastwood, 'Governing Rural England: Tradition and Transformation in Local Government 1780-1840' 261-5; Hilton, *England* 590-4, 606-7

without the permission of the court. Such permission could be only granted so that the defendant could 'prepare his defence or otherwise.'¹¹⁸¹ By this point Sessions courts appear to have abandoned any attempt to effect their own justice practices. The Dorset Quarter Sessions in 1857 simply integrated the s 27 verbatim into its Standing Orders.¹¹⁸² The West Riding *Practice* of the late 1850s and onwards simply omitted any rules relating to the trial of traverses and misdemeanors. Although the Shropshire Sessions retained rules about notice for traverse trials in their rules into 1867 'where such notice is required,' the effect of the 1851 Act was to remove, or at least considerably restrict, the powers of the Sessions and the parties to control the timing of proceedings. With the exception of the court's discretion set out under s 27 of the 1851 Act to adjourn such hearings, Sessions control of the process had been replaced by a relatively simple rule of immediate trial. The result was that rule making in this area ceased on the part of Quarter Sessions courts.

Where a case was adjourned under s 27, the Act specified that the court had a discretion to respite prosecutors and witnesses to the next session. In one sense, the 1851 Act brought the misdemeanour trial process back to the state in which it had been placed in Somerset in the eighteenth century; prosecutors and their witnesses involved in trials would be under a standing obligation to attend each Quarter Sessions until the trial matter was resolved. The significant difference was that resolution would take place at the first trial hearing and adjournments were exceptional. Gaps in the statutory framework of 1851 do not, however, appear to have been filled by any subsequent rule-formation. From 1850 onwards, attempts to control and regulate the traverse process withered away. Even those Courts making orders simply integrated the 1851 Act into their own rule system.¹¹⁸³ There was no attempt to regulate how the court's discretion to adjourn would be exercised nor how the courts would deal with such adjournments.

Dealing with Delay: Efficacy and Efficiency

For as long as the Quarter Sessions operated a flexible system of trial dates, it was necessary to ensure the efficacy as well as the efficiency of their processes. These have already been examined as features of the central justice discourse although there they were, at least during this period, secondary to a dominant value of trial accuracy. At the Sessions, staffed as it was largely, at least until the 1840s, by volunteers and largely self-financing, efficiency appears to have been a more significant value within just adjudication.

¹¹⁸¹ Criminal Procedure Act 1851 (14 & 15 Vict C 100), ss 26, 27

¹¹⁸² *Dorset Rules* (QS/6/2 1857) 26

¹¹⁸³ *Ibid*

Listing of Trials, Regular Proceedings and Sanctions for Failure

In fact, in addition to providing proper notice before the Sessions, the prompt entry of the traverse with the clerk of the peace at the Sessions itself came to be a requirement for a trial to go ahead at all. Rules regularly specified processes for recording, listing and ordering of trials. The Somerset Guide of 1815 is particularly detailed.¹¹⁸⁴ Other orders such as the early orders of the Ridings, simply required entry of traverses with the clerk of the peace, usually by a specified day of the proceedings.¹¹⁸⁵ The clear assumption was that traverses entered might be tried there and then adjourned to later Sessions (to the extent the rules noted above allowed such respiting of proceedings). In East Sussex, orders put in place in 1800 required that traverses be entered with the Clerk of the Peace by the second day of the Sessions and would be heard in the order they were so entered.¹¹⁸⁶ The Lancaster *Rules* show that the Lancashire Quarter Sessions had also ruled in 1790 that all traverses be entered for trial on the first day of each Session but in 1802 this rule was qualified to allow witnesses to attend only on the third day.¹¹⁸⁷

This regulation illustrates some of the difficulties that were caused by the flexible traverse system. The duties of the clerks included ensuring that proceedings were in their proper form and that trials took place in due order.¹¹⁸⁸ In the absence of a salaried and permanent court staff, the courts in different parts of the country manifested the same tendency to regulate likely business during the days during which the Sessions sat. The Lancashire *Rules* show this tension. The 1790 rule aimed to clarify which matters were to be tried. This seems to have led to one of two problems that had to be fixed in 1802. Entry of traverses on the first day meant that witnesses had to be ready for those trials. This potentially led to the inefficiency and inconvenience (and general injustice) of witnesses attending from the first day of the Sessions, unaware whether or not their case was to proceed then or later. On the other hand, to allow a more flexible approach to attendance by parties and witnesses, presented the danger that witnesses might not be in attendance when trials did commence.

The Lancaster rule is in fact one of a number of responses that sought to provide a more reliable and dependable structure to the sessions. The Lancaster Sessions had specified an order for

¹¹⁸⁴ *Ibid*

¹¹⁸⁵ The early orders of the West Riding and North Riding specified the same process of entry for appeals and traverses, namely specifying a deadline of 12 o'clock on the first day of the Sessions: *QSO 16/1* 1, 16; *NR QSO 2/2* 55, 62

¹¹⁸⁶ *East Sussex Order Book* 11-12; the East Sussex Sessions sat in two divisions so this orders is made twice and the second day of the Sessions was a Friday for the western division and a Tuesday for the eastern division.

¹¹⁸⁷ *CPV/5*

¹¹⁸⁸ Eastwood, 'Governing Rural England: Tradition and Transformation in Local Government 1780-1840' 61-7

proceedings in 1786 in which traverses were to be heard last.¹¹⁸⁹ In 1820, this system was supplemented with the rule that, after the Grand Jury had finished its deliberations, misdemeanour indictments would first be called for plea. Trials would then be taken in a particular order: felonies, alleged misdemeanours where a defendant was in custody, cases traversed from a previous sessions and finally cases of those who had pleaded at the current sessions.¹¹⁹⁰

The West Riding and North Riding Orders of 1801 also made provision for the process to be followed at the Sessions, both specifying that traverses were the last matters to be dealt with.¹¹⁹¹ There was no obviously right sequence for such proceedings. They were not only matters of local preference but could be subject to internal change and revision. In the North Riding, for example, this order was struck through in the 1801 manuscript with annotation 'not necessary' and the schedule of proceedings is not included in either 1809 or the 1815 Sessions Orders. During the amendment process in 1821, a schedule of Sessions business was, however, reinstated albeit in a slightly different order, and the new rule continued into the 1833 Rules.¹¹⁹² Traverse trials (as they were termed) were to be the penultimate business of the Sessions before the passing of vagrants. The Cheshire *Orders* of 1838 made detailed provision about the ordering of trials too. Felonies were to take place first to be followed by misdemeanour trials of those in custody, traverses of former sessions and misdemeanours who had pleaded at the same sessions and finally motions for judgment against those submitted at the sessions.¹¹⁹³ However this ordering of the *sequence* of business did little to provide guidance on when exactly parties and their witnesses were to attend.

The difficulty that was being confronted was that although the dates for the holding of the sessions were defined, the duration of those sessions was not. Under the medieval statutory structure, sessions were to be commenced on specific dates of the year.¹¹⁹⁴ There was no mention, however, of how long a Sessions had to sit nor where. In most counties and Ridings this had led to the development of a number of different sittings, each sitting constituting an adjourned part of the Sessions that had commenced on the statutory date. The West Riding Michaelmas Quarter Sessions of 1778, for example, commenced in Knaresborough on Tuesday, 6th October. It then adjourned to recommence in Leeds on Thursday, 8th October and then to

¹¹⁸⁹ *Ibid*, 6, 31

¹¹⁹⁰ *Ibid*, 7

¹¹⁹¹ *QSO 16/1 12-3; NR QSO 1/1 10*

¹¹⁹² *The General Rules and Orders for Regulating the Practice of the Court of General Quarter Sessions in the North Riding of the County of York (2nd Draft)* (1821) 17; *QSO 2/4 17*

¹¹⁹³ *Chester Orders* 4

¹¹⁹⁴ Burn, *Burn's Justice* (12th edn) 154

Sheffield on Wednesday, 14th October.¹¹⁹⁵ Frequently matters appear to have been dealt with at the sitting closest to the court. The result of this could be that matters would be adjourned or respited from one Sessions to another for want of time. Whether a particular matter would be dealt with was dependent on the weight of business. Attempts like that of the Lancaster Sessions to specify a date for witnesses to appear sought to reduce the potential for wasted time and costs on the part of the defendants but, as the court did not sit in permanent session in the locality of the complaint, delay and the wastage of costs and expenses remained a frequent problem into the nineteenth century.

Such ambiguity of schedules probably did little to encourage witness attendance, something that cannot have assisted the efficacy of the justice dispensed. Instead of procedural reform, however, Quarter Sessions imposed rigorous duties on parties and backed them with stern sanctions. These varied from court to court. In the West and North Ridings, defendants failing to make entry by the required deadline would not be entitled to proceed to trial and would be required to pay costs to the prosecutor.¹¹⁹⁶ A similar but less onerous duty was placed on prosecutors. Any party not ready to prefer indictments by 11 o'clock on the first day of the Sessions was 'not to be allowed any costs by the court unless sufficient cause be assigned to such delay'.¹¹⁹⁷ As refusing the defendant an entitlement to proceed could therefore occur even if both parties were in fact present, the justice of prompt determinations had given way to the expediency of manageable caseloads.

At first glance, the orders in the Somerset *Guide* and the Lancaster *Rules* appear more stringent. In Somerset, cases were to be heard in the order they were entered unless the court made a special determination otherwise. If a prosecutor was not ready when the case was called on, the Somerset orders allowed the case to be dismissed for want of prosecution and for any unready party to have their recognizance estreated. In the case of defendants, there could also be a loss of bail.¹¹⁹⁸ Under rules made for the Lancashire Sessions in 1806, a party failing to appear in person or through counsel when a case was listed would face the same range of sanctions.¹¹⁹⁹ However, these rules, at least insofar as they related to prosecutors, appear simply to state the position where prosecutions were proceeded with under recognizance. In this sense, the Somerset rules may have been less draconian than those in Yorkshire. There is certainly no reference to additional costs penalties.

¹¹⁹⁵ *WR QS 4/39* 195-253

¹¹⁹⁶ *NR QSO 1/1* 13 (and all North Riding orders up to the 1833 Orders); *QSO 16/1* 16

¹¹⁹⁷ *QSO 2/1* 58 (see also *NR QSO 2/2* 56 and *North Riding Standing Orders (Amended)* 56)

¹¹⁹⁸ Jesse, *Practice of the Sessions* 115

¹¹⁹⁹ *CPV/5* 25

Into the early decades of the nineteenth century, the Quarter Sessions courts had to deal with the consequences of the flexibility of misdemeanour trials owing to the traverse system. Felony trials were less problematic. Defendants were generally committed to prison and, in any event, felony trials were expected to take place earlier during the Sessions. Misdemeanours, covering as they did a broad range of crimes and wrongs, and subject as they were to a higher likelihood of recognizance and the possibility of traverses from one session to another, required localised rulemaking efforts to ensure that trials would take place promptly and efficiently. Up to (and after) the 1820s, the Quarter Sessions courts sought to use their rule making powers to create a system that was as regular as they could make it. However, in the early decades of the nineteenth century, the procedures being adopted came under increasing scrutiny from Parliament and Westminster government.

Warrants and Process

A number of rules created by the Sessions before the 1820s were intended to underpin the trial process and to ensure that it ran smoothly. Again they also show the relationship between counties in proximity to each other. Wiltshire and Somerset both had rules under the heading "Processes", for example. In both cases, these rules governed both the issue of *warrants* for the immediate arrest of persons accused of crime and also *processes*, by which was meant an older set of formal procedures used to secure the attendance of a party by the threat of distraint or outlawry.

Warrants were available for the arrest of those accused of, or suspected of, a crime following the presentation of evidence before a magistrate. Warrants appear to have been used for the more serious crimes and could lead to detention in custody or binding under recognizance to appear at a subsequent Sessions. Where this had not happened, usually in less serious cases, and an indictment had been found, the attendance of the defendant was secured by issuing *process*. In indictment cases this would be by *venire facias*, which was enforced if the defendant failed to appear either by distress, if he or she had land in the county, or *capias* (the seizure of the person) otherwise. In cases of felonies, the *capias* was always to be used.¹²⁰⁰

The powers under which process and warrants were effected and their jurisdictional limits were therefore a matter of national substantive law and promulgated in texts like Burn and Blackstone. What such literature did not provide was a system for making such rules work at a local level.

¹²⁰⁰ Samuel Glasse, *The Magistrate's Assistant; or, a Summary of Those Laws, Which ... Respect the Conduct of a Justice of the Peace* (Second edition. edn, Gloucester, 1788) 319-20, 417-20; Burn, *Justice* (21st edn, 1810), vol 5, 79-91, 750-6; W Blackstone and John Frederick Archbold, *Commentaries on the Laws of England* (16th edn, Reed 1811), Vol 4, 290-2, 318-21

Therefore Sessions like those in Somerset and Wiltshire, sought to develop further rules and practices to be followed once such procedures had been initiated. Here again concerns about the efficiency of justice processes were central to rule creation. Both seemed to have been motivated by concerns about the effectiveness of those who were to implement such powers but the results differed.

The Somerset rule placed the clerk of the peace under a duty to issue processes and warrants to 'proper officers' (local sheriffs or bailiffs) within twenty days of each Sessions, and placed those officers under an obligation to execute those orders within ten days of receipt. They were then to be returned to the next meeting of the Quarter Sessions whereupon the clerk was obliged to deliver an account in open court of the processes issued and the officers to whom they had been delivered.¹²⁰¹ The Wiltshire orders also directed the clerk to send out processes 'against the several persons presented and indicted at each Sessions' but without specifying any particular timetable for doing so. The order also specified that such process would be directed to the constables and bailiffs of the hundreds and liberties of the county and made clear that upon the issuing of a warrant:

[T]he same shall require the said Constables and Bailiffs in his Majesty's name to apprehend and take the bodies of the persons presented or indicted; and bring them before the next Justice of the Peace of this County, to find sufficient sureties to appear at the next General Quarter Sessions of the Peace to be holden for this County, there to answer to all such matters and offences whereof they stand presented or indicted; the substance of which matters and offences shall be mentioned in such Warrants'.¹²⁰²

The preamble to the Wiltshire order under the heading 'Bailiffs' reveals something of the rationale of the making of such orders, expressing concern at the 'great Neglect and Contempt of the Constables and Bailiffs of the several Hundreds in this County, in the Execution, and Returning of the Precepts and Processes of this Court to them directed.'¹²⁰³ These were, of course, non-professional (and not always entirely willing) officials.¹²⁰⁴ The Wiltshire orders reminded such officials of their duties to 'be diligent and careful in the taking and apprehending the persons mentioned in such Processes' and ordered them to bring anyone detained before a Justice of the Peace to secure appearance at the next Quarter Sessions. To further ensure the

¹²⁰¹ Jesse, *Practice of the Sessions* 100-101

¹²⁰² *Wiltshire Orders (QSO/6/7)* 28-9

¹²⁰³ *Ibid*

¹²⁰⁴ Eastwood, *Governing Rural England* 226-30

diligent fulfilling of these roles, each bailiff or constable was placed under an obligation to swear an oath before one of the Justices 'of what they have done in the execution of such processes' at least six days before the session and each was to be paid five shillings for each person bound in recognizance following the service of such a process by him.¹²⁰⁵

Although these two adjacent counties felt the need to regulate the system of processes, the concerns were not the same. The Somerset concern was that of time and the solution a timetable for compliance. In Wiltshire, the concern seems to have been the willingness of bailiffs and constables to fulfil their legal duties at all. Of course, both difficulties are likely to have been closely related to the non-professional nature of the county officials. The Somerset and Wiltshire orders suggest that both in fact had concerns about neglect of roles by their county sheriffs and bailiffs, but the differing solutions adopted suggest that the rule makers in each county saw a different, more immediate problem, rather than the underlying structural issues they shared.

There was little science to provide understanding of either the function or the rationale of the Quarter Sessions as a whole. Nor was this gap in understanding filled by the practical literature upon which they relied: Blackstone's explanation of the Quarter Sessions was historical and functional.¹²⁰⁶ Burn fully explained the processes of the Sessions but did not identify their overall purpose. This seems to have been assumed. Both sets of orders, therefore, show a seemingly subconscious anxiety about the regularity, reliability and effectiveness of this localised justice system and responded to it with ad hoc solutions. The result was that the Somerset perception of lateness of warrants led to a rule on timetables while the Wiltshire perception of neglect led to rules specifying obligations more clearly. It does not appear to have been within the conception of either to alter the basic structures of county governance.

To ensure regular, effective and legitimate processes, the Clerks of the Peace of the two Ridings Sessions were required to issue a *capias* warrant to place the defendant under a practical or legal duty to attend subsequent hearings.¹²⁰⁷ In Somerset, the Clerk was obliged to issue a precept for the detention of the defendant within 20 days of the end of a Sessions at which he or she was indicted by the Grand Jury (from which precept would flow either incarceration in custody or the taking of recognisances).¹²⁰⁸

¹²⁰⁵ *Wiltshire Orders (QSO/6/7)* 29-30

¹²⁰⁶ Blackstone, *4 BI Comm* (1st edn) 271-2

¹²⁰⁷ *QSO 16/1* 16-17; *NR QSO 1/1* 13. Again the text of *NR QSO 1/1* before amendment is almost identical to that of *WR QSO 16/1*

¹²⁰⁸ Jesse, *Practice of the Sessions* 8

As with other orders examined in this chapter, these localised practices of rule creation and rule dealing fell into disuse as the justice of the centre was exported into Quarter Sessional practices. As the 1819 and 1851 Acts removed the capacity for Sessions to adjourn processes, their particular rule systems for doing so became less important. Although the Cheshire Rules set out their approach to proceedings and the forms of process to be used in detail, this content largely replicated the provisions of sources such as Burn although some attempt was made to make provision regulating which legal professionals could participate in such processes (motions to prevent processes were to be made by counsel).¹²⁰⁹

Conclusion to Part Two

As such, the business of specifying and regulating judicial processes generally by orders of the Quarter Sessions appears, by the 1850s and 1860s, to have had its day. Faced with increasing tendencies on the part of Parliament to specify and control legal processes (and thereby to define a particular understanding of their justice), the Courts of Quarter Sessions turned their rule making in other directions. This appears not, in fact, to have been a permanent state of affairs. The North Yorkshire Records Office contains at least two sets of much more significantly detailed and purely judicial sets of orders dating from the early twentieth century.¹²¹⁰ By the time of their creation, however, the business of the Quarter Sessions had moved profoundly to the judicial and the local nature of its justice was, perhaps, less controversial.

This chapter has sought to show a different phase of existence for these courts, an earlier period when its function was much more closely aligned with governance than adjudication. This different perspective influenced the Sessions' sense of purpose and a resulting sense of how best to decide matters (i.e. to be just). The Quarter Sessions were different in form and function from the courts of the centre that were examined in Part One and their conceptions of justice differed accordingly. They were, for all that, legal institutions and their process therefore had to be legally constituted. For this reason, as was seen in the previous chapter, their broad fact-dependent decision-making had to operate within and around formal requirements of the indictment. So it was that the justice of formal legal validity and that of fact-based accuracy had to be reconciled. This reconciliation and tension was not that different from those operating within the courts of the centre and the national discourse explored in Part One.

In this chapter the nature and tensions within Quarter Sessional conceptions of justice differ more markedly from the values that were examined in central justice discourse. Here, although

¹²⁰⁹ CPV/7, 29-32

¹²¹⁰ QSO 2/5 (dated 1933) and QSO 2/6 (dated 1952)

the justice of promptness and notice were of importance, they were, as far as it is possible to determine such matters in such a text-poor environment, more heavily weighted towards concerns of efficiency and the pursuit of broad aims of governance. In this sense the difference between the courts of the centre, predominantly institutions of adversarial dispute resolution, can be contrasted with the broad and patriarchal governing justice of the Sessions.

In neither chapter has it been possible to resort to rich textual sources explaining understandings and significations of justice. The purpose, however, of this second Part of the thesis has been to explore the possibilities of using concepts of justice in a different way, from the angle of practice. Drawing on some of the values identified in Part One, it has been possible to suggest (to do more would be incautious) interpretations of the nature of the rules created and to attempt to understand how Quarter Sessions understood their duty to do things right and by the right ways, to act justly. The particular aspect of justice that has been the focus of this analysis has been the justice of procedure – not the question of what the answer should be but the question of how to make such decisions in just ways. The success and the limits of this experiment will be explored more fully in the conclusion.

Chapter 8

Conclusion

When Mr and Mrs Bird were prosecuted, the law as it existed, the innovations of lawyers and Parliament and the wider notions of appropriate results all failed to provide an obvious result. This is not unusual; dispute and disagreement is a natural state of a system, a primary function of which is dispute resolution.¹²¹¹ In fact, because law is a system of dispute *resolution*, its inherent codes, its normative structure, were designed to provide an answer. Therefore those acting in the case, whether as judges, lawyers or even Mr and Mrs Bird themselves, will have expected an outcome, a solution. The law was expected to provide one by resort to existing rules, wider legal principles, principles of legal interpretation and determination. In fact from one theoretical perspective, 'the law' is, and was then, no more than a social construct that is defined in a reflexive way by the rules it makes about itself.¹²¹²

R v Bird and Bird was, however, a difficult case. A well-established principle of common law (double jeopardy) collided with a piece of progressive legislation (the Offences Against the Person Act 1837) that had been intended to increase appropriate outcomes in the form of merited convictions by bypassing technical rules that offered outcomes unrelated to factual merit or moral desert. There was no necessary conflict between these provisions except due to decisions that had been made during the Birds' prosecution not to apply the 1837 Act to achieve that end. That this did not happen was due to concerns about the inappropriate and unjust effects of applying the Act to do so. This fear, expressed in the judgements of the majority, consisted of a combination of anxieties: concerns about applying the law in the way that created dangers of over-prosecution,¹²¹³ concerns about the ability of juries to process complicated cases accurately¹²¹⁴ or of lawyers to allege cases in ways that provided accurate outcomes,¹²¹⁵ and perhaps most tellingly amongst those in the majority, concerns that the changes to the law under the 1837 Act threatened to undermine processes that had served to enhance the rightfulness of adjudications for centuries.¹²¹⁶ These concerns were all concerns about reaching the right result. They were not simply concerns about the actual result, the appropriateness of punishing Mr and

¹²¹¹ Cotterrell, *Sociology* 205; Genn, *Civil Justice* 7

¹²¹² Luhmann, *Law* 86-7; Nobles and Schiff, *Sociology of Jurisprudence* 28-9

¹²¹³ *R v Bird and Bird* (1851) 2 Denison 94; 169 ER 431, 151-2, 161, 207-8

¹²¹⁴ *ibid* 161

¹²¹⁵ *ibid* 208

¹²¹⁶ *ibid* 176-7, 200

Mrs Bird for what appeared to be acts of awful brutality. Such concerns may have influenced the judges in the majority, they certainly influenced the wider public (or at least those who wrote the editorials of their papers),¹²¹⁷ but the judges in the majority expressed the reasons for conviction in different ways.

In fact no one was agitating for Mr and Mrs Bird to escape conviction. Even those in the minority, whose arguments would, if accepted, have had that effect, did not suggest that this is what Mr and Mrs Bird deserved. Lord Cockburn in fact did quite the opposite.¹²¹⁸ In fact, the reasons they gave for what they contended was that the appropriate application of legal principles, the bigger legal picture, required an outcome that might seem inappropriate for the situation of Mr and Mrs Bird but which would, by upholding the value of double jeopardy, ensure a more generally right outcome. Equally, they contended for understandings of the nature of criminal trials that differed significantly from those of the majority. Their understanding of the trial and how it secured appropriate outcomes saw trial processes in different terms. These fourteen judges disagreed on some fundamental aspects of criminal trial processes. They took different views on when a case had in fact been presented to a jury and on whether it was appropriate for a defendant to be prosecuted for a variety of crimes at the same time.¹²¹⁹

This was not simply a disagreement about matters of law, although it was profoundly legal in content; although the term was only occasionally invoked in the course of their deliberations, this was a dispute about justice, about doing the right thing in the right way.

The judges did not constantly invoke justice in discussing these values. Some of them did, others did not. But the matter of justice was raised. It was raised most trenchantly and persistently by the press on the Birds' first acquittal but it was also raised in the legal discussions. Justice had a part to play in deciding how *legally* to resolve this dispute. Unfortunately, it did not provide any more clear a solution than the law itself.

The Nature of Justice

Over the course of this piece of writing, it has been argued that justice is a polysemic concept; it is capable of a variety of meanings. In fact, it has been shown that justice could be raised in different situations to support different normative outcomes. The justice deliberated in the course of Bird, as in many other cases, was legal justice. The variety of conceptions that were possible when justice was raised were legal conceptions.

¹²¹⁷ See Ch 1, pp 12-4

¹²¹⁸ *R v Bird and Bird* (n 1213) 216

¹²¹⁹ *ibid* 153, 159, 161, 170-1, 178-9

One of the most significant values that has been associated with justice in this thesis, other than factual accuracy, is the value of consistency and, particularly in the legal context, fidelity to established bodies of legal rules. Being consistent with bodies of rules has in fact been of such normative significance that it could and did frequently prevail over any claims to justice. It did so, however, without always being invoked *as* justice although this did sometimes happen.¹²²⁰ Nonetheless, it is clear that when justice was invoked in argument, it could frequently fail, or at least be limited, in its claims by countervailing concerns about the consistent application of rules or, more fundamental, flat assertions that, notwithstanding any justice claims, following legal rules was the most appropriate outcome. In fact this happened to be the basis, or at least the justification, for many of the judgments in *Bird*.¹²²¹

As Bird shows, however, it can be very difficult to cohere to rules that are capable of more than one meaning. Furthermore, legal systems in fact encourage disputes as to meaning and, given the way in which legal systems interact with a wider world by accepting and resolving its disputes, such differences of meaning are inevitable.¹²²² Human agents (lawyers) acting within legal discourse are given the task of solving the problems of those entering the legal field, and are encouraged to find interpretations that solve those problems. The lawyers representing Mr and Mrs Bird had incentives to find meanings of the Offences Against the Person Act 1837 and the principles of double jeopardy that provided them with the possibility of acquittal. The lawyers acting for the Crown had incentives to find meanings that ensured that these norms were interpreted in ways that ensured conviction.

In this context of inevitable ambiguity, the law's mechanisms for legal interpretation could be stretched. One of these mechanisms to assist interpretation, although not one that has officially been recognised as a 'canon of statutory interpretation' or as an aspect of common law method is the need to achieve justice. This has, in fact, been suggested by Luhmann to be essentially what all legal interpretation is about: treating like cases alike and avoiding injustice.¹²²³

Luhmann's theory has some value in explaining what judges did. His explanation certainly explains the loyalty of lawyers to what was already established as law. However, his explanation fails to explain the resolution of ambiguity. To explain that as avoiding injustice is to underestimate what lawyers were doing when drawing on justice. Luhmann was in fact only putting a

¹²²⁰ e.g. *Ancaster v Meyer* (1785) 1 Bro CC 454; 28 ER 1237, 463; *Freeman v Tranah* (1852) 12 CB 406; 138 ER 964, 411

¹²²¹ *R v Bird and Bird* (n 1213) 132, 140, 151-2, 176-7

¹²²² Nobles and Schiff, *Sociology of Jurisprudence* 25, Sewell, *Logics* 127, 142

¹²²³ Luhmann, *Law* 210-29

label of 'justice' on a set of principles he had already interpreted. He was not, as this thesis has sought to do, looking for instances in which justice was explicitly invoked to provide answers to points of legal dispute.

It is certainly the case that justice was used actively by judges and advocates to minimise injustice.¹²²⁴ However, the avoidance of injustice occasionally had to defer to prior justice claims of fidelity to established rules. Justice could not negate what a judge saw to be an unjust result.

As has been seen, justice was also a means adopted by both advocates and judges to interpret ambiguities. Therefore where the justice of consistent rule application could not be met in obvious ways, other justice values could be used positively to assist in interpretation. Justice was not the only value for this purpose. Others, such as 'common sense', were resorted to. Although Lobban has suggested that these values are 'outside' the law,¹²²⁵ it is the contention of this thesis that this is only partly true. What is interesting about justice is that it is a value that is shared between legal discourse and other discourses. It is 'shared' in the sense that both lawyers and non-lawyers could invoke justice and feel confident that they were entitled to use the term and to attach particular meanings to it. This is evident in the trenchant commentary on the court's practices in *R v Bird*.

However, lawyers were far more conscious about attaching a particular meaning to the term. Senior judges like Brougham and Lushington spoke of a legal form of justice.¹²²⁶ It has therefore been necessary to explore some of the legal discourse and to look at instances where justice was invoked to identify particular meanings and uses of justice terms. In addition to justice as consistency (whether to laws, rules, practices or previous behaviour), it has been shown that justice could be invoked to argue in favour of or to justify other values.

The justice values that have been identified in the course of this research are the justice of accurate (and morally appropriate) determinations, of effective participation in processes, of impartiality, of effective representation, of sanctified, validated and legitimate outcomes, of prompt and efficient adjudications and processes, the justice of protecting liberties and the justice of flexibility. These were not categorisations present in the legal discourse, they are the result of interpretations placed on the uses of justice and related phrases in arguments within the records of the central courts. In fact, as has been discussed, there were complicated

¹²²⁴ *Hamilton and Smith v Davis* (1771) 5 Burrow 2732, 2738; 98 ER 433, 436; *Tickell v Read* (1773) Lofft 215, 215-6; 98 ER 617, 617

¹²²⁵ Lobban, *Common Law* 90

¹²²⁶ *Clayton v Attorney General and others* (1834) 1 Coop t Cott 97, 120; 47 ER 766 (Brougham); *The Aline* (1839) 1 W Rob 111 (Lushington)

relationships between some of these values (such as representation, participation and accuracy, for example) that suggest caution before attaching too much analytical weight to the way they have been categorised. Rather, it is suggested, to identify such values as distinct is a useful starting point for more detailed analysis of what exactly was being argued (and for how these values related to one another).

The Value of Research into Justice Discourse

It is necessary to be circumspect about any conclusions to be reached by such analysis in other ways too. First of all, the limits of the nature of this research should be recognised. Reliant as it has been upon use of case reports, there are certainly aspects of the actual judicial discourse of the centre that will be missing. The court reports neither covered all cases nor necessarily accurately reported those they did. Certainly the reports of the earlier periods are less likely to be verbatim records of what was in fact said.¹²²⁷

Secondly, in the interests of locating a manageable range of sources, it has not been possible to examine every case in which justice was discussed. Certain phrases were used to locate references to justice and there is therefore a risk that a particular value, one that is more readily associated with another of the terms that could have been researched, will have been overlooked. It certainly seems to be the case that particular terms became closely associated with particular uses of justice concepts. The 'interests of justice' appear to have been particular associated with legal professional privilege (and therefore the values of effective representation and, through it, accuracy).¹²²⁸ The same phrase was used to support values of accuracy and notice in disclosure cases.¹²²⁹ Equally, 'the principle of justice' (and particularly 'natural justice') took on particular significance in supporting entitlements to notice.¹²³⁰ It remains probable therefore, perhaps even likely, that ongoing research into other justice terms will change the emphasis and qualify the conclusions reached by this particular analysis yet further.

Thirdly, it is recognised that, given that this project has focussed on procedural justice, the meaning of justice in a substantive or distributive sense has been ignored. It is likely that some of

¹²²⁷ Van Vechten 22-3, Baker, *Legal History* 183-4

¹²²⁸ *Greenough v Gaskell* (1833) Coop t Brough 96, 47 ER 35; *Ford v Tennant (No 2)* (1863) 32 Beav 162, 167; 55 ER 63; *Russell v Jackson* (1851) 9 Hare 387, 391; 68 ER 558; *Brown v Foster* (1857) 1 Hurl & N 735, 739; 156 ER 1397

¹²²⁹ *Bartlett v Lewis* (1862) 12 CB NS 249, 260; 142 ER 1139; *Stern v Sevastopulo* (1863) 14 CB NS 737, 741; 143 ER 634

¹²³⁰ *Fisher v Lane* (1772) 3 Wils 297, 95 ER 1065; *Cavan v Stewart* (1816) 1 Stark 525, 529-30; 171 ER 551; in *Buchanan v Rucker* (1808) 9 East 192, 103 ER 546; *Douglas v Forrest* (1828) 4 Bing 686, 695-6; 130 ER 933; *Bruce v Wait and James* (1840) 1 Man & G 1, 40; 133 ER 222; *Capel v Child* (1832) 2 Cr & J 558; 149 ER 235; *Kinning's Case* (1847) 10 QB 730, 116 ER 277; *Ex parte Thomas Kinning* (1847) 4 CB 507, 136 ER 605; *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180, 143 ER 414

the most substantial values and conceptions of justice have therefore not been given enough attention. The justice of desert, the justice of morally appropriate outcomes, concepts of equality, equity, apportionment, punishment and vindication, to name but a few, have not been the subject of this analysis.

Fourthly, rather than looking at a broad array of courts across a broad time span, it might have been possible to concentrate on particular courts or shorter periods. This may have provided some particularly focussed insights. It may also, however, have failed to provide sufficient breadth of analysis and may have obscured one of the fundamental points of such analysis: that there was a broad conceptualisation of justice that straddled particular courts. The conceptualisation may have been particularly influenced by particular practices but it was distinct to those practices. Judges (or at least some of them) spoke about it in such terms, distinguishing justice from practice.¹²³¹ Equally, however, these distinct arenas of practice did form their own cultural spheres in which what may have seemed contrary to justice to a stranger appeared natural and rightful to a native.¹²³² This examination, however fleeting, of discourse across arenas has revealed some of these qualities. Such specific further research into particular areas will undoubtedly fill out the overall picture. Investigation of the term 'principles of justice' has, for example, suggested it may have been important in the development of principles of reciprocal justice resorted to in the development of the international jurisdiction of prize courts during the long years of war from 1793 to 1815.¹²³³ There is certainly real value in seeking to focus research more particularly on specific courts but it was not the best place to start.

It is suggested, however, that notwithstanding these qualifications, this research has been valuable. Although thinly spread, it has proved useful in sketching out such an area for further, more detailed analysis. The purpose of this research was to start to explore the possibilities of investigation of the meanings and conceptualisations of justice. It is not suggested that the results are comprehensive. Further research is merited. It does seem, however, possible, subject to such qualifications, to reach some provisional conclusions on the basis of the research conducted.

The first conclusion is that there is value in exploring the meaning of concepts within justice discourse. It is useful in a number of ways. First of all, unpicking the uses of justice in this way, does help in developing a fuller picture of the values that informed what lawyers did and how they did it at any particular point in time. If it is recognised that justice was not always the sole

¹²³¹ *The Mary (otherwise The Alexandria)* (1867-69) LR 2 A&E 319, 322 (Phillimore)

¹²³² *Hall v Ody* (1799) 2 Bos & P 28, 29; 126 ER 1136

¹²³³ See n 424 above

basis of decisions; it is nonetheless possible to conclude that justice was important enough to merit use by judges and lawyers and that, sometimes, it was central to the process of decision making. Although some attempt has been made to identify the weight attached to justice as a concept, it is not possible to conclude much more than that it sometimes impacted upon decisions but generally only did so when there were not clear rules that had already answered the case.¹²³⁴ It also appears to have carried greater weight where the issue was how to conduct processes rather than what the outcome of those processes should be.¹²³⁵

Secondly, it seems clear that justice was vague in its meaning and could be used to support particular outcomes. It may even have been used to cover, or at least justify, political or partisan decisions.¹²³⁶ It certainly seems to have been useful for claiming the rightness of what, in many cases, was a particular preference for one of the particular justice values that have been identified already.

Thirdly, although there was a range of values, it is possible, with some circumspection, to suggest that some conceptions of justice carried greater weight than others at particular times. It seems to be the case that, during the period from 1770 to 1870, leaving aside the justice of consistency to rules, the term was most frequently used to support arguments in favour of factual accuracy and the securing of information (i.e. evidence) for that purpose. In fact many of the other values that have been identified (notification, participation, representation, etc.) were frequently promoted for reasons that relate to concerns about obtaining the best evidence to secure the best outcomes.¹²³⁷

Fourthly, no such value, however, was dominant or paramount. All such values might be overcome by other values. The claims of accuracy and truth could be overcome by arguments in favour of efficiency or the saving of costs, for example.¹²³⁸

Fifthly, (and further to concerns raised above about over-categorisation), it was frequently possible for the same justice value to feature on each side of an argument because there were further issues about how such a value might best be secured. This was particularly seen in relation to the value of truth and accuracy. The aspiration towards such a value did not answer questions about *how* it was best secured, whether through 'free proof' or controlling

¹²³⁴ See 'Justice subordinate to law' on p 73 above

¹²³⁵ See p 86

¹²³⁶ e.g. *R v Burdett* (1820) 4 B & Ald 95; 106 ER 873

¹²³⁷ See generally p 103 (notice), p 119 (participation) and p 142 (representation)

¹²³⁸ e.g. *Stern v Sevastopulo* (1863) 14 CB NS 737; 143 ER 634

evidence,¹²³⁹ whether through adversarial or inquisitorial systems,¹²⁴⁰ or whether through the jury's freedom or the constraints of lawyerly analysis.¹²⁴¹ Equally, securing a value in one way might constrain it in another, for example by maximising the evidence and information at trial through privileging discussions with a lawyer, which would reduce the amount of information upon which the court could then rely.¹²⁴²

Finally, it is also possible to conclude (or reaffirm) that justice was a profoundly cultural concept in the sense that it was capable of meanings that were deeply embedded in the context and milieu in which it was being invoked and discussed. Taking all of these conclusions together, and noting that they are advanced with some caution, it seems possible to conclude that justice can be seen as a portmanteau term, one that is capable of carrying a range of other values and being used to justify a range of other conclusions. In this sense it is a problematic term and it should be used with great caution. Without some sort of explanation or qualification, it is far from clear what might be meant by 'justice'.

The Value of Research into Practices of Justice

It has been the purpose of this project not simply to examine what was said (and possibly meant) about justice but also to explore ways in which justice was practiced in courts. In this sense, the project is not that different from the extensive canon of academic research into the local practices of courts.¹²⁴³ It is hoped this research adds something to that canon in other ways. First of all, being based on the investigation into justice values, the purpose of this part of the thesis has been to attempt to use those values invoked by lawyers in an investigation of local court practice. This has been challenging because the courts chosen, the Quarter Sessions, do not have rich textual sources that provide their own discourse by which to be evaluated. Rather it has been necessary to draw on general discourse of the central courts as a basis of comparison. Certainly, it would enhance any such analysis significantly if it were supplemented by further investigation into what Justices of the Peace said about themselves. It is likely that such information is still available to be found in the many unexplored corners of local archives across the country and among the many letters and personal records of some of those who sat at the Sessions. Even so, comparison of central discourse and local practices offers some conclusions about the nature of justice as practice in Quarter Sessions courts. Furthermore, use of two different courts has highlighted the contrast between central adversarial and adjudicative

¹²³⁹ e.g. *Crowther v Hopwood* (1821) 3 Stark 21; 171 ER 753

¹²⁴⁰ McEwan

¹²⁴¹ e.g. *R v Shipley* (1784) 4 Douglas 73; 99 ER 774

¹²⁴² *Greenough v Gaskell* (1833) Coop t Brough 96, 47 ER 35 and subsequent cases set out at p 148 onwards

¹²⁴³ Beattie, *Crime*; King, *Crime*; King, *Crime and Law*, etc

assumptions and what appears to be a markedly different inquisitorial and paternalistic approach in the localities.¹²⁴⁴

Investigation of the various rules and standing orders alongside the wider national context and particularities of some areas of local practice suggests that the peculiar circumstances of the Quarter Sessions led to the creation of not one but of a variety of localised arenas of justicing practice. Each had its own normative culture and could lead to distinctive practices. At the same time, however, there appear to be clear connections between each of these cultures through which values and practices were transmitted. This was not simply transmission to or from the centre; it seems possible to trace outlines, at least, of the dissemination of ideas and practices between some of these distinct local cultures.¹²⁴⁵

The nature of this analysis has made it difficult to offer conclusions at this point with any certainty but it seems possible to suggest that the rules and the practices of the Quarter Sessions were different from those of the centre and to infer thereby that the justice it practised was different too, having a greater focus on efficiency and flexible disposals than upon the formalities of trial adjudications. For all that, Sessions were, however, courts and therefore had to conform to expectations and the strictures of the law. Sessions practices therefore placed significant weight on formalities, particularly on the indictment, as the basis of its procedures. There is some evidence of a variety of practices being used in the Ridings in attempts to navigate the twin justice tensions of formal validity and factual accuracy. Again, it is only possible to reach the most provisional of conclusions: that local innovators developed particular tactics to maximise success in particular ways and, in so doing, may have developed their own set of rules and practices (in the sense of 'the right thing to do').

It is important that the structure and nature of this normative framework is not overlooked. First of all, it was what people *did* as much as what they *said* that created the actual normative code under which each of these courts operated. Sewell describes this as 'semiotic practice', an understanding that it is important to look beyond rules or knowledge to explore how such things are enacted and implemented.¹²⁴⁶ In this sense, it is suggested, a fuller understanding of justice, the variety of its meanings and ways in which it manifested within the practices of the Sessions, can be achieved as much by examination of indictments, convictions, recognizances, calling of juries, disposal of vagrants and a range of other actions, all of which are as important for an

¹²⁴⁴ Eastwood, 'Governing Rural England: Tradition and Transformation in Local Government 1780-1840'; Landau, *Justices* 240-65; Langford, *Public Life* 390-7

¹²⁴⁵ King, *Crime and Law* 11-3

¹²⁴⁶ Sewell, *Logics* 337-8; King, *Crime and Law* 38

understanding of the norms and values of each of these courts. Certainly, these actions were constrained by rules, both of the centre and locally developed, but these constraints were not absolute and, as Sewell suggests, the unpredictable relationship between the physical world of things to be stolen, people to steal them, costs to be paid, etc. and the normative world of crimes, procedures, arguments and moral conclusions, meant that rules could be changed and by instances of mass or individual human innovation as much as by conscious rule-drafting efforts.¹²⁴⁷ The peculiarities of indictment drafting, the pleading of specific and generic versions of the same item or resort to alternative counts, may be examples of such problem-solving creativity, attempts to navigate expectations of accuracy and formalism to achieve desired ends.

Sewell has not invented a new historiography here. Examination of justice in the form of what the courts did has a well-established pedigree in relation to the English criminal justice of the long eighteenth and early nineteenth centuries. Beattie has provided an excellent explanation of how trial processes in fact worked from beginning to end,¹²⁴⁸ and King has explored a number of areas of discretionary justice, the ways it has been implemented in a variety of contexts.¹²⁴⁹

However, there remains room for further investigation and the Quarter Sessions merit some of this further investigation. Much of Beattie's account does not clearly distinguish Sessional and Assize practices. Equally there are some of the less well-explored features of Sessional business, practices and activities that support the justice-as-governance thesis advanced here that merit further attention to determine the nature of the practice of these peculiarly hybrid institutions. These include the use of regulatory laws, attitudes to the passing and punishment of vagrants, the extent of localism within Sessional practice, and the personalities at the 'efficient secret'¹²⁵⁰ of the Sessions.

The overall narrative of the examination of the Sessions practice has been one in which the courts were transformed from a locally embedded fixture of county governance into a criminal trial court. This analysis fits into a wider narrative of the growth of the central state and the dissemination of central values. The evidence suggests an inevitability to this change: the weight of cases and centrally promoted legal changes removed from the Sessions much of their original jurisdiction. However, it is equally clear that, at least for the first half of the period under examination, these courts were dynamic centres of their own justice cultures.

¹²⁴⁷ Sewell, *Logics* 133-5

¹²⁴⁸ Beattie, *Crime*

¹²⁴⁹ King, *Crime*; King, 'War as a Judicial Resource: Press Gangs and Prosecution Rates, 1740-1830'; King, *Crime and Law*

¹²⁵⁰ Eastwood, 'Governing Rural England: Tradition and Transformation in Local Government 1780-1840' 55

Implications for Modern Justice Scholarship

It may have been possible to construct this analysis of the courts and their practices without resort to the analysis of justice discourse explored in Part One. The interpretations of the Sessional practices could have been undertaken by resorting to the modern literature on justice that was identified in the introduction.

Although Packer's Crime Control and Due Process models do not appear to create a suitable package of values to explain how the Quarter Sessions worked, some of Michael King's alternative models might do so. The form of justice-as-governance posited in Part Two might be argued to conform with King's bureaucratic model of justice, for example.¹²⁵¹

By the same token, it might have been possible to conduct the analysis of the claims being made in the central court discourse and the practices of the local courts by resort to modern evaluative scholarship of justice processes, both civil and criminal. These certainly offer perspectives from which to understand how procedures are used appropriately. Ashworth and Redmayne's concern for rights and accurate outcomes,¹²⁵² for example, can explain much of the procedural discourse and the anxieties in cases like *R v Mellor*¹²⁵³, *R v Mawbey*¹²⁵⁴ and *R v Bird and Bird*¹²⁵⁵, for example. They may also offer a basis for understanding the practices in drafting indictments in the Quarter Sessions. Equally, Packer's models might provide a useful index by which to examine many of the cases in which the courts seemed to have preferred the certainty of punishments over the protection of rights.¹²⁵⁶ In relation to civil justice, Genn's and Zuckerman's interest in accuracy, promptness, cost, notice, participation and fairness can be seen in the cases that have been examined.¹²⁵⁷

However, to take twentieth and twenty-first century interpretations of just outcomes to evaluate eighteenth and nineteenth practices would have been to presume what those values were. Many of them appear to have been resorted to in the discourse of the central courts but not all of them. This is not only so for the concept of rights but also, largely, for the concept of fairness. Both of these concepts clearly had a part to play in the overall justice discourse that has been examined, but to give them the weight that Ashworth or Genn have given them would be to project values onto these courts. Instead, it has been attempted to begin analysis with the

¹²⁵¹ King, *Criminal Justice* 21-3

¹²⁵² Ashworth and Redmayne, *Criminal Process* 55-61

¹²⁵³ *R v Mellor* (n 807)

¹²⁵⁴ *R v Mawbey* (n 714)

¹²⁵⁵ *R v Bird and Bird* (n 1213)

¹²⁵⁶ *R v Mellor* (n 807)

¹²⁵⁷ Zuckerman 11, Genn, *Civil Justice* 14-6

sources themselves. The result is that the examination of the central discourse suggests a pre-eminence to accurate and rightful verdicts and the maximisation of evidence that, while significant today, is often more fully balanced with other values.

To do so would have taken these commentators on modern justice out of their contexts. None of them, in fact, except possibly Genn, were explicitly writing about justice.¹²⁵⁸ Rather they were establishing a broader normative understanding of their fields. Certainly, it could be argued that any evaluation of the best way of conducting a legal process is an examination of its 'justice' (that, at least, might be a conclusion as to what the word means) but it does not seem justified to make that assumption.

In fact to have attempted evaluation without exploring the discourse would have been to miss a key aspect of this thesis, which was to consider what lawyers mean when they invoke justice and related terms. Not only did examining these terms provide a basis for evaluating decisions and practices based on the justice as it was expressed at the time, but that exploration has suggested conclusions that might be applied not only to the evaluation of historical justice but which might also be carried forward (at least as questions) into modernity.

It has already been suggested that the concept of justice was a portmanteau term, capable of carrying a broad range of possible meanings as long as any could be associated with getting a right result or going through a rightful process. As such, justice is a problematic concept to use to define particular ways in which things should be done. This is, however, exactly how justice is used in current law making.

A brief search for the term 'interests of justice' in the statutes section of Westlaw shows the term is used in 1,307 pieces of legislation. If this is narrowed to U.K. legislation currently in force, this reduces to 645 occurrences. Some of these are amending legislation (i.e. the relevant section is in fact changing the text of some other Act or statutory instrument) so the numbers could be reduced further but, assuming half of the hits are amending the other half, that is still at least 320 uses of the term for legal definition. To take but one Act, the Criminal Justice Act 2003, the 'interests of justice' is the basis for deciding whether trials can take place without a jury on the grounds of jury tampering,¹²⁵⁹ whether a judge can stop a witness from giving evidence by live link,¹²⁶⁰ whether to restrict reporting of a prosecution appeal,¹²⁶¹ whether to allow retrial for a

¹²⁵⁸ Zuckerman's use of 'justice' in his title is a reference to the system not the concept necessarily.

¹²⁵⁹ Criminal Justice Act 2003 (c 44), ss 44, 46

¹²⁶⁰ s 52(3)

¹²⁶¹ s 77(5), (6)

serious offence and whether to allow restriction of its publication,¹²⁶² whether to admit evidence of a defendant's bad character or hearsay evidence,¹²⁶³ and a number of aspects of the exercise of sentencing powers.¹²⁶⁴

This is all a far cry from the phrase's modest beginnings. It will be remembered that it was barely used until the 1830s.¹²⁶⁵ It did, however, quickly show its promise as a term useful in justifying particular values or explaining general way of doing things properly. In fact, the start of the term's life as the justice term of choice for legislators began in 1865 with the Prison Act, where the term was used to define the basis upon which prison governors could restrict prisoners' access to legal advice.¹²⁶⁶ The term came to be used regularly in statutes in the subsequent decades.¹²⁶⁷ The difficulty with this as a basis for legislation is that the term lacks clear meaning. There have been attempts to define what the interests of justice are. For example s 114(2) of the Criminal Justice Act 2003 directs judges to a number of evidential considerations in determining the interests of justice. However, this list, in contrast to earlier 'interests of justice' tests for admissibility of such evidence (such as s 26 of the Criminal Justice Act 1988), does not allow for the same confrontation and challenge rights.

The tendency to draw on justice as a concept defining and explaining the conduct of legal processes has grown since the 1870s. Now the overriding objective of both criminal and civil proceedings is to 'deal with cases justly'.¹²⁶⁸ Again there have been attempts to define what constitutes justice in these situations. Again, however, the content of justice is a malleable concept. The original overriding objective listed a number of inclusive aspects of just dealing: equality, reducing expense, proportionality, dealing with cases expeditiously and fairly and properly allocating resources.¹²⁶⁹ In 2014, proportionality was given equal significance to justice.¹²⁷⁰

As the historical discourse shows, justice is a malleable term. It can be deployed in arguments to support almost any value that does not sound unjust. As this analysis has shown, the tensions between such values are intricate and not easily resolved. This is not obviously something that is

¹²⁶² ss 79, 80, 82

¹²⁶³ ss 108, 114, 116, 121

¹²⁶⁴ ss 174, Schedules 3, 8, 9, 12 and 23

¹²⁶⁵ See Appendix 1

¹²⁶⁶ Prison Act 1865 (c 126), Sch 1, para 54

¹²⁶⁷ Foreign Enlistment Act 1870, s 18, Slave Trade Act 1873, s26; Rivers Pollution Prevention Act 1876, 11 and Summary Jurisdiction Act 1879, s 44

¹²⁶⁸ CPR (SI 1998 No 3132), r 1.1, Crim PR (SI 2004 No 1610), r 1.1

¹²⁶⁹ CRP, r 1.1(2): the Crim PR also includes respecting rights, convicting the guilty and acquitting the innocent and victim awareness.

¹²⁷⁰ Civil Procedure (Amendment) Rules 2013/262, r 4

reflected on modern legislation: lists of inclusive factors may simply provide a list of matters that might justify decisions.

Such, in fact, is the vagueness of the term and the facility with which it can be deployed to support particular interests or agendas, it is tempting to be cynical about justice, if not to endorse Hay's suggestion that justice is an 'ideological weapon',¹²⁷¹ then at least to recognise that its breadth and vagueness covers a much more discretionary system of adjudication than its very name suggests. Justice is certainly a vague term, one that does not carry quite the clarity, certainty or unanimity it professes. However, as has been seen, there was within the law in the eighteenth and nineteenth century what seems to be a genuine discourse about justice and what doing things justly meant in a legal context. Equally, peering into the practices of the Quarter Sessions seems to suggest a complicated system of governance. It is hard in either situation to dismiss it as mere ideology.

It may, therefore, be preferable to prefer the company of an even greater historian of eighteenth century justice. Thompson was no less trenchant in his criticisms of arbitrariness and self interest but he was, at least, willing to concede an internal fidelity of law to the values it professed. 'In the case of an ancient historical formation like the law,' he suggested, 'there will always be some men who actively believe in their own procedures and in the logic of justice. The law may be rhetoric but it need not be empty rhetoric.'¹²⁷² Thompson seems, as ever, to have summed up the essential state of affairs.

¹²⁷¹ Douglas Hay, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (1st edn, Pantheon Books 1975) 37

¹²⁷² Thompson, *Whigs and Hunters* 263

Appendix 1: References to Justice in Reported Cases

Table 12: Overview of Use of Justice References in Westminster Court Reports by court

Date Range	Total number of reported cases	References to Justice ¹²⁷³	References to Justice (without institutions of justice) ¹²⁷⁴	References to particular justice concepts ¹²⁷⁵	Concepts (C) as % of All references (A)	House of Lords & Privy Council	Court of Appeal	KB & QB & QBD	Probate & PD & A	Chancery & ChD	Crown Cases Reserved	Common Pleas	Admiralty	Exchequer, Ex Ch & ExD	Assize & Old Bailey	Ecclesiastical & Divorce
1770-1779	1802	314	189	134	42.7%	15	0	108	0	1	2	0	6	2	0	0
1780-1789	2090	334	265	160	47.9%	8	0	91	0	36	6	15	0	0	4	0
1790-1799	3987	577	345	382	66.2%	15	0	165	0	112	4	40	19	14	10	3
1800-1809	5697	637	401	435	68.3%	5	0	107	0	209	5	43	36	6	19	5
1810-1819	7647	755	499	469	62.1%	46	0	94	0	161	0	56	20	52	26	14
1820-1829	7660	1206	568	615	51.0%	62	0	148	0	92	3	80	27	135	40	28
1830-1839	10703	1414	695	782	55.3%	158	0	196	0	169	3	78	15	105	39	19
1840-1849	11489	1667	887	1071	64.2%	174	0	156	0	339	9	156	55	123	30	29
1850-1859	10692	2233	716	1081	48.4%	161	0	181	0	365	42	158	61	96	10	7
1860-1869	9783	2165	680	1073	49.6%	236	0	128	11	346	7	167	74	66	28	10

¹²⁷³ ...

Table 13: Overview of Use of Justice References in Westminster Court Reports by term

	% of all cases	Total # refs	Administr of J	Interests of J	Ends of J	Requirem. of J	Principles of J	Rule of J	Course of J	Miscar. of J	Do J	Denial of J	Failure of J	Purpose of J	Bring to J	J of Case	Natural Justice
1770-1779	10.49%	184	5.82%	0.00%	2.65%	1.59%	12.17%	1.59%	2.65%	0.00%	15.34%	0.00%	2.65%	0.53%	1.06%	19.58%	5.29%
1780-1789	12.68%	259	6.42%	0.38%	4.53%	2.26%	9.06%	1.89%	2.26%	0.00%	10.94%	0.00%	0.38%	1.51%	1.51%	15.85%	3.40%
1790-1799	8.65%	336	13.62%	0.58%	4.06%	4.93%	11.88%	1.74%	2.90%	0.00%	21.16%	0.58%	4.64%	3.19%	1.45%	34.20%	5.80%
1800-1809	7.04%	380	14.96%	1.50%	4.49%	7.98%	10.22%	1.75%	3.24%	0.25%	25.69%	0.50%	4.74%	7.23%	1.25%	20.95%	3.74%
1810-1819	6.53%	478	17.23%	0.80%	2.00%	8.62%	7.62%	1.40%	2.20%	0.00%	20.44%	0.20%	4.01%	7.41%	0.40%	18.64%	3.01%
1820-1829	7.42%	553	21.48%	0.53%	3.87%	7.39%	5.46%	0.88%	2.64%	0.00%	25.53%	1.23%	3.17%	8.45%	1.41%	24.65%	1.58%
1830-1839	6.49%	667	25.32%	1.73%	7.19%	4.75%	5.90%	1.15%	3.60%	0.14%	23.88%	1.87%	4.32%	4.60%	0.86%	24.03%	3.17%
1840-1849	7.72%	837	19.95%	1.35%	5.75%	9.13%	10.71%	1.35%	3.49%	0.11%	29.09%	3.49%	6.88%	4.96%	1.13%	20.07%	3.27%
1850-1859	6.70%	686	27.37%	2.09%	6.84%	15.78%	11.31%	0.84%	2.51%	0.84%	40.64%	2.79%	6.28%	5.31%	1.12%	22.07%	5.17%
1860-1869	6.95%	636	24.41%	3.09%	5.59%	17.50%	11.62%	1.03%	5.88%	4.26%	37.79%	4.71%	4.71%	4.71%	1.03%	24.85%	6.62%

Appendix 2: References to Justice in the Central Courts

Table 14: House of Lords and Privy Council

Date Range	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J	
Number of references to each term																		
1750s		1	1		1	1												
1760s		1		1	1	2					4				2		1	
1770s		4			1	2				2	2			3	1	1	1	
1780s					1		2				2			2	1			
1790s		3		2	3						4	1		1	1			
1800s		3					1				1					1		
1810s		11	1	2	8	1	3				12	4		4		2	1	
1820s		18	2	6	6	1	1			2	15	2		8	2	2	5	
1830s	2	41	7	7	12	2	5	1	3	5	38	5		27	3	6	1	
1840s	4	43	8	9	19	2	3		7	8	38	6	1	21	5	7	5	
1850s	2	34	1	14	13	1	2	3	9	5	35	4		25	4	8	8	
1860s	3	49	6	24	25	4	22	11	13	9	29	1		35	5	8	4	
1870s	3	31	2	12	17	4	5	17		2	33	3		20	4	7	4	
References to each term as % of total number of references to all of these terms in each decade																		
1750s		25.0%	25.0%		25.0%	25.0%												
1760s		8.3%		8.3%	8.3%	16.7%					33.3%				16.7%		8.3%	
1770s		23.5%			5.9%	11.8%				11.8%				17.6%	5.9%	5.9%	5.9%	
1780s					12.5%		25.0%				25.0%			25.0%	12.5%			
1790s		20.0%		13.3%	20.0%						26.7%	6.7%		6.7%	6.7%			
1800s		50.0%					16.7%				16.7%						16.7%	
1810s		22.4%	2.0%	4.1%	16.3%	2.0%	6.1%				24.5%	8.2%		8.2%		4.1%	2.0%	
1820s		26.1%	2.9%	8.7%	8.7%		1.4%			2.9%	21.7%	2.9%		11.6%	2.9%	2.9%	7.2%	
1830s	1.2%	24.8%	4.2%	4.2%	7.3%	1.2%	3.0%	0.6%	1.8%	3.0%	23.0%	3.0%		16.4%	1.8%	3.6%	0.6%	
1840s	2.2%	23.1%	4.3%	4.8%	10.2%	1.1%	1.6%		3.8%	4.3%	20.4%	3.2%	0.5%	11.3%	2.7%	3.8%	2.7%	
1850s	1.2%	20.2%	0.6%	8.3%	7.7%	0.6%	1.2%	1.8%	5.4%	3.0%	20.8%	2.4%		14.9%	2.4%	4.8%	4.8%	
1860s	1.2%	19.8%	2.4%	9.7%	10.1%	1.6%	8.9%	4.4%	5.2%	3.6%	11.7%	0.4%		14.1%	2.0%	3.2%	1.6%	
1870s	1.8%	18.9%	1.2%	7.3%	10.4%	2.4%	3.0%	10.4%	0.0%	1.2%	20.1%	1.8%		12.2%	2.4%	4.3%	2.4%	
Order of frequency of references to each term compared to the other terms during each decade																		
1750s		1 st	1 st		1 st	1 st												
1760s		4 th		4 th	4 th	2 nd					1 st				2 nd		4 th	
1770s		1 st			6 th	3 rd				3 rd	3 rd			2 nd	6 th	6 th	6 th	
1780s					4 th		1 st				1 st			1 st	4 th			
1790s				4 th	2 nd						1 st	5 th		5 th	5 th			
1800s		1 st					2 nd										2 nd	
1810s		2 nd	9 th	7 th	3 rd	9 th	6 th				1 st	4 th		4 th		7 th	9 th	
1820s		1 st	7 th	4 th	4 th		12 th			7 th	2 nd	7 th		3 rd	7 th	7 th	6 th	
1830s	13 th	1 st	5 th	5 th	4 th	13 th	8 th	15 th	11 th	8 th	2 nd	8 th		3 rd	11 th	7 th	15 th	
1840s	13 th	1 st	6 th	5 th	4 th	15 th	14 th		8 th	6 th	2 nd	10 th	16 th	3 rd	11 th	8 th	11 th	
1850s	13 th	2 nd	15 th	4 th	5 th	15 th	13 th	12 th	6 th	9 th	1 st	10 th		3 rd	10 th	7 th	7 th	
1860s	15 th	1 st	11 th	5 th	4 th	13 th	6 th	8 th	7 th	9 th	3 rd	16 th		2 nd	12 th	10 th	13 th	
1870s	12 th	2 nd	14 th	6 th	4 th	9 th	8 th	4 th		14 th	1 st	12 th		3 rd	9 th	7 th	9 th	
Mean		13.2	1.6	8.5	4.9	3.8	8.9	7.8	9.8	8.0	8.0	1.7	9.0	16.0	2.9	7.7	6.8	8.9
Mode		13 th	1 st	n/a	4 th	4 th	9 th	6 th	n/a	n/a	9 th	1 st	10 th	n/a	3 rd	11 th	7 th	6 th
		Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J

Table 15: Courts of King's Bench and Queen's Bench (and Queen's Bench Division)

Date Range	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J
Number of references to each term																	
1750s		5	3	2	6	3	1				30			17	8	3	3
1760s		13	2	1	6	2	4			3	18		2	15	7	3	6
1770s		5	4	3	21	1	3			3	23	1	1	34	9	6	6
1780s		11	9	3	15	3	2			1	12	3	3	25	4	4	2
1790s		22	7	8	15		8			10	20	3	5	62	5	10	1
1800s		14	4	8	7	1	6			5	14	7	2	36	3	2	
1810s		17	4	8	1	1	4			3	13	10	2	19	3	2	
1820s		27	6	2	8		7			5	35	16	3	20	1	4	2
1830s	1	35	15	15	11	2	4		1	11	56	7	2	29	7	3	
1840s	1	19	14	17	2	4	9	1		10	34	6	1	14	6	3	1
1850s	1	36	12	29	18	3	4		3	8	41	3	2	14	7	4	1
1860s	5	20	14	16	7		5	6	2	2	21	3	2	20	5	3	1
1870s	4	12	2	7	5		1		1	1	9	3		9	2	4	
References to each term as % of total number of references to all of these terms in each decade																	
1750s	0.0%	6.2%	3.7%	2.5%	7.4%	3.7%	1.2%	0.0%	0.0%	0.0%	37.0%	0.0%	0.0%	21.0%	9.9%	3.7%	3.7%
1760s	0.0%	15.9%	2.4%	1.2%	7.3%	2.4%	4.9%	0.0%	0.0%	3.7%	22.0%	0.0%	2.4%	18.3%	8.5%	3.7%	7.3%
1770s	0.0%	4.2%	3.3%	2.5%	17.5%	0.8%	2.5%	0.0%	0.0%	2.5%	19.2%	0.8%	0.8%	28.3%	7.5%	5.0%	5.0%
1780s	0.0%	11.3%	9.3%	3.1%	15.5%	3.1%	2.1%	0.0%	0.0%	1.0%	12.4%	3.1%	3.1%	25.8%	4.1%	4.1%	2.1%
1790s	0.0%	12.5%	4.0%	4.5%	8.5%	0.0%	4.5%	0.0%	0.0%	5.7%	11.4%	1.7%	2.8%	35.2%	2.8%	5.7%	0.6%
1800s	0.0%	12.8%	3.7%	7.3%	6.4%	0.9%	5.5%	0.0%	0.0%	4.6%	12.8%	6.4%	1.8%	33.0%	2.8%	1.8%	0.0%
1810s	0.0%	19.5%	4.6%	9.2%	1.1%	1.1%	4.6%	0.0%	0.0%	3.4%	14.9%	11.5%	2.3%	21.8%	3.4%	2.3%	0.0%
1820s	0.0%	19.9%	4.4%	1.5%	5.9%	0.0%	5.1%	0.0%	0.0%	3.7%	25.7%	11.8%	2.2%	14.7%	0.7%	2.9%	1.5%
1830s	0.5%	17.6%	7.5%	7.5%	5.5%	1.0%	2.0%	0.0%	0.5%	5.5%	28.1%	3.5%	1.0%	14.6%	3.5%	1.5%	0.0%
1840s	0.7%	13.4%	9.9%	12.0%	1.4%	2.8%	6.3%	0.7%	0.0%	7.0%	23.9%	4.2%	0.7%	9.9%	4.2%	2.1%	0.7%
1850s	0.5%	19.4%	6.5%	15.6%	9.7%	1.6%	2.2%	0.0%	1.6%	4.3%	22.0%	1.6%	1.1%	7.5%	3.8%	2.2%	0.5%
1860s	3.8%	15.2%	10.6%	12.1%	5.3%	0.0%	3.8%	4.5%	1.5%	1.5%	15.9%	2.3%	1.5%	15.2%	3.8%	2.3%	0.8%
1870s	6.7%	20.0%	3.3%	11.7%	8.3%	0.0%	1.7%	0.0%	1.7%	1.7%	15.0%	5.0%	0.0%	15.0%	3.3%	6.7%	0.0%
Order of frequency of references to each term compared to the other terms during each decade																	
1750s		5 th	6 th	10 th	4 th	6 th	11 th				1 st			2 nd	3 rd	6 th	6 th
1760s		3 rd	10 th	13 th	5 th	10 th	7 th			8 th	1 st			10 th	2 nd	4 th	8 th
1770s		7 th	8 th	9 th	3 rd	12 th	9 th			9 th	2 nd	12 th	12 th	1 st	4 th	5 th	5 th
1780s		4 th	5 th	8 th	2 nd	8 th	12 th			14 th	3 rd	8 th	8 th	1 st	6 th	6 th	12 th
1790s		2 nd	9 th	7 th	4 th	7 th	7 th			5 th	3 rd	12 th	10 th	1 st	10 th	5 th	13 th
1800s		2 nd	9 th	4 th	5 th	13 th	7 th			8 th	2 nd	5 th	11 th	1 st	10 th	11 th	
1810s		2 nd	6 th	5 th	12 th	12 th	6 th			8 th	3 rd	4 th	10 th	1 st	8 th	10 th	
1820s		2 nd	7 th	11 th	5 th	12 th	6 th			8 th	1 st	4 th	10 th	3 rd	13 th	9 th	11 th
1830s	14 th	2 nd	4 th	4 th	6 th	12 th	10 th		14 th	6 th	1 st	8 th	12 th	3 rd	8 th	11 th	
1840s	13 th	2 nd	4 th	3 rd	12 th	10 th	7 th	13 th		6 th	1 st	8 th	13 th	4 th	8 th	11 th	13 th
1850s	15	2 nd	6 th	3 rd	4 th	11 th	9 th		11 th	7 th	1 st	11 th	14 th	5 th	8 th	9 th	15
1860s	8 th	2 nd	5 th	4 th	6 th		8 th	7 th	13 th	13 th	1 st	11 th	13 th	2 nd	8 th	11 th	16
1870s	6 th	1 st	9 th	4 th	5 th		11 th		11 th	11 th	2 nd	8 th	11 th	2 nd	9 th	6 th	
Mean	11.2	2.8	6.8	6.5	5.6	10.4	8.5	10.0	12.3	8.6	1.7	8.3	11.2	2.2	7.6	8.3	10.7
Mode	n/a	2 nd	6 th	4 th	5 th	12 th	7 th	n/a	11 th	8 th	1 st	8 th	10 th	1 st	8 th	11 th	5 th
	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J

Table 16: Court of Chancery, Lord Chancellor, Court of Appeal in Chancery and Chancery Division

Date Range	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J	
Number of references to each term																		
1750s			1	2	1	2	1				18			7	7	4	2	
1760s					1	2			1		3			4	1		1	
1770s					1													
1780s	1	4	3		3		1				1	1		11	2	2		
1790s	1	10	3	4	9	3	1		1	2	36	3		29	10	4	1	
1800s	6	34	12	15	15	4	3			9	65	12		24	10	11	15	
1810s		32	4	19	6	1	2			9	5	12		23	3	4	10	
1820s		11	5	3	3		1		1	4	35	9		19	1	1	7	
1830s	4	35	12	2	11	2	8		5	2	36	9	1	34	8	10	8	
1840s	5	54	14	25	19	4	6		11	13	14	11		66	7	13	20	
1850s	6	56	12	33	23		3	1	6	12	12	16	1	67	9	16	22	
1860s	3	30	9	44	17	1	4	7	11	10	132	16	1	46	15	15	29	
1870s	8	29	6	2	34	5		3	4	3	11	5	1	40	7	8	22	
References to each term as % of total number of references to all of these terms in each decade																		
1750s			2.2%	4.4%	2.2%	4.4%	2.2%				40.0%			15.6%	15.6%	8.9%	4.4%	
1760s					7.7%	15.4%			7.7%		23.1%			30.8%	7.7%		7.7%	
1770s					100.0%													
1780s	3.4%	13.8%	10.3%		10.3%		3.4%				3.4%	3.4%		37.9%	6.9%	6.9%		
1790s	0.9%	8.5%	2.6%	3.4%	7.7%	2.6%	0.9%		0.9%	1.7%	30.8%	2.6%		24.8%	8.5%	3.4%	0.9%	
1800s	2.6%	14.5%	5.1%	6.4%	6.4%	1.7%	1.3%			3.8%	27.7%	5.1%		10.2%	4.3%	4.7%	6.4%	
1810s		24.6%	3.1%	14.6%	4.6%	0.8%	1.5%			6.9%	3.8%	9.2%		17.7%	2.3%	3.1%	7.7%	
1820s		11.0%	5.0%	3.0%	3.0%		1.0%		1.0%	4.0%	35.0%	9.0%		19.0%	1.0%	1.0%	7.0%	
1830s	2.1%	18.7%	6.4%	1.1%	5.9%	1.1%	4.3%		2.7%	1.1%	19.3%	4.8%	0.5%	18.2%	4.3%	5.3%	4.3%	
1840s	1.8%	19.1%	5.0%	8.9%	6.7%	1.4%	2.1%		3.9%	4.6%	5.0%	3.9%		23.4%	2.5%	4.6%	7.1%	
1850s	2.0%	19.0%	4.1%	11.2%	7.8%		1.0%	0.3%	2.0%	4.1%	4.1%	5.4%	0.3%	22.7%	3.1%	5.4%	7.5%	
1860s	0.8%	7.7%	2.3%	11.3%	4.4%	0.3%	1.0%	1.8%	2.8%	2.6%	33.8%	4.1%	0.3%	11.8%	3.8%	3.8%	7.4%	
1870s	4.3%	15.4%	3.2%	1.1%	18.1%	2.7%		1.6%	2.1%	1.6%	5.9%	2.7%	0.5%	21.3%	3.7%	4.3%	11.7%	
Order of frequency of references to each term compared to the other terms during each decade																		
1750s			8 th	5 th	8 th	5 th	8 th				1 st			2 nd	2 nd	4 th	5 th	
1760s					4 th	3 rd			4 th		2 nd			1 st	4 th		4 th	
1770s					1 st													
1780s	7 th	2 nd	3 rd		3 rd		7 th				7 th	7 th		1 st	5 th	5 th		
1790s	12 th	3 rd	8 th	6 th	5 th	8 th	12 th		12 th	11 th	1 st	8 th		2 nd	3 rd	6 th	12 th	
1800s	12 th	2 nd	7 th	4 th	4 th	13 th	14 th			11 th	1 st	7 th		3 rd	10 th	9 th	4 th	
1810s		1 st	9 th	3 rd	7 th	13 th	12 th			6 th	8 th	4 th		2 nd	11 th	9 th	5 th	
1820s		3 rd	6 th	8 th	8 th		10 th		10 th	7 th	1 st	4 th		2 nd	10 th	10 th	5 th	
1830s	12 th	2 nd	4 th	13 th	5 th	13 th	8 th		11 th	13 th	1 st	7 th	16 th	3 rd	8 th	6 th	8 th	
1840s	14 th	2 nd	6 th	3 rd	5 th	15 th	13 th		10 th	8 th	6 th	10 th		1 st	12 th	8 th	4 th	
1850s	12 th	2 nd	8 th	3 rd	4 th	14 th	15 th	15 th	12 th	8 th	8 th	6 th	15 th	1 st	11 th	6 th	5 th	
1860s	15 th	4 th	12 th	3 rd	6 th	16 th	14 th	13 th	10 th	11 th	1 st	7 th	16 th	2 nd	8 th	8 th	5 th	
1870s	6 th	3 rd	9 th	15 th	2 nd	10 th		13 th	12 th	13 th	5 th	10 th	16 th	1 st	8 th	6 th	4 th	
Mean	11.3	2.4	7.3	6.3	4.8	10.7	11.2	13.7	10.1	9.8	3.5	7.0	15.8	1.8	7.7	7.0	5.5	
Mode	12 th	2 nd	8 th	3 rd	4 th	13 th	14 th	13 th	12 th	11 th	1 st	7 th	16 th	2 nd	8 th	6 th	5 th	
		Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J

Table 17: Court of Common Pleas

Date Range	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J
Number of references to each term																	
1750s																	
1760s																	
1770s																	
1780s				3	3						3			4	2	3	
1790s		4	2	2	5		1		1	2	6			15	2	4	
1800s		1		4	10	1		1		1	11	1		11	2	2	
1810s		4		9	2	1				3	6	6		23	2	2	
1820s	1	15	3	7	4	1	1			2	15	6	1	22	2	2	3
1830s	1	20	1	2	2		2		1	3	14	2		29	1	3	2
1840s	2	17	4	17	12	1	1		7	16	28	2		46	3	6	2
1850s	1	25	4	22	9	1	3		1	7	41	4		28	12	14	6
1860s	3	27		19	17		6	2	1	5	36	6	2	30	13	3	3
1870s	2	5	1	5	5		1	3	1		13	3	1	15	5	1	5
References to each term as % of total number of references to all of these terms in each decade																	
1750s																	
1760s																	
1770s																	
1780s				16.7%	16.7%						16.7%			22.2%	11.1%	16.7%	
1790s		9.1%	4.5%	4.5%	11.4%					4.5%	13.6%			34.1%	4.5%	9.1%	
1800s				8.9%	22.2%						24.4%			24.4%	4.4%	4.4%	
1810s		6.9%		15.5%	3.4%					5.2%	10.3%	10.3%		39.7%	3.4%	3.4%	
1820s		17.6%	3.5%	8.2%	4.7%					2.4%	17.6%	7.1%		25.9%	2.4%	2.4%	3.5%
1830s		24.1%		2.4%	2.4%		2.4%			3.6%	16.9%	2.4%		34.9%		3.6%	2.4%
1840s	1.2%	10.4%	2.4%	10.4%	7.3%				4.3%	9.8%	17.1%	1.2%		28.0%	1.8%	3.7%	1.2%
1850s		14.0%	2.2%	12.4%	5.1%		1.7%			3.9%	23.0%	2.2%		15.7%	6.7%	7.9%	3.4%
1860s	1.7%	15.6%		11.0%	9.8%		3.5%	1.2%		2.9%	20.8%	3.5%	1.2%	17.3%	7.5%	1.7%	1.7%
1870s	3.0%	7.6%		7.6%	7.6%			4.5%			19.7%	4.5%		22.7%	7.6%		7.6%
Order of frequency of references to each term compared to the other terms during each decade																	
1750s																	
1760s																	
1770s																	
1780s				2nd	2nd						2nd			1st	6th	2nd	
1790s		4th	6th	6th	3rd		10th		10th	6th	2nd			1st	6th	4th	
1800s		7th		4th	3rd	7th		7th		7th	1st	7th		1st	5th	5th	
1810s		5th		2nd	7th	10th				6th	3rd	3rd		1st	7th	7th	
1820s	12th	2nd	7th	4th	6th	12th	12th			9th	2nd	5th	12th	1st	9th	9th	7th
1830s	11th	2nd	11th	6th	6th		6th		11th	4th	3rd	6th		1st	11th	4th	6th
1840s	11th	3rd	9th	3rd	6th	14th	14th		7th	5th	2nd	11th		1st	10th	8th	11th
1850s	13th	3rd	10th	4th	7th	13th	12th		13th	8th	1st	10th		2nd	6th	5th	9th
1860s	10th	3rd		4th	5th		7th	13th	15th	9th	1st	7th	13th	2nd	6th	10th	10th
1870s	10th	3rd	11th	3rd	3rd		11th	8th	11th		2nd	8th	11th	1st	3rd	11th	3rd
<i>Mean</i>	11.2	3.6	9.0	3.8	4.8	11.2	10.3	9.3	11.2	6.8	1.9	7.1	12.0	1.2	6.9	6.5	7.7
<i>Mode</i>	11 th	3 rd	11 th	4 th	3 rd	n/a	12 th	n/a	11 th	6 th	2 nd	7 th	n/a	1 st	6 th	4 th	n/a
		Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J
	Int J																

Table 18: Court of Exchequer, Exchequer Chamber and Exchequer Division

Date Range	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J	
Number of references to each term																		
1750s											1							
1760s																		
1770s		2																
1780s																		
1790s		1	1		1					1	2	2		6			1	
1800s					1					1		1		3		1		
1810s		7	1	2	7		1				17	1		15	1	2	3	
1820s	1	25	6	5	5	2	2		2	1	33	6		45	2	9	1	
1830s		26	4	5	1	2	4		1	7	14	4		34	3	3	2	
1840s		21	5	9	9		1		3	8	37	8	2	14	6	10	3	
1850s	1	21	1	5	7	1	4	1	1	3	27	4	1	15	4	8	6	
1860s	1	13	1	7	7	1	1				13	2	1	16	3	3	2	
1870s		8	1	7	8				1		13			6	4	1	4	
References to each term as % of total number of references to all of these terms in each decade																		
1750s																		
1760s																		
1770s		100.0%																
1780s																		
1790s											13.3%	13.3%		40.0%				
1800s														42.9%				
1810s		12.3%		3.5%	12.3%						29.8%			26.3%		3.5%	5.3%	
1820s		17.2%	4.1%	3.4%	3.4%	1.4%	1.4%		1.4%		22.8%	4.1%		31.0%	1.4%	6.2%		
1830s		23.6%	3.6%	4.5%		1.8%	3.6%			6.4%	12.7%	3.6%		30.9%	2.7%	2.7%	1.8%	
1840s		15.4%	3.7%	6.6%	6.6%				2.2%	5.9%	27.2%	5.9%	1.5%	10.3%	4.4%	7.4%	2.2%	
1850s		19.1%		4.5%	6.4%		3.6%			2.7%	24.5%	3.6%		13.6%	3.6%	7.3%	5.5%	
1860s		18.3%		9.9%	9.9%						18.3%	2.8%		22.5%	4.2%	4.2%	2.8%	
1870s		15.1%		13.2%	15.1%						24.5%			11.3%	7.5%		7.5%	
Order of frequency of references to each term compared to the other terms during each decade																		
1750s											1 st							
1760s																		
1770s		1 st																
1780s																		
1790s		4 th	4 th		4 th					4 th	2 nd	2 nd		1 st		2 nd	4 th	
1800s				2 nd						2 nd		2 nd		1 st		2 nd	2 nd	
1810s		3 rd	8 th	6 th	3 rd		8 th				1 st	8 th		2 nd	8 th	6 th	5 th	
1820s	13 th	3 rd	5 th	7 th	7 th	9 th	9 th		9 th	13 th	2 nd	5 th		1 st	9 th	4 th	13 th	
1830s		2 nd	6 th	5 th	13 th	11 th	6 th		13 th	4 th	3 rd	6 th		1 st	9 th	9 th	11 th	
1840s		2 nd	10 th	5 th	5 th		14 th		11 th	7 th	1 st	7 th	13 th	3 rd	9 th	4 th	11 th	
1850s	12 th	2 nd	12 th	7 th	5 th	12 th	8 th	12 th	12 th	11 th	1 st	8 th	12 th	3 rd	8 th	4 th	6 th	
1860s	10 th	2 nd	10 th	4 th	4 th	10 th	10 th				2 nd	8 th	10 th	1 st	6 th	6 th	8 th	
1870s		2 nd	8 th	4 th	2 nd				8 th		1 st			5 th	6 th	8 th	6 th	
Mean	11.7	2.3	7.9	5.0	5.4	10.5	9.2	12.0	10.6	6.8	1.6	5.8	11.7	2.0	7.9	5.4	8.0	
Mode	n/a	2 nd	8 th	7 th	4 th	n/a	8 th	n/a	n/a	4 th	1 st	8 th	n/a	1 st	9 th	4 th	11 th	
		Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J

Table 19: Ecclesiastical Courts

Date Range	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J
Number of references to each term																	
1750s		1															
1760s																	
1770s																	
1780s																	
1790s		2								1							
1800s		2							1	1				1		1	
1810s	2	5							1	1		2		3	1	4	
1820s		7							3			3		14	1	7	
1830s		9										2		8			
1840s		9							2	2	4	4	1	6	1		
1850s		2							1	1	2	2					
1860s	1	2	2								4				1		
1870s		5						1	1	1	6			4	2		1
References to each term as % of total number of references to all of these terms in each decade																	
1750s																	
1760s																	
1770s																	
1780s																	
1790s		66.7%															
1800s		33.3%															
1810s	11.1%	27.8%										11.1%		16.7%		22.2%	
1820s		20.0%							8.6%			8.6%		40.0%		20.0%	
1830s		47.4%										10.5%		42.1%			
1840s		31.0%						6.9%	6.9%	13.8%	13.8%			20.7%			
1850s		28.6%									28.6%	28.6%					
1860s		20.0%	20.0%								40.0%						
1870s		23.8%									28.6%			19.0%	9.5%		
Order of frequency of references to each term compared to the other terms during each decade																	
1750s		1 st															
1760s																	
1770s																	
1780s																	
1790s		1 st								2 nd							
1800s		1 st							2 nd	2 nd				2 nd		2 nd	
1810s	4 th	1 st							6 th			4 th		3 rd	6 th	2 nd	
1820s		2 nd							4 th			4 th		1 st	6 th	2 nd	
1830s		1 st										3 rd		2 nd			
1840s		1 st							5 th	5 th	3 rd	3 rd	7 th	2 nd	7 th		
1850s		1 st								4 th	1 st	1 st					
1860s	4 th	2 nd	2 nd								1 st				4 th		
1870s		2 nd				5 th	5 th	5 th		1 st				3 rd	4 th		5 th
Mean	4.0	1.3	2.0	n/a	n/a	5.0	n/a	5.0	4.0	3.8	1.5	3.0	7.0	2.2	5.4	2.0	5.0
Mode	4 th	1 st	n/a	n/a	n/a	n/a	n/a	n/a	5 th	2 nd	1 st	4 th	n/a	2 nd	6 th	2 nd	n/a
	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J

Table 20: Admiralty Courts

Date Range	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J
Number of references to each term																	
1750s																	
1760s											1						
1770s							2				4						
1780s																	
1790s		3		1	5	3					2	1		2	2	5	
1800s		3		1	8	1			1	2	6	6		8		2	
1810s		3			5	2			1	4	2			3		3	
1820s		3			3	2			1	3	5	2	1	7		2	1
1830s		1			4				1		7	1		1			
1840s		5	1	3	13		3		1	1	13	3	1	1	1	1	
1850s	2	9	3	6	9		1				2	3		8		1	
1860s	4	13	2	6	5			1	4	1	17	3		15	3	2	2
1870s	1	9		2						1	4	3		2	1		1
References to each term as % of total number of references to all of these terms in each decade																	
1750s																	
1760s																	
1770s							33.3%				66.7%						
1780s																	
1790s		12.5%			20.8%	12.5%					8.3%			8.3%	8.3%	20.8%	
1800s		7.9%			21.1%					5.3%	15.8%	15.8%		21.1%		5.3%	
1810s		13.0%			21.7%	8.7%				17.4%	8.7%			13.0%		13.0%	
1820s		10.0%			10.0%	6.7%				10.0%	16.7%	6.7%		23.3%		6.7%	
1830s					26.7%						46.7%						
1840s		8.9%		5.4%	23.2%		5.4%				23.2%	5.4%		17.9%			
1850s	3.2%	14.5%	4.8%	9.7%	14.5%						32.3%	4.8%		12.9%			
1860s	5.1%	16.7%	2.6%	7.7%	6.4%				5.1%		21.8%	3.8%		19.2%	3.8%	2.6%	2.6%
1870s		37.5%		8.3%							16.7%	12.5%		8.3%			
Order of frequency of references to each term compared to the other terms during each decade																	
1750s																	
1760s											1st						
1770s							2nd				1st						
1780s																	
1790s		3rd		8th	1st	3rd					5th	8th		5th	5th	1st	
1800s		5th		8th	1st	8th			8th	6th	3rd	3rd		1st		6th	
1810s		3rd			1st	6th			8th	2nd	6th			3rd		3rd	
1820s		3rd			3rd	6th			9th	3rd	2nd	6th	9th	1st		6th	9th
1830s		3rd			2nd				3rd		1st	3rd		3rd			
1840s		4th	8th	5th	1st		5th		8th	8th	1st	5th	8th	3rd	8th	8th	
1850s	8th	2nd	6th	5th	2nd		9th				1st	6th		4th		9th	
1860s	6th	3rd	10th	4th	5th			13th	6th	13rdth	1st	8th		2nd	8th	10th	10th
1870s	6th	1st		4th						6th	2nd	3rd		4th	6th		6th
<i>Mean</i>	6.7	3.0	8.0	5.7	2.0	5.8	5.3	13	7.0	6.3	2.2	5.3	8.5	2.9	6.8	6.1	8.3
<i>Mode</i>	6th	3rd	n/a	8th	1st	6th	n/a	n/a	8th	6th	1st	3rd	n/a	3rd	8th	6th	n/a
	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J

Table 21: Reserved Judgements and Court of Crown Cases Reserved

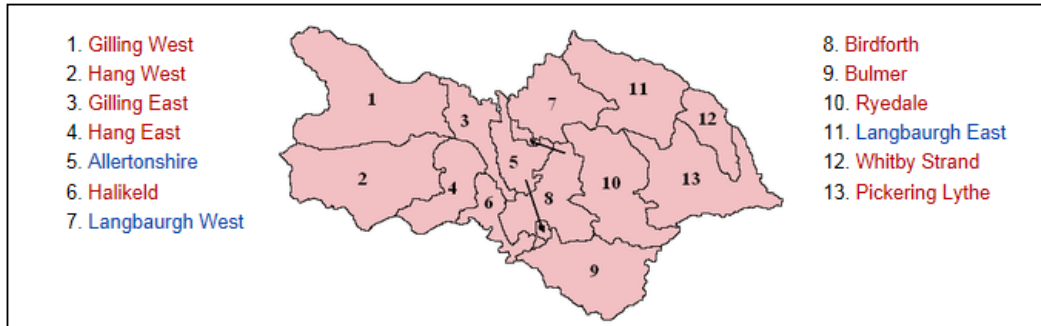
Date Range	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Cise J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J
Number of references to each term																	
1750s			1				1							1			
1760s			1				1					1					
1770s			1										1				
1780s		1			1	2					1		1				
1790s	1	1	1		1												
1800s			2				1					1	1				
1810s																	
1820s		2					1										
1830s		1	1								1						
1840s		3	1	1	1							1	2				1
1850s	2	12	5	3	2		1			9	4	1	2	1	1		2
1860s		1	1	1		1				2				1			
1870s		2		1	2					1	1	1	1		2		
References to each term as % of total number of references to all of these terms in each decade																	
1750s																	
1760s																	
1770s																	
1780s						33.3%											
1790s																	
1800s			40.0%														
1810s																	
1820s		66.7%															
1830s																	
1840s		30.0%											20.0%				
1850s	4.5%	27.3%	11.4%	6.8%	4.5%					20.5%	9.1%		4.5%				4.5%
1860s										28.6%							
1870s		18.2%			18.2%										18.2%		
Order of frequency of references to each term compared to the other terms during each decade																	
1750s			1 st				1 st							1 st			
1760s			1 st				1 st					1 st					
1770s			1 st									1 st					
1780s			2 nd		2 nd	1 st					2 nd		2 nd				
1790s	1 st	1 st	1 st		1 st	1 st											
1800s			1 st				2 nd					2 nd	2 nd				
1810s																	
1820s		1 st					2 nd										
1830s		1 st	1 st								1 st						
1840s		1 st	3 rd	3 rd	3 rd							3 rd	2 nd				3 rd
1850s	6 th	1 st	3 rd	5 th	6 th		10 th			2 nd	4 th		6 th	10 th	10 th		6 th
1860s		2 nd	2 nd	2 nd			2 nd			1 st				2 nd			
1870s		1 st		4 th	1 st					4 th	4 th	4 th	4 th	2 nd		1 st	
Mean	3.5	1.3	1.6	3.5	2.6	1.5	3.2	n/a	n/a	2.3	2.8	2.5	2.8	4.3	5.5	4.5	n/a
Mode	n/a	1 st	1 st	n/a	1 st	n/a	1 st	n/a	n/a	n/a	4 th	n/a	2 nd	n/a	n/a	n/a	n/a
		Admin J	Ends J	Req J	Prin J	Rule J	Cise J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J
	Int J																

Table 22: Assize Courts (including Old Bailey)

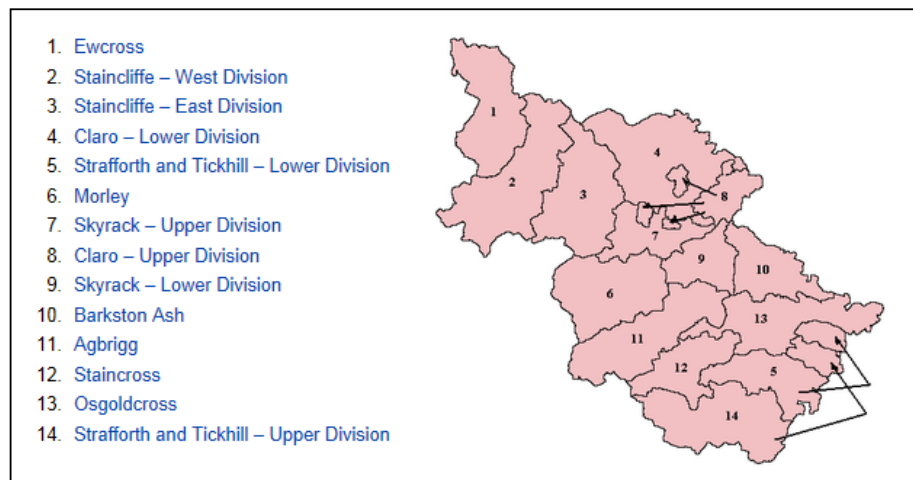
Date Range	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J
Number of references to each term																	
1750s																	
1760s																1	
1770s																	
1780s		1			1		1				1						
1790s		1			2		2				3	1		3			
1800s		3		3	1		2				6	1	2	1		2	2
1810s	2	7		3		1	1				2	2	2	3	5		
1820s	1	14		1	2		2			1	7	4	3	5		2	2
1830s	4	8	10	2			2		1	2		2	3	5			
1840s		6	4		2	1	8			3		3	2	1		3	3
1850s		1	2	1				1			1	2	2				
1860s	1	10	3	2	1		2	2		2	1	1	1	2		2	2
1870s																	
References to each term as % of total number of references to all of these terms in each decade																	
1750s																	
1760s																	
1770s																	
1780s																	
1790s					20.0%						30.0%			30.0%			
1800s		13.0%		13.0%			8.7%				26.1%		8.7%			8.7%	8.7%
1810s	7.7%	26.9%		11.5%							7.7%	7.7%	6.8%	11.5%	19.2%		
1820s		31.8%			4.5%		4.5%				15.9%	9.1%	6.8%	11.4%		4.5%	4.5%
1830s	10.3%	20.5%	25.6%	5.1%			5.1%			5.1%		5.1%	7.7%	12.8%			
1840s		16.7%	11.1%		5.6%		22.2%			8.3%		8.3%	5.6%			8.3%	8.3%
1850s			20.0%									20.0%	20.0%				
1860s		31.3%	9.4%	6.3%			6.3%	6.3%		6.3%				6.3%		6.3%	6.3%
1870s																	
Order of frequency of references to each term compared to the other terms during each decade																	
1750s																	
1760s																1 st	
1770s																	
1780s		1 st			1 st		1 st				1 st						
1790s		4 th			3 rd						1 st	4 th		1 st			
1800s		2 nd		2 nd	8 th		4 th				1 st	8 th	4 th	8 th		4 th	4 th
1810s	5 th	1 st		3 rd		8 th	8 th				5 th	5 th	5 th	3 rd	2 nd		
1820s	10 th	1 st		10 th	6 th		6 th			10 th	2 nd	4 th	5 th	3 rd		6 th	6 th
1830s	4 th	2 nd	1 st	6 th			6 th		10 th	6 th		6 th	5 th	3 rd			
1840s		2 nd	3 rd		8 th	10 th	1 st			4 th		4 th	8 th	10 th		4 th	4 th
1850s		4 th	1 st	4 th				4 th			4 th	1 st	1 st				
1860s	10 th	1 st	2 nd	3 rd	10 th		3 rd	3 rd		3 rd	10 th	10 th	10 th	3 rd		3 rd	3 rd
1870s																	
<i>Mean</i>																	
<i>Mode</i>	10 th	1 st	1 st	3 rd	8 th	n/a	1 st	n/a	n/a	n/a	1 st	4 th	5 th	3 rd	n/a	4 th	4 th
	Int J	Admin J	Ends J	Req J	Prin J	Rule J	Crse J	Misc J	Denial of J	Failure of J	Do J	Purp J	Bring J	J of Case	Natural Justice	Subst J	Compl J

Appendix 3: Wapentakes of the North and West Ridings

Map of the wapentakes of the North Riding of Yorkshire¹²⁷⁶



Map of the wapentakes of the West Riding of Yorkshire¹²⁷⁷



¹²⁷⁶ http://en.wikipedia.org/wiki/List_of_wapentakes_in_Yorkshire

¹²⁷⁷ http://en.wikipedia.org/wiki/List_of_wapentakes_in_Yorkshire

Appendix 4: Cases Tried in the Courts of Quarter Sessions of the North Riding and the West Riding: 1768-1861

		Assaults	Thefts	Conspiracy	Coining	Public Order	Misdemeanours*	Nuisances, Highways and Public Works	Previous Felonies	Trials	Not Found	Committals
Northallerton	6/10/1778	2					2	2		6	1	2
Easingwold	12/1/1779	2	3			1		3		9	3	2
Richmond	14/1/1779	2				1	1			4	1	2
Northallerton	13/4/1779	8	1			1	4	5		19	3	8
Guisborough	13/7/1779	2					1	1		4		2
Thirsk	15/7/1779	6	2			3	2	2		15	3	6
Northallerton	5/10/1779	7	1			1		2		11	3	7
New Malton	11/1/1780	2	1				3	1		7	2	2
Richmond	14/1/1780	1					1	1		3		1
Northallerton	4/4/1780	1	3			2	6	2		14	2	1
Stokesley	11/7/1780		1				3	1		5	1	
Thirsk	13/7/1780	1					3			4		1
Northallerton	3/10/1780	8	1			1	7	3		20	6	8
New Malton	9/1/1781	1					2	1		4		1
Richmond	11/1/1781	2				1	1			4		2
Northallerton	24/4/1781	7	2			1	2	4		16	2	7
Guisbrough	10/7/1781						1	5		6	1	
Thirsk	12/7/1781	4				1	1	1		7	1	4
		56	15			13	40	34		158	29	56

Table 23: Cases Before North Riding Sessions 1778-81¹²⁷⁸

* In the period 1770 to 1781 misdemeanours were not identified distinctly.

¹²⁷⁸ Sources: ---, *North Riding Quarter Sessions Minute and Order Books 1778-92 (1778-92)*

		Assaults	Thefts	Conspiracy	Coining	Public Order	Offences in Public Offices	Poaching	Keeping Disorderly Houses	Decency Offences	Offences against Administration of Justice	Economic Crimes	Nuisances, Highways and Bridges	Previous Felonies	Trials	Not Found	Committals
Knarebrough	6/10/1778	1											5		6	1	
Leeds	8/10/1778	15	4	1			1				1		9		31		
Sheffield	14/10/1778	3	2				1					1	1		8		
Wetherby	12/1/1779	2	4			3							3		12		
Wakefield	14/1/1779	8	5	1			1				1		8		24	2	
Doncaster	20/1/1779	4	7				1					1	1		14		
Pontefract	12/4/1779	12	10			1	1		2		1	1	19		47	4	
Skipton	13/7/1779	1									1		6		8		
Bradford	15/7/1779	7	1			1	1		1		1	1	8		21		
Knarebrough	5/10/1779												4		4		
Leeds	7/10/1779	12				5	1				1		7		26	1	
Sheffield	13/10/1779	3	1			1							2		7		
Wetherby	11/1/1780												10		10		
Wakefield	13/1/1780	9	1			4	1		1		1		10		27		
Doncaster	19/1/1780	4	3										3		10		
Pontefract	3/4/1780	8	2			4						5	23		42		
Skipton	11/7/1780					1							6		7		
Bradford	13/7/1780	18	3			1							7		29	1	
Rotherham	19/7/1780	2	3			2	1					3	8		19		
Knarebrough	3/10/1780	1	1			1							5		8		
Leeds	5/10/1780	8	2								1		18		29		
Sheffield	11/10/1780	5	2			2	1					3	7		20		
Wetherby	9/1/1781	5	3			1							2		11		
Wakefield	11/1/1781	16	6			3							17		42	2	
Doncaster	17/1/1781	7	2		1								5		15		
Pontefract	23/4/1781	11	7	1							2	2	24		47	2	
Skipton	10/7/1781	6				4							5		15	1	
Bradford	12/7/1781	14	5								1		24		44	1	
Rotherham	18/7/1781												1		1		
		182	74	3	1	34	10		4		11	17	248		584	15	

Table 24: Cases Before West Riding Quarter Sessions, 1778-1781¹²⁷⁹

¹²⁷⁹ ---, *West Riding Quarter Sessions Indictment Book, July 1776 to October 1780* (QS 4/39, 1776-80); ---, *West Riding Quarter Sessions Indictment Book, October 1780 to January 1784* (QS 4/40, 1780-4)

		Assaults	Thefts	Conspiracy	Coining	Public Order	Offences in Public Offices	Poaching	Keeping Disorderly Houses	Decency Offences	Offences against Administration of Justice Economic Crimes	Nuisances, Highways and Bridges Previous Felonies	Trials	Not Found	Committals
2/10/1798	Northallerton	12									1	12	25		4
15/1/1799	Easingwold	3	2										5	2	
17/1/1799	Richmond	6	1									1	8	1	3
19/1/1799	Northallerton														
2/4/1799	Northallerton	4	1				1				1	4	11	1	2
16/7/1799	Guisborough		1			2					3	3	9		5
8/10/1799	Northallerton	4	1			2					3	8	18	3	6
14/1/1800	Northallerton	5	4										9	5	8
16/1/1800	Northallerton														
17/1/1800	Richmond	3	4								1	1	9	2	
22/4/1800	Northallerton	6	9									19	34		
15/7/1800	Northallerton	6	8								2	13	29		11
7/10/1800	Northallerton	15	6			1					3	6	31		3
13/1/1801	Easingwold	3	5			1					1		10	3	2
15/1/1801	Richmond	7	5									3	15	2	2
14/4/1801	Northallerton	6	3									3	12	4	18
14/7/1801	Northallerton	7	9			2					2	4	24	2	17
		87	59			8	1				17	77	249	25	81

Table 25: Cases Before North Riding Quarter Sessions, 1798-1801

		Assaults	Thefts	Conspiracy	Coining	Public Order	Offences in Public Offices	Poaching	Keeping Disorderly Houses	Decency Offences	Offences against Administration of Justice	Economic Crimes	Nuisances, Highways and Bridges	Previous Felonies	Trials	Not Found	Committals
2/10/1798	Knarebrough	7									8		4		19		
4/10/1798	Leeds	6	1			2			4				1		14	1	
10/10/1798	Sheffield	9					2				1		1		13		
15/1/1799	Wetherby	13	4										6		23		
17/1/1799	Wakefield	4	3			3							2		12		
23/1/1799	Doncaster	12	34	2			3						10		61		
1/4/1799	Pontefract	1	1	2		3							2		9		
16/7/1799	Skipton	14	9			1	2				1		15		42	3	
18/7/1799	Bradford	8	12			5			1						26		
24/7/1799	Rotherham	3	1										1		5		
8/10/1799	Knarebrough	9				1					2		3		15		
10/10/1799	Leeds	18	9			5					2	13	9		56		
16/10/1799	Rotherham												10		10		
14/11/1799	Wakefield		4				1						1		6	3	
14/1/1800	Wetherby	9	17			9					1		14		50	2	
16/1/1800	Wakefield	2	14												16	1	
22/1/1800	Doncaster	26	56			8	3				2		44		139	3	
21/4/1800	Pontefract	3	8			1						2	2		16		
15/7/1800	Skipton	1	12			4						12	4		33	3	
17/7/1800	Bradford	6	15			2						5	2		30	1	
23/7/1800	Rotherham		4												4	1	
7/10/1800	Knarebrough	10	17												27	2	
9/10/1800	Leeds	5	9												14	1	
15/10/1800	Sheffield																
11/12/1800	Wakefield	6	20			1			1		1		3		32	1	
15/1/1801	Wetherby	2	3												5		
13/1/1801	Wakefield	4	9			1			1				1		16	4	
21/1/1801	Doncaster	2	40								2		10		54	4	
13/4/1801	Pontefract	1	1										1		3	1	
14/7/1801	Skipton	3	19						2		1		1		26	3	
16/7/1801	Bradford	13	25			5			2				1		46	1	
		197	347	4		51	11		11		21	32	148		822	35	

Table 26: Cases Before West Riding Quarter Sessions, 1798-1801

		Assaults	Thefts	Conspiracy	Coining	Public Order	Offences in Public Offices	Poaching	Keeping Disorderly Houses	Decency Offences	Offences against Administration of Justice	Economic Crimes	Nuisances, Highways and Bridges	Previous Felonies	Trials	Not Found	Committals
20/10/1818	Northallerton	8	3			6	1						11		29	2	11
12/1/1819	Northallerton	7	15			1							4		27	3	8
20/4/1819	Northallerton	7	12			2		7					6		34	4	21
13/7/1819	Northallerton	1	12		4	2							4		32	8	6
19/10/1819	Northallerton	9	5			3							2		19	2	16
11/1/1820	Northallerton	7	12			2							4		25	1	4
11/4/1820	Northallerton	5	18		1	2				1			6		33	6	17
11/7/1820	Northallerton	6	9			2							9		26	2	17
17/10/1820	Northallerton	4	12		2	2							4		24	2	11
9/1/1821	Northallerton	7	5										3		15	4	13
1/5/1821	Northallerton	6	11			4		2					7		3	5	15
10/7/1821	Northallerton	1	11		8	2							8		3	2	11
		77	125		15	28	1	9			1		68		324	41	15

Table 27: Cases Before North Riding Quarter Sessions, 1818-1821

		Assaults	Thefts	Conspiracy	Coining	Public Order	Offences in Public Offices	Poaching	Keeping Disorderly Houses	Decency Offences	Offences against Administration of Justice	Economic Crimes	Nuisances, Highways and Bridges	Previous Felonies	Trials	Not Found	Committals
19/10/1818	Knaresbrough	1			1	3							1		6	1	
21/10/1818	Leeds	36	7			6							13		62	3	
28/10/1818	Sheffield	7	39		2				1	4			1		63	2	
12/1/1819	Wetherby		4			1							2		7	1	
14/1/1819	Wakefield	27	24			2		7				11	14		85	2	
20/1/1819	Doncaster	7	47	1	2			9	1			9	1		77		
19/4/1819	Pontefract	28	46		8	4			1				21		18		
13/7/1819	Skipton	2	3			2									7	23	
15/7/1819	Bradford	41	11		2	3					1		9		67	7	
21/7/1819	Rotherham	18	31			2			1				4		56	11	
21/10/1819	Leeds	19	21			4					2	2	12		6		
27/10/1819	Sheffield	13	58		1	2							2		76	1	
11/1/1820	Wetherby	1	3					3				3	4		14		
13/1/1820	Wakefield	29	26			3		1			2	1	5		67	2	
19/1/1820	Doncaster	9	52		1								2		64	19	
10/4/1820	Pontefract	28	88		6	16		5			4	5	11		163	2	
11/7/1820	Skipton	9	12			1							3		25	9	
13/7/1820	Bradford	25	21			6					1		4		57	3	
2/8/1820	Rotherham	7	62							1			3		73	1	
17/10/1820	Knaresbrough	5	2			2							4		13	8	
19/10/1820	Leeds	26	21			3							9		59	5	
25/10/1820	Sheffield	9	34										5		48	2	
9/1/1821	Wetherby	7	14										4		25	1	
17/1/1821	Wakefield	1	4			3		6	2			6	7		74	15	
30/4/1821	Pontefract	32	66			7							16		121	2	
10/7/1821	Skipton	3	1										5		9	1	
12/7/1821	Bradford	21	15			4							13		53	1	
18/7/1821	Rotherham	7	4							1			3		51		
		427	788	1	23	74		31	6	6	1	37	187		1581	149	

Table 28: Cases Before West Riding Quarter Sessions, 1818-1821

		Assaults	Thefts	Conspiracy	Coining	Public Order	Offences in Public Offices	Poaching	Keeping Disorderly Houses	Decency Offences	Offences against Administration of Justice	Economic Crimes	Nuisances, Highways and Bridges	Previous Felonies	Trials	Not Found	Committals
15/10/1838	Northallerton	3	29			3							1		36	4	
31/12/1838	Northallerton	1	17										1		19	3	
8/4/1839	Northallerton		33										1	5	34	7	
1/7/1839	Northallerton		7												7	1	3
14/10/1839	Northallerton	8	28			1				1			1	2	39	2	
30/12/1839	Northallerton		20												20	5	1
6/4/1840	Northallerton	1	44			3							1		49	9	4
29/6/1840	Northallerton	1	32		2										35	1	2
19/10/1840	Northallerton	2	38		2					1			2		45	5	11
4/1/1841	Northallerton		37							2			1		40	6	2
5/4/1841	Northallerton	2	24		2	1				1			1		31	6	
29/6/1841	Northallerton	4	31										1	1	36	5	
		22	340		6	8				5			10	8	391	54	23

Table 29: Cases Before North Riding Quarter Sessions, 1838-1841

		Assaults	Thefts	Conspiracy	Coining	Public Order	Offences in Public	Poaching	Keeping Disorderly	Decency Offences	Offences against	Economic Crimes	Nuisances, Highways	Previous Felonies	Trials	Not Found	Committals
16/10/1838	Knarebrough		13			2								1	15	5	
17/10/1838	Leeds		64							1				9	65	3	
22/10/1838	Sheffield	20	82			3			2	1				7	108	2	
31/12/1838	Knarebrough		8												8	10	
2/1/1839	Wakefield		63										6	4	69	1	
7/1/1839	Doncaster	6	73			2			1	1				9	83	4	
25/3/1839	Sheffield	4	61			1				2				6	68	5	
8/4/1839	Pontefract	5	148							3			4	19	160		
2/7/1839	Skipton	1	5										2		8	1	
3/7/1839	Bradford	7	73		3	3				1			5	10	92	6	
8/7/1839	Rotherham	7	89			2				2			1	12	101	2	
15/10/1839	Wetherby		18										1	2	19	10	
16/10/1839	Wakefield	18	107		4	1			2	4			2	18	138	2	
21/10/1839	Doncaster	12	95			7				2			2	13	118		
31/12/1839	Sheffield		8											1	8	4	
1/1/1840	Pontefract		65		1					1			2	8	69	1	
6/1/1840	Skipton		116			1				1			1	9	119	4	
20/3/1840	Bradford		64											8	64	24	
6/4/1840	Rotherham	1	142		2	7				1	4		9	14	166	1	
30/6/1840	Knarebrough	4	5								3		2	2	14	7	
1/7/1840	Leeds	7	100		1	2				1			2	2	113	4	
6/7/1840	Sheffield	1	93							7	1		3	10	105		
20/10/1840	Knarebrough		15							1			3	2	19	9	
21/10/1840	Leeds	2	105		2					1			2	12	112	13	
26/10/1840	Sheffield	3	102						2	1	1		3	19	112		
5/1/1841	Knarebrough		7											2	7	1	
6/1/1841	Wakefield		117		3				4		5		4	9	133		
11/1/1841	Doncaster	4	104			2					1		3	11	114	4	
22/3/1841	Sheffield	2	81											6	83	6	
5/4/1841	Pontefract	3	149			1				5	3		4	15	165	1	
29/6/1841	Skipton	1	14							4			1	1	20	6	
30/6/1841	Bradford	2	87	2	1	2			2	2	4		1	9	103		
5/7/1841	Rotherham		78										5	12	83		
		110	2351	2	17	36			13	42	18	4	68	262	2661	136	

Table 30: Cases Before West Riding Quarter Sessions, 1838-1841

		Assaults	Thefts	Conspiracy	Coining	Public Order	Offences in Public Offices	Poaching	Keeping Disorderly Houses	Decency Offences	Offences against Administration of Justice Economic Crimes	Nuisances, Highways and Bridges	Previous Felonies	Trials	Not Found	Committals
19/10/1858	Northallerton	5	23		2					2			3	32		
14/1/1859	Northallerton		18		7								7	18	19	
5/4/1859	Northallerton		15											15		
28/6/1859	Northallerton	2	13											15		
18/10/1859	Northallerton	1	8											9		
3/1/1860	Northallerton	5	9									2	2	16		
3/4/1860	Northallerton	1	20		2	2							4	23	1	
3/7/1860	Northallerton		11											11		
11/10/1860	Northallerton	6	15							2			2	23		
1/1/1861	Northallerton		15		2				1				3	16		
9/4/1861	Northallerton	4	13		1					1			2	18		
2/7/1861	Northallerton	10	8							1			1	19		
		34	164		12	2			1	6		2	23	215	20	

Table 31: Cases Before North Riding Quarter Sessions, 1858-61

		Assaults	Thefts	Conspiracy	Coining	Public Order	Offences in Public Office	Poaching	Keeping Disorderly Houses	Decency Offences	Offences against Administration of Justice Economic Crimes	Nuisances, Highways and Bridges	Previous Felonies	Trials	Not Found
18/10/1858	Knaresborough	1	1											2	
19/10/1858	Leeds		37										8	37	5
22/10/1858	Doncaster	2	54		1								10	57	2
03/12/1858	Sheffield int.	31	31			15							9	77	
06/12/1858	Bradford int.	4	38										13	42	1
04/01/1859	Wakefield		26										5	26	2
07/01/1859	Sheffield		23										2	23	2
01/03/1859	Sheffield int.	1	27										1	28	2
03/03/1859	Wakefield	2	59										10	61	1
04/04/1859	Pontefract		52										6	52	1
20/05/1859	Sheffield int.		46							2			10	48	
23/05/1859	Bradford int.	3	46										9	49	1
01/07/1859	Rotherham	6	31										5	37	
16/08/1859	Sheffield int.	2	33							2			3	37	
18/08/1859	Wakefield int.	5	56					1				2	6	64	1
18/10/1859	Leeds	12	58			3							16	73	3
21/10/1859	Doncaster		14										7	14	1
29/11/1859	Sheffield int.		46										6	46	
01/12/1859	Bradford	4	45										16	49	1
03/01/1860	Wakefield		35										7	35	3
06/01/1860	Sheffield		44										4	44	4
02/03/1860	Wakefield Int.		52										2	52	4
02/04/1860	Pontefract	2	49										8	51	1
15/05/1860	Sheffield int.		56										7	56	1
17/05/1860	Bradford int.		55							2			12	57	
02/07/1860	Skipton	2	31										6	33	1
03/07/1860	Bradford	1	6										1	7	
06/07/1860	Rotherham	4	56							2			5	62	
15/10/1860	Leeds	5	57					1				2	6	65	1
19/10/1860	Doncaster	14	64			3							18	81	3
04/12/1860	Sheffield Int.		26										12	26	2
06/12/1860	Bradford Int.		58										8	58	
01/01/1861	Wakefield	6	60										21	66	1
04/01/1861	Sheffield		20										4	20	2
01/03/1861	Sheffield int.		29										3	29	3
04/03/1861	Wakefield int.		57										2	57	4
08/04/1861	Pontefract	2	41										7	43	1
20/05/1861	Bradford int.		81										10	81	1
22/05/1861	Sheffield Int.		32							2			7	34	
01/07/1861	Skipton	2	42										8	44	1
02/07/1861	Bradford		1											1	
05/07/1861	Rotherham	4	63					2	10			4	6	83	
		115	1738		1	21		4	20			8	306	1907	56

Table 32; Cases Before West Riding Quarter Sessions, 1858-1861

Appendix 5: Changes in Numbers of Cases by Type in North Riding and West Riding Quarter Sessions, 1778-1861

1778-1801

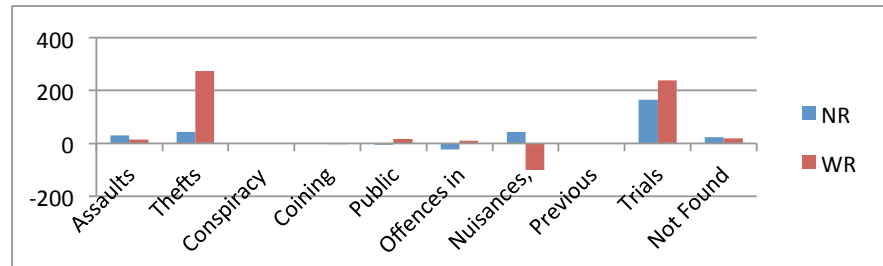


Figure 5: Changes in numbers of cases between the periods 1778-1781 and 1898-1801

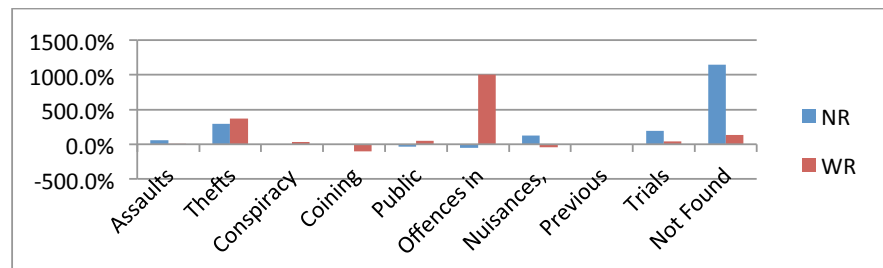


Figure 6: Changes in numbers of cases as a percentage between the periods 1778-1781 and 1798-1801

1798-1818

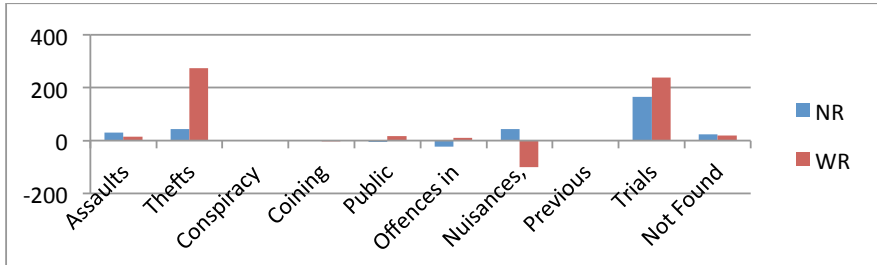


Figure 7: Changes in numbers of cases between the periods 1798-1801 and 1818-21

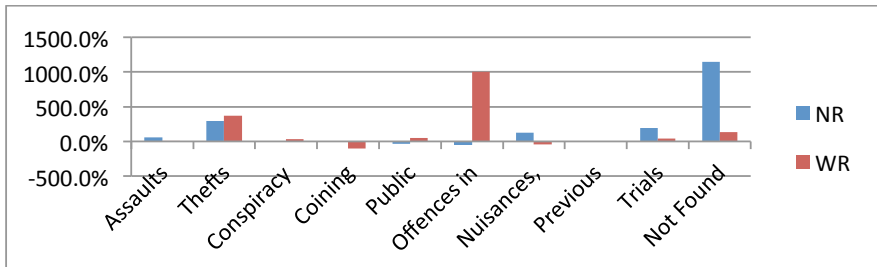


Figure 8: Changes in numbers of cases as a percentage between the periods 1798-1801 and 1818-21

1818-1841

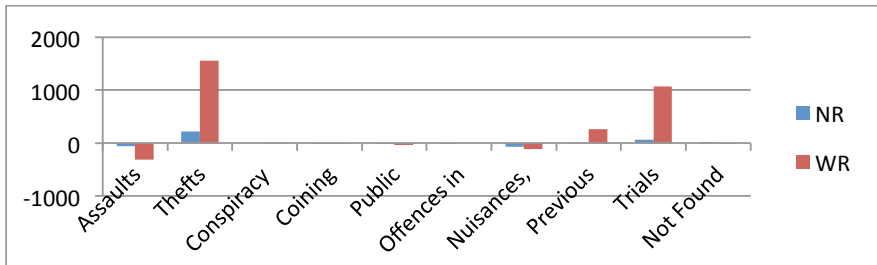


Figure 9: Changes in numbers of cases between the periods 1818-21 and 1838-41

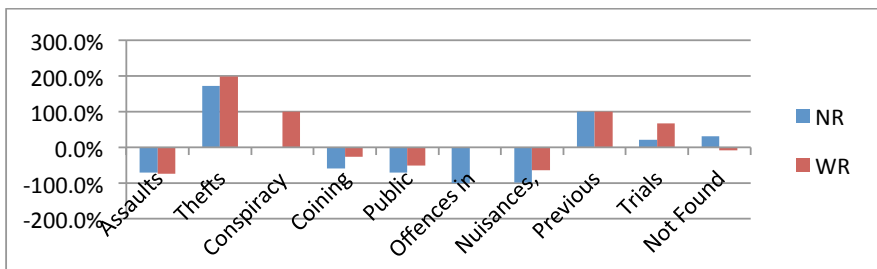


Figure 10: Changes in numbers of cases as a percentage between the periods 1818-21 and 1838-41

1838-1861

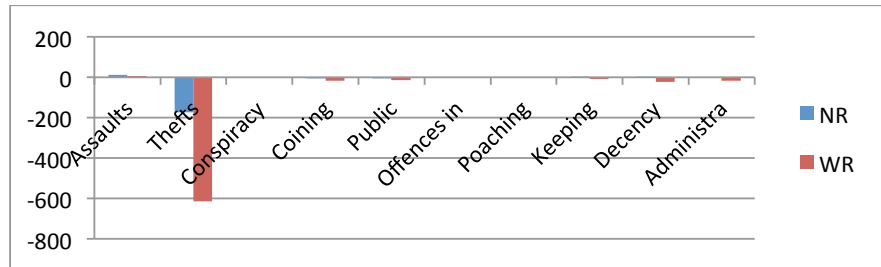


Figure 11: Changes in numbers of cases between the periods 1838-41 and 1858-61

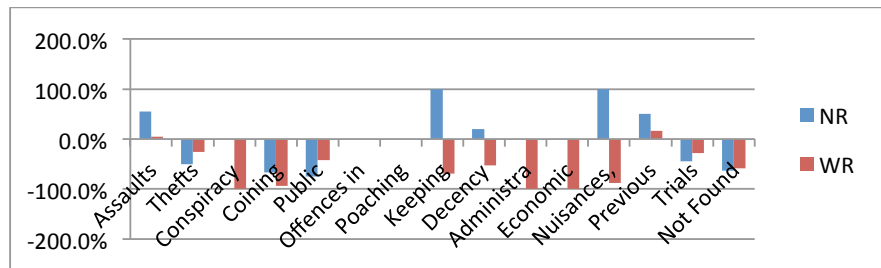


Figure 12: Changes in numbers of cases as a percentage between the periods 1838-41 and 1858-61

Appendix 6:

Orders appearing in more than half of Standing Orders

All (21 documents)	Up to 1819 (7 documents)	1820 to 1859 (6 documents)	1860 to 1881 (8 documents)
<i>Appeals (21)</i>	<i>Appeals (7)</i>	<i>Appeals (6)</i>	<i>Appeals (8)</i>
<i>Sessions business (20)</i>	<i>Sessions business (6)</i>	<i>Sessions business (6)</i>	<i>Sessions business (8)</i>
<i>Bridges (17)</i>	<i>Roads/Highways (6)</i>	<i>Roads/Highways (6)</i>	<i>Bridges (7)</i>
<i>Roads/Highways (16)</i>	<i>Traverses (6)</i>	<i>Recognizances (6)</i>	<i>Committees (7)</i>
Coroners (14)	Bridges (5)	<i>Bridges (5)</i>	<i>Accounts & Finance (6)</i>
Accounts & Finance (13)	Vagrants & Paupers (5)	<i>Coroners (5)</i>	<i>Asylums (6)</i>
Traverses (12)	Bailiffs (5)	<i>Vagrants & Paupers (5)</i>	Coroners (5)
Vagrants & Paupers (12)	Constables (5)	Accounts & Finance (4)	Trial costs & Allowances (5)
Recognizances (12)	Recognizances (5)	Traverses (4)	Weights and Measures (5)
Trial costs & Allowances (12)	Coroners (4)	Trial costs & Allowances (4)	Chairman (5)
Attorneys (11)	Felons/ies (4)	Attorneys (4)	Counsel (5)
Weights and Measures (11)		Weights and Measures (4)	Notice (5)
		Jurors (4)	Rates (4)
		Soldier's Baggage & militia (4)	Constabulary & police (4)
		Indictments (4)	Roads/Highways (4)
		Prosecutors (4)	Attorneys (4)
			Adjournments (4)
			Gaols & prisons (4)
			Officers (4)
			Clerk of the Peace (4)
Key			
Entries in bold italics with dark shading appear in all orders in the period in question.			
<i>Entries in italics with light shading appear in more than ¼ of the orders in the period in question.</i>			
Entries in normal font without shading appear in more than ½ of the orders in the period in question.			

Table 33: Headings appearing more than half of the sets of orders by period

Appendix 7: Property Crimes as Alternative Counts, 1838-41 and 1858-1861

	NR 1838				WR 1838				NR 1858				WR 1858			
	1 st	2 nd	3 rd	4 th	1 st	2 nd	3 rd	4 th	1 st	2 nd	3 rd	4 th	1 st	2 nd	3 rd	4 th
Attempt (Theft)	1															
Breaking & Entering	13	2			72	4			3				63			
Burglary	1				18											
Burglary (intent to steal)					1											
Embezzlement	3	1	1		13	8	5	1	2	1			11	9	9	
Obtaining by False Pretences	5	2	1		29	24	9	4	13	6	1		54	11		
Previous Felony	2	3	1			223	31	1	34	3				125	28	3
Receiving	12				9	12	1	1	2	15	3	1	2	467	45	
Robbery	1				16											
Theft	252	34	5	2	394	393	11	7	64	3	2		691	238		
Theft (cloth whilst on tenters)																
Theft (coal)					1	2	1	1								
Theft (dwelling)									1	1						
Theft (dwellinghouse)					2				5							
Theft (from ship)	1															
Theft (Person)	8	1			19	3			12				94			
Theft from employer	3				128	3	2	1	2	1	1	1	54			
Theft from vessel					3											
Theft of metal from building					16	2	3						11			
Theft of metal from land					2	1							4			

Appendix 8:

Adjournments of Cases by Type

North Riding

West Riding

1778 to 1781

	1	2	3	4	5+	1	2	3	4	5+
Thefts	94.7%	5.3%	0.0%	0.0%	0.0%	85.9%	14.1%	0.0%	0.0%	0.0%
Assaults	68.9%	27.9%	3.3%	0.0%	0.0%	70.6%	23.4%	6.1%	0.0%	0.0%
Highways	44.2%	39.5%	16.3%	0.0%	0.0%	38.1%	29.6%	18.3%	8.9%	5.1%
Other	46.2%	38.5%	15.4%	0.0%	0.0%	54.0%	34.0%	12.0%	0.0%	0.0%

1798 to 1801

	1	2	3	4	5+	1	2	3	4	5+
Thefts	98.3%	1.7%	0.0%	0.0%	0.0%	98.7%	1.3%	0.0%	0.0%	0.0%
Assaults	47.7%	36.4%	13.1%	2.8%	0.0%	66.2%	29.4%	3.0%	1.4%	0.0%
Highways	36.0%	38.7%	24.0%	1.3%	0.0%	22.2%	33.7%	24.6%	13.6%	5.9%
Other	76.3%	23.7%	0.0%	0.0%	0.0%	69.8%	24.9%	3.1%	1.3%	0.9%

1818 to 1821

	1	2	3	4	5+	1	2	3	4	5+
Theft	98.5%	1.5%	0.0%	0.0%	0.0%	95.4%	3.9%	0.2%	0.2%	0.2%
Assault	59.0%	21.4%	10.3%	6.0%	3.4%	69.4%	27.8%	2.8%	0.0%	0.0%
Highways	31.0%	35.2%	26.1%	5.6%	2.1%	8.6%	36.0%	24.6%	17.7%	13.1%
Other	72.3%	16.9%	4.6%	4.6%	1.5%	71.8%	25.7%	2.4%	0.0%	0.0%

1838 to 1841

	1	2	3	4	5+	1	2	3	4	5+
Theft	100.0%	0.0%	0.0%	0.0%	0.0%	95.2%	4.8%	0.0%	0.0%	0.0%
Assault	100.0%	0.0%	0.0%	0.0%	0.0%	98.5%	1.5%	0.0%	0.0%	0.0%
Highways	90.0%	10.0%	0.0%	0.0%	0.0%	12.1%	44.9%	24.3%	11.2%	7.5%
Other	100.0%	0.0%	0.0%	0.0%	0.0%	86.1%	12.7%	1.3%	0.0%	0.0%

1858 to 1861

	1	2	3	4	5+	1	2	3	4	5+
Theft	90.1%	9.9%	0.0%	0.0%	0.0%	100.0%	0.0%	0.0%	0.0%	0.0%
Assault	90.5%	9.5%	0.0%	0.0%	0.0%	100.0%	0.0%	0.0%	0.0%	0.0%
Highway	100.0%	0.0%	0.0%	0.0%	0.0%	80.0%	20.0%	0.0%	0.0%	0.0%
Other	98.3%	1.7%	0.0%	0.0%	0.0%	100.0%	0.0%	0.0%	0.0%	0.0%

List of References

- Allen CJW, *The Law of Evidence in Victorian England* (Cambridge University Press 1997)
- Archbold JF, *The New System of Criminal Procedure, Pleading and Evidence* (Butterworths 1852)
- Archbold JF and Chitty T, *The Practice of the Court of King's Bench in Personal Actions, and Ejectment* (J. Butterworth & Son 1819)
- Arthurs HW, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press 1985)
- Ashworth A and Redmayne M, *The Criminal Process* (4th ed. / Andrew Ashworth and Mike Redmayne. edn, Oxford University Press 2010)
- Atiyah PS, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979)
- Bacon F, *Collected Works of Francis Bacon* (Spedding J, Ellis RL and Heath DD eds, Routledge/Thoemmes 1887-1879)
- Baines E, *History, Directory and Gazeteer of the County of York*, vol 2 (Leeds Mercury 1823)
- Baker JH, *An Introduction to English Legal History* (4th edn, Butterworths 2002)
- Barlow F, *A Complete English Dictionary: Or, General Repository of the English Language. Containing a Copious Explanation of All the Words in the English Language ... To Which Is Prefixed, a Complete English Grammar* (The Author 1772)
- Beattie JM, 'The Pattern of Crime in England 1660-1800' (1974) 62 *Past & Present* 47
- , *Crime and the Courts in England, 1660-1800* (Clarendon 1986)
- Bentham J, 'The Works of Jeremy Bentham, Published under the Superintendence of His Executor, John Bowring' (*William Tait, 1843*)
- Bentham J and Dumont E, *A Treatise on Judicial Evidence Extracted from the Manuscripts of Jeremy Bentham Esq by M. Dumont* (Baldwin, Cradock & Joy 1825)
- Bentley DJ, *English Criminal Justice in the Nineteenth Century* (Hambledon Press 1998)
- Bix B, *Law, Language, and Legal Determinacy* (Clarendon Press ; New York : Oxford University Press 1993)
- Blackstone W, *Commentaries on the Laws of England* (Clarendon Press, 1765)
- , *Commentaries on the Laws of England*, vol 2 (1st edn, printed at the Clarendon Press, 1766)
- , *Commentaries on the Laws of England*, vol 4 (1st edn, printed at the Clarendon Press, 1769)
- , *Commentaries on the Laws of England* (3rd edn, John Exshaw 1769)
- , *Commentaries on the Laws of England*, vol 4 (4th edn, 1770)
- , *Commentaries on the Laws of England, in the Order and Compiled from The Text of Blackstone and Embracing the New Statutes and Alterations to the Present Time*, vol 1 (Bayley JB ed, 1st edn, Saunders and Benning 1840)
- Blackstone W and Archbold JF, *Commentaries on the Laws of England* (15th edn, M&S Brooke 1811)
- Blackstone W and Archbold JF, *Commentaries on the Laws of England* (16th edn, Reed 1811)
- Blackstone W and Coleridge JT, *Commentaries on the Laws of England*, vol 4 (16th edn, A Strahan 1825)
- Blackstone W and Stewart J, *Commentaries on the Laws of England ... The Twentieth Edition, Incorporating the Alterations down to the Present Time* (20th edn, Edmund Spettigue 1841)
- Blackstone WS and Kerr RM, *Commentaries on the laws of England: A new edition, Adapted to the present state of the law, by R. M. Kerr.* (20th edn, John Murray 1857)
- Bourdieu P, *Outline of a Theory of Practice* (Cambridge University Press 1977)
- , 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *The Hastings Law Journal* 805
- Brenneis D, 'Language and Disputing' (1988) 17 *Annual Review of Anthropology* 221

Brewer J, 'The Wilkites and the Law' in Brewer J and Styles J (eds), *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* (Hutchinson 1980)

Brewer J and Styles J, *An Ungovernable People: the English and their Law in the Seventeenth and Eighteenth Centuries* (Hutchinson 1980)

Briggs A, *The Age of Improvement, 1783-1867* (Longman 1959)

Burke J and Burke JB, *A Genealogical and Heraldic Dictionary of the Landed Gentry of Great Britain & Ireland*, vol 1 (Henry Colburn 1847)

Burke P, *What is cultural history?* (Polity 2004)

Burn R, *The Justice of the Peace and Parish Officer*, vol 2 (12th edn, Strahan and Woodfall 1772)

---, *The Justice of the Peace and Parish Officer* (12th edn, Strahan and Woodfall 1772)

---, *The Justice of the Peace and Parish Officer*, vol 4 (12th edn, Strahan and Woodfall 1772)

---, *The Justice of the Peace and Parish Officer* (14th edn, 1780)

Burn R and Chetwynd G, *The Justice of the Peace and Parish Officer*, vol 4 (23rd edn, 1820)

Burn R, Chitty T and Bere M, *The Justice of the Peace and Parish Officer*, vol 3 (29th edn, 1845)

Burn R, Durnford C and King J, *The Justice of the Peace and Parish Officer*, vol 1 (21st edn, 1810)

Butterworth-Bayley T, *A Charge Delivered to the Grand Jury at the Quarter Sessions at the New Bayley Court-House In Salford, April the Twenty-Fifth, 1798* (2 edn, Wheeler and Son 1799)

Cairns DJA, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865* (Clarendon Press 1998)

---, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865* (Clarendon Press 1998)

Cane P, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law' [2005] 25 OJLS 393

Carlyle T, 'Signs of the Times' (1829) 49 *Edinburgh Review* 441

Chambliss W, 'A Sociological Analysis of the Law of Vagrancy' (1964) 12 *Social Problems* 67

Chitty J, *A Practical Treatise on the Criminal Law; Comprising the Practice, Pleadings, and Evidence Which Occur in the Course of Criminal Prosecutions* (AJ Valpy)

---, *A Practical Treatise on the Criminal Law; Comprising the Practice, Pleadings, and Evidence Which Occur in the Course of Criminal Prosecutions* (Printed by A. J. Valpy ... Sold by Messrs. Butterworth and Son ... ; Longman and Co. 1816)

Chitty J, *A Practical Treatise on the Criminal Law* (Riley's edition ... With additional notes of decisions in the courts of the United States ... by R. Peters. edn, Edward Earle 1819)

Conley JM and O'Barr WM, *Just words: law, language, and power* (University of Chicago Press 1998)

Cornish WR and Clark GdN, *Law and Society in England, 1750-1950* (Sweet & Maxwell 1989)

Costello K, 'The Writ of Certiorari and Review of Summary Criminal Convictions, 1660-1790' UCD Working Papers in Law, Criminology and Socio-Legal Studies accessed 21 November 2012

Cotterrell R, *The Sociology of Law* (2nd edn, Butterworth 1992)

Cottu C, *On the Administration of the Criminal Code in England, and the Spirit of the English Government ... Translated, etc* (1820.)

Dalton M, *The Countrey Justice, containing the Practice of the Justices of the Peace out of their Sessions ... Now the sixth time published, revised, in many things corrected, and much enlarged.* (6th edn, The Company of Stationers 1655)

Damaska MR, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1991)

Daunton M, *Progress and Poverty: An Economic and Social History of Britain 1700-1850* (OUP 1995)

De Bolla P, *The Architecture of Concepts: The Historical Formation of Human Rights* (Fordham University Press 2013)

Dennis IH, 'Rethinking Double Jeopardy: Justice and Finality in Criminal Process' [2000] *Crim LR* 933

---, 'Prosecution Appeals and Retrial for Serious Offences' [2004] Crim LR 619
 ---, *The Law of Evidence* (4th edn, Sweet & Maxwell 2010)
 ---, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' [2010] Crim LR 255
 Dicey AV, *Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century* (pp. xx. 503. Macmillan & Co.: London; Macmillan Co.: New York 1905)
 Dickinson W, *A practical Guide to the Quarter and other Sessions of the Peace, adapted to the use of young magistrates* (1st edn, London 1815)
 Dickinson W and Talfourd TN, *Dickinson's Guide to the Quarter Sessions, and Other Sessions of the Peace* (3rd edn, London 1829)
 Dickinson W, Talfourd TN and Tyrwhitt RP, *Dickinson's Guide to the Quarter and other Sessions of the Peace* (6th edn, Sweet, Stevens, Norton, Maxwell, Butterworth & Richards 1845)
 Dickinson W, Talfourd TN and Tyrwhitt RP, *Dickinson's Guide to the Quarter Sessions, and Other Sessions of the Peace* (4th edn, London 1845)
 Dodsworth F, 'Civic' police and the condition of liberty: the rationality of governance in eighteenth-century England' (2004) 29 *Social History* 199
 Duff A (ed) *The Trial on Trial*, vol 1 (Hart 2004)
 Duman D, 'Pathway to Professionalism: The English Bar in the Eighteenth and Nineteenth Centuries' (1980) 13 *Journal of Social History* 615
 Dworkin R, *Taking Rights Seriously* (Duckworth 1977)
 ---, *Law's Empire* (Fontana 1986)
 ---, *Justice in Robes* (Belknap Press 2006)
 Dwyer DM, *The Civil Procedure Rules Ten Years On* (Oxford University Press 2009)
 Eastwood D, *Governing Rural England: Tradition and Transformation in Local Government, 1780-1840* (Oxford University Press 1994)
 ---, *Government and Community in the English Provinces, 1700-1870* (Macmillan 1997)
 Emsley C, *Crime and Society in England, 1750-1900* (3rd edn, Longman/Pearson 2005)
 Ewing KD and Gearty CA, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Clarendon 1990)
 Finnis J, *Natural Law and Natural Rights* (Oxford Univ. Press 1980)
 Fish SE, *Doing what comes naturally: change, rhetoric and the practice of theory in literary and legal studies* (Clarendon 1989)
 Foley R, John, *Charges Delivered to the Grand Jury at the General Quarter Sessions of the Peace for the County of Gloucester* (D Walker 1804)
 Foss E, *A Biographical Dictionary of the Judges of England: from the conquest to the present time 1066 -1870* (Murray 1870)
 Foster M, *A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746 in the County of Surrey, and of Other Crown Cases. To Which Are Added Discourses Upon a Few Branches of the Crown Law.* (Sarah Cotter 1767)
 Foucault M and Sheridan A, *The Archaeology of Knowledge* (Sheridan A tr, Tavistock Publications 1972)
 Freeman MDA, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet & Maxwell 2001)
 Gatrell VAC, *The Hanging Tree: Execution and the English people, 1770-1868* (Oxford University Press 1994)
 Gatrell VAC and Hadden TB, 'Criminal Statistics and Their Interpretation' in Wrigley EA (ed), *Nineteenth-Century Society* (Cambridge University Press 1972)
 Genn HG, *Judging Civil Justice* (Cambridge University Press 2010)
 Glasse S, *The Magistrate's Assistant; or, a summary of those laws, which Immediately Respect the Conduct of a Justice of the Peace ... By a Country Magistrate* (2nd edn, Gloucester 1788)
 Glasser C, 'Civil Procedure and the Lawyers - the Adversary System and the Decline of the Orality Principle' (1993) 56 *MLR* 307

- Gramsci A, *Selections from the Prison Notebooks of Antonio Gramsci* (Hoare Q and Smith GN trs, International Pubs. 1971)
- Gray D, 'The People's Courts? Summary Justice and Social Relations in the City of London, c.1760-1800' (2008) 11 *Family & Community History* 7
- , 'Making Law in Mid-Eighteenth-Century England: Legal Statutes and their Application in the Justicing Notebook of Phillip Ward of Stoke Doyle' (2013) 34 *The Journal of Legal History* 211
- Green J, *Green's Dictionary of Slang* (Chambers 2010)
- Griffith JAG, *The Politics of the Judiciary* (5th edn, Fontana 1997)
- Hale M, Emlyn S and Wilson G, *Historia Placitorum Coronæ. The History of the Pleas of the Crown. ... Now first published from his Lordships original Manuscript ... by S. Emlyn..* (New edition ... with additional notes and references ... by G. Wilson. Published from the original manuscripts by S. Emlyn. edn, London 1778)
- Halévy E, *England in 1815*, vol 1 (2nd edn, Ernest Benn 1949)
- Harling P, 'The State' in Williams C (ed), *A Companion to the Nineteenth Century* (Blackwell 2007)
- Hart HLA, *The Concept of Law* (Clarendon Press 1961)
- , 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593
- , *The Concept of Law* (2nd edn, Clarendon 1994)
- Hawkins W and Leach T, *A treatise of the pleas of the Crown; or, A system of the principal matters relating to that subject, digested under proper heads ... To which an explanatory preface is prefixed, and new and copious indexes are subjoined. By Thomas Leach*, vol 2 (6th edn, London: the editor, sold by Thomas Whieldon 1777)
- Hay D, 'Property, Authority, and the Criminal Law' in Hay D and Elton GR (eds), *Albion's Fatal Hay Tree: Crime and Society in Eighteenth-Century England* (A. Lane 1975)
- , 'War, Dearth and Theft in the Eighteenth Century: The Record of the English Courts' (1982) 95 *Past & Present* 117
- , 'Dread of the Crown Office: the English Magistracy and King's Bench, 1740-1800' in Landau N (ed), *Law, Crime and English Society* (Cambridge University Press 2002)
- , *Criminal Cases on the Crown Side of King's Bench: Staffordshire, 1740-1800* (Tringham NJ ed, Staffordshire Record Society 2010)
- Hay D and Rogers N, *Eighteenth-century English society: shuttles and swords* (Oxford University Press 1997)**
- Heffernan WC, 'Social Justice/Criminal Justice' in Heffernan WC and Kleinig J (eds), *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* (Oxford University Press 2000)
- Henstock A, 'Dickinson, William (bap. 1756, d. 1822)' (*Oxford Dictionary of National Biography*, January 2008)
<<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/7608>> accessed 26 June 2013
- Hilton B, *Corn, Cash, Commerce* (1977)
- , 'The Gallows and Mr Peel' in TCW B and Cannadine D (eds), *History and Biography: Essays in Honour of Derek Beales* (Cambridge University Press 1996)
- , *A Mad, Bad and Dangerous People?: England 1783-1846* (Clarendon Press 2006)
- Hoffmann L, 'Changing Perspectives on Civil Litigation' (1993) 56 *MLR* 297
- Hoppen KT, *The Mid-Victorian Generation, 1846-1886* (Clarendon 1998)
- Jenks E, 'The Prerogative Writs in English Law' (1923) 32 *Yale Law Journal* 523
- Johnson S, *A Dictionary of the English Language, in Which the Words Are Deduced from Their Originals, and Illustrated in Their Different Significations by Examples from the Best Writers. To Which Are Prefixed a History of the Language, and an English Grammar* (London 1755)
- Jones GH, 'Copley, John Singleton, Baron Lyndhurst (1772-1863)' (*OUP*, 2008)
<<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/6272>> accessed 17 November 2013

- Jones GH and Jones V, 'Denman, Thomas, first Baron Denman (1779–1854)' (*OUP*, 2009)
 <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/7495>> accessed 21
 November 2013
- Jordanova L, *History in practice* (2nd edn, Hodder Arnold 2006)
- Kelsen H, *Essays in Legal and Moral Philosophy* (D. Reidel Publishing Co. 1973)
- King M, *The Framework of Criminal Justice* (Croom Helm 1981)
- , *Non-Adversarial Justice* (The Federation Press 2009)
- King A, 'Thinking with Bourdieu Against Bourdieu: A 'Practical' Critique of the Habitus'
 [Blackwell Publishers, Inc.] 18 *Sociological Theory* 417
- King P, *Crime, Justice, and Discretion in England, 1740-1820* (Oxford University Press 2000)
- , 'War as a Judicial Resource: Press Gangs and Prosecution Rates, 1740-1830' in Landau N
 and Beattie JM (eds), *Law, Crime and English Society, 1660-1830* (Cambridge University Press
 2002)
- , 'The Summary Courts and Social Relations in Eighteenth-Century England' (2004) 183
Past and Present 125
- , *Crime and Law in England, 1750-1840: Remaking Justice from the Margins* (Cambridge
 University Press 2006)
- Kitson Clark GSR, *The Making of Victorian England* (Methuen & Co. 1962)
- Knipe JR, 'The Justice of the Peace in Yorkshire, 1820-1914, A Social Study' (Ph.D thesis,
 University of Wisconsin 1970)
- Landau N, 'Burn, Richard (1709–1785)' (*Oxford Dictionary of National Biography*, 2004)
 <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/4043>> accessed 26 June
 2013
- Landau N, *The Justices of the Peace, 1679-1760* (University of California Press 1984)
- , 'Indictment for Fun and Profit: A Prosecutor's Reward at Eighteenth Century Quarter
 Sessions' (1999) 17 *Law and History Review* 507
- Langbein JH, *The Origins of Adversary Criminal Trial* (Oxford University Press 2003)
- , 'Albion's Fatal Flaws' (1983) 98 *Past and Present* 96
- Langford I, 'Fair Trial: The History of an Idea' (2009) 8 *Journal of Human Rights* 37
- Langford P, *A polite and commercial people : England 1727-1783* (Clarendon Press, 1998
 1989)
- , *Public Life and the Propertied Englishman, 1689-1798* (Clarendon 1991)
- Lemings D, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth
 Century* (Oxford University Press 2000)
- , 'Erskine, Thomas, first Baron Erskine (1750–1823)' (*OUP*, 2008)
 <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/8873>> accessed 17
 November 2013
- Lieberman D, 'Mapping the Criminal Law: Blackstone and the Categories of English
 Jurisprudence' in Landau N (ed), *Law, Crime and English Society, 1600-1830* (CUP 2002)
- Lines CJ, *Companion to the Industrial Revolution* (Facts on File 1990)
- Lobban M, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of
 Political Crime, C1770-1820' (1990) 10 *OJLS* 307
- , *The Common Law and English Jurisprudence 1760-1850* (Clarendon Press 1991)
- , 'Old Wine in New Bottles': The Concept and Practice of Law' in Burns A and Innes J
 (eds), *Rethinking the Age of Reform: Britain 1780-1850* (Cambridge University Press 2003)
- Lobban M, 'How Benthamic Was the Criminal Law Commission?' (2000) 18 *Law and History
 Review* 427
- , 'Brougham, Henry Peter, first Baron Brougham and Vaux (1778–1868)' (*OUP*, 2008)
 <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/3581>> accessed 12
 November 2013
- Locke J, *The Law and Practice of Foreign Attachment in the Lord Mayor's Court, under the New
 Rules of Practice* (S. Sweet 1853)

- Lucas P, 'A Collective Biography of Students and Barristers of Lincoln's Inn, 1680-1804: A Study in the "Aristocratic Resurgence" of the Eighteenth Century' (1974) 46 *The Journal of Modern History* 227
- Luhmann N, *Law as a Social System* (Ziegert KA tr, Oxford University Press 2004)
- MacCormick N, *Rhetoric and the Rule of Law : A Theory of Legal Reasoning* (Oxford University Press 2005)
- Macdonald S, 'Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes' (2008) 11 *New Criminal Law Review* 257
- McEwan J, 'The Adversarial and Inquisitorial Modes of Criminal Trial' in Duff A (ed), *The Trial on Trial*, vol 1 (Hart 2004)
- MacGowen R, 'The Image of Criminal Justice and Reform of the Criminal Law in Early Nineteenth-Century England' (1983) 32 *Buffalo Law Review* 89
- Malcolmson RW, 'A Set of Ungovernable People': the Kingswood Colliers in the Eighteenth Century' in Brewer J and Styles J (eds), *An Ungovernable People: the English and their Law in the Seventeenth and Eighteenth centuries* (London 1980)
- Mandler P, 'The Problem with Cultural History' (2004) 1 *Cultural and Social History* 1
- Mann M, *The Sources of Social Power, Vol I, A History of Power from the Beginning to AD 1760* (Cambridge University Press 1986)
- May AN, *The Bar and the Old Bailey, 1750-1850* (University of North Carolina Press 2003)
- Melikan R, 'Romilly, Sir Samuel (1757-1818)' (OUP, 2008)
<<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/24050>> accessed 18 November 2013
- Miles M, "'Eminent Practitioners": The New Visage of Country Attorneys c.1750-1800' in Rubin GR and Sugarman D (eds), *Law, Economy and Society, 1750-1914 : Essays in the History of English Law* (Professional Books 1984)
- Mitford J, *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill* (2nd edn, London 1787)
- Morgan G and Rushton P, *The Justicing Notebook (1750-64) of Edmund Tew, rector of Boldon* (Surtees Publication 2000)
- , 'The Magistrate, the Community and the Maintenance of an Orderly Society in Eighteenth-century England' (2003) 76 *Historical Research* 54
- Mulcahy L, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge 2011)
- Nobles R and Schiff D, 'Theorising the Criminal Trial and Criminal Appeal: Finality, Truth and Rights' in Duff A (ed), *The Trial on Trial*, vol 2 (Hart 2004)
- , *A Sociology of Jurisprudence* (Hart 2006)
- North Riding Constabulary, *The First Hundred Years of the North Riding Constabulary* (North Riding Constabulary 1957)
- Ogilvie J and Cull R, *The Smaller English Dictionary: Explanatory Pronouncing and Etymological* (Blackie and son 1872)
- Oldham J, 'Law Reporting in the London Newspapers, 1756-1786' (1987) 31 *American Journal of Legal History* 177
- O'Gorman F, *The Long Eighteenth Century: British Political and Social History, 1688-1832* (Arnold 1997)
- Packer HL, *The Limits of the Criminal Sanction* (Stanford University Press ; London : Oxford University Press 1969)
- Paley R (ed) *Justice in Eighteenth Century Hackney: the Justicing Notebook of Henry Norris and the Hackney Petty Sessions Book* (London Record Society 1991)
- Radzinowicz L, *History of English Criminal Law and its Administration from 1750*, vol 1 (Stevens and Sons Limited 1948)
- Parry JP, *The Rise and Fall of Liberal Government in Victorian Britain* (Yale University Press 1993)
- Partridge S, *An Address to the Grand Jury of the Hundreds of Kirton and Skirbeck in the Parts of Holland in the County of Lincoln at the General Quarter Sessions of the Peace held at Boston,*

- April 17, 1798 Concerning the Late Act of Parliament, for the Security of the Realm* (London 1798)
- Pattenden R, *English Criminal Appeals, 1844-1994* (Clarendon Press 1996)
- Philips D and Storch RD, *Policing Provincial England, 1829-1856: The Politics of Reform* (Leicester University Press 1999)
- Pocock JGA, *Virtue, commerce, and history : essays on political thought and history, chiefly in the eighteenth century* (Cambridge University Press 1985)
- Polden P, 'The County Courts' in Cornish W and others (eds), *The Oxford History of the Laws of England: Volume Xi: 1820-1914 English Legal System*, vol 13 (Oxford University Press)
- Postpisil LJ, *Anthropology of Law. A Comparative Theory* (Harper & Row 1971)
- Postema GJ, 'Philosophy of the Common Law' in Coleman JL and Shapiro S (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of the Law* (OUP 2002)
- Prest WR, 'The Experience of Litigation in Eighteenth-Century England' in Lemmings D (ed), *Law and Government in England in the Long Eighteenth Century: From Consent to Command* (Palgrave Macmillan 2011)
- Rawls J, *A Theory of Justice* (Cambridge 1971)
- Raz J, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009)
- Reiner R, *The Politics of the Police* (4th edn, Oxford University Press 2010)
- Rigg J, 'Pollock, Sir (Jonathan) Frederick, first baronet (1783-1870)' (*OUP*, 2004)
<<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/22479>> accessed 28 November 2013
- Roberts D, *Paternalism in Early Victorian England* (Croom Helm 1979)
- Roberts P, 'Double Jeopardy Law Reform: A Criminal Justice Commentary' (2002) 65 MLR 393
- Roberts P and Zuckerman AAS, *Criminal Evidence* (2nd edn, Oxford University Press 2010)
- Sen A, *The Idea of Justice* (Penguin 2010)
- Sewell WH, *Logics of History: Social Theory and Social Transformation* (University of Chicago Press 2005)
- Shapiro BJ, *Probability and certainty in seventeenth-century England: a study of the relationships between natural science, religion, history, law, and literature* (Princeton University Press 1983)
- Sheldon R, 'Zouch, Henry (1725?-1795)' (*OUP*, 2004)
<<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/30298>> accessed 11 December 2013
- Shoemaker R, 'The Old Bailey Proceedings and the Representation of Crime and Criminal Justice in Eighteenth-Century London' (2008) 47 *Journal of British Studies* 559
- Simpson AWB, 'The Rise and Fall of the Legal Treatise' in Simpson AWB (ed), *Legal Theory and Legal History : Essays on the Common Law* (Hambledon 1987)
- Smith EA, 'Scott, John, first earl of Eldon (1751-1838)' (*OUP*, 2008)
<<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/24897>> accessed 17 November 2013
- Smith BP, 'The Presumption of Guilt and the English Law of Theft, 1750-1850' Interdisciplinary Law and Humanities Junior Scholar Workshop Paper
<<http://ssrn.com/abstract=582022> or <http://dx.doi.org/10.2139/ssrn.582022>> accessed 12/12/2013
- Smith MS, 'Parliamentary Reform and the Electorate' in Williams C (ed), *A Companion to Nineteenth-Century Britain* (Blackwell 2004)
- Sorabji J, *English Civil Justice after the Woolf and Jackson Reforms : A Critical Analysis* (Cambridge University Press 2014)
- Starkie T, *A Practical Treatise of the Law of Evidence* (London 1824)
- Stephen HJ, *New Commentaries on the Laws of England. (Partly founded on Blackstone)*, vol 4 (Butterworths 1845)

---, *New Commentaries on the Laws of England. (Partly founded on Blackstone.)* (5th edn, Butterworths 1863)

Stephen JF, *A general view of the criminal law of England* (Macmillan and Co. 1863)

Stephen L, 'Stephen, Henry John (1787–1864)' (*Oxford Dictionary of National Biography*, 2004) <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/26372>> accessed 26 June 2013

Stern G, *Meaning and Change of Meaning* (Ind UP 1964)

Stubbs W and Talmash G, *The Crown Circuit Companion* (4th edn, London 1768)

Stubbs W and Talmash G, *The Crown Circuit Companion*, vol 1 (5th edn, E Brooke 1783)

Sullivan R, *A Dictionary of the English Language* (A Thomas & Sons 1854)

Talfourd TN, *Dickenson's Guide to the Quarter Sessions, and Other Sessions of the Peace, Adapted to the Use of Young Magistrates and Professional Gentlemen, at their Commencement of Practice* (5th edn, Sweet, Stevens, Norton, Maxwell, Butterworth & Richards & Co 1841)

Talfourd TN and Tyrwhitt RP, *Dickinson's Guide to the Quarter and Other Sessions of the Peace* (6th edn, 1845)

Taylor D, *The New Police in Nineteenth-Century England: Crime, Conflict and Control* (Manchester University Press 1997)

Taylor M, *The decline of British radicalism, 1847-1860* (Clarendon 1995)

Terdiman R, 'The Force of Law: Toward a Sociology of the Juridical Field by Pierre Bourdieu: Translator's Introduction' (1987) 38 *The Hastings Law Journal* 805

Thompson EP, *Whigs and Hunters: The Origin of the Black Act* (1st edn, Penguin 1977)

---, *The Poverty of Theory, & other essays* (Merlin Press 1978)

---, *The Making of the English Working Class* (Penguin 1980)

---, *Customs in Common* (Merlin 1991)

---, *Making History* (The New Press 1995)

Thompson FML, 'Lennox, Charles Gordon-, fifth duke of Richmond and fifth duke of Lennox (1791–1860)' (*Oxford Dictionary of National Biography*, Jan 2008) <<http://www.oxforddnb.com.ezproxy.york.ac.uk/view/article/16453>> accessed 1 July 2013

Twining W, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld & Nicolson 1985)

---, *Rethinking Evidence: Exploratory Essays* (2nd edn, Cambridge University Press 2006)

Vallance E, *A Radical History of Britain* (Abacus 2010)

Van Vechten V, 'The English Reports, 1292-1865' (1901) 15 *Harvard Law Review* 1

Walter J, 'Grain Riots and Popular Attitudes to the Law: Maldon and the Crisis of 1629' in Brewer J and Styles J (eds), *An Ungovernable People: the English and their Law in the Seventeenth and Eighteenth Centuries* (London 1980)

Weeks J, 'Foucault for Historians' (1982) 14 *History Workshop Journal* 106

Wharton and JJS, *Law Lexicon, or Dictionary of Jurisprudence: Explaining All the Technical Words and Phrases Employed in the Several Departments of English Law* (Spettigue and Farrance 1848)

White JB, *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (University of Wisconsin Press 1985)

White W, *History, Gazeteer and Directory of the West Riding of Yorkshire*, vol 1 (Robert Leader 1837)

Williams C, 'Expediency, Authority and Duplicity: Reforming Sheffield's Police, 1832-40' in Morris RJ and Trainor RH (eds), *Urban Governance, Britain and Beyond Since 1750* (Ashgate 2000)

---, 'Police and Crime in Sheffield, 1818-74' (Ph.D thesis, University of Sheffield 2000)

Williams R, *Keywords* (Fontana Press 1983)

Wittgenstein L, *Philosophical Investigations* (Anscombe GEM tr, 2nd ed. edn, Blackwell 1958)

Woodfall W and Harrison SB, *Woodfall's Practical Treatise on the Law of Landlord and Tenant* (3rd edn, London 1837)

Zander M, *The Law Making Process* (6th edn, Cambridge University Press 2004)

Zuckerman AAS (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press 1999)