Summary jurisdiction and the decline of the criminal jury in Victorian England

Summary Jurisdiction and the Decline of Criminal Jury Trial in Victorian England

Abstract

Trial by jury was the standard dispositive mechanism for felony trials in England at the start of the nineteenth century. By the end of the century, the summary courts were dealing with a large number of formerly felony cases. This change came about as a result of the inefficiencies of the jury process, which resulted in a push to expand the jurisdiction of the summary courts. Three statutes – the Juvenile Offenders Act 1847, the Larceny Act 1850, and the Criminal Justice Act 1855 – enacted in the middle of the century transferred jurisdiction to deal with the great majority of larcenies from the courts of quarter sessions to the petty sessional courts. To enact these statutes, reformers had to overcome considerable opposition. The consequence of the new legislation was to initiate a decline in the use of the criminal jury that continues to this day.

I. Introduction

At the turn of the nineteenth century, two modes of criminal trial existed in English law: trial on indictment before a jury at assizes or quarter sessions, or summary trial before justices of the peace at petty sessions.[1] Trial on indictment was used for the trial of all treasons, felonies and the more serious misdemeanours, while summary trial was used for the trial of minor matters and nuisances. Blackstone wrote in 1769 that trial by jury was the 'grand bulwark of [an Englishman's] liberties', such liberties being protected 'so long as this palladium remains sacred and inviolate'.[2] He warned specifically against 'new and arbitrary methods of trial, by justices of the peace'.[3] Nevertheless, as is well known, between 1847 and 1855, parliament enacted three statutes that extended the summary jurisdiction of justices of the peace. The effect of these statutes was to transfer a large volume of indictable crime to the jurisdiction of the petty sessions. Doing so set off a gradual decline in the use of jury trial. The legislation faced considerable opposition from those who defended the institution of trial by jury. The purpose of this article is to explain the motivation of the reformers, how they overcame the defenders of jury trial, and the immediate impact of the legislation.

II. The Problem with Trials on Indictment

Under legislation going back to the sixteenth century,[4] a prosecutor (usually the victim)[5] who apprehended a suspect had to bring him and any witnesses before a justice of the peace, who examined all the witnesses and reduced their statements to writing.[6] The justice also would

[1] See generally David Bentley, *English Criminal Justice in the Nineteenth Century*, London, 1998.
[2] 4 Bl. Comm. 343.
[3] Ibid, 343-344.
[4] Marian Committal Statute of 1555 (2 & 3 Phil. & Mar., c. 10).
[5] See Charles Cottu, *On the Administration of Criminal Justice in England*, London, 1822, 37.
[6] For an overview of the 1555 legislation, see John H. Langbein, 'The Origins of Public Prosecution at Common Law' 17 *American Journal of Legal History* (1973) 313, 317-324; *Prosecuting Crime in the Renaissance:*

commit the suspect for trial (and usually remand him to gaol), and bind over both the prosecutor and the witnesses to press the prosecution at the next sitting of the quarter sessions or the assizes, depending on the nature of the charge.[7] The prosecutor would have to arrange for a bill of indictment to be drafted, usually by a court clerk who would charge the prosecutor a fee for his efforts. Shortly before trial, a twenty-three member grand jury would consider the indictment, operating as a 'filtering mechanism to dispose of groundless or insubstantial prosecutions, sparing the defendant the peril and indignity of a public trial in a transparently weak case'.[8] Grand juries rejected a considerable proportion of the bills presented to them; between 1805 and 1817, for example, assize grand juries around England and Wales rejected nearly seventeen percent of all bills.[9] Only if the grand jury found the indictment a 'true bill' was the defendant sent forward for jury trial before justices or an assize judge.

Larceny was by far the most common indictable offence in the first half of the nineteenth-century. Between 1805 and 1808, for example, more than three-quarters of those committed for trial had been charged with larceny.[10] So, in 1808, 3,746 out of 4,717 committals concerned larceny.[11] Similarly, a return for 1838 shows that of 23,094 persons committed for trial, a total of 15,915 or 69 percent had been charged with some form of larceny, with simple larceny being the most prevalent (13,270 or 57 percent of the total number charged).[12] Most of the dissatisfaction with trials on indictment arose in the context of larceny trials, and the considerable increase in the number of committals for larceny, as shown by the figures above, magnified this dissatisfaction.

1. Pre-Trial Detention

Nineteenth-century criminal trial procedure favoured detention over bail. Legislation enacted in 1826 prohibited bail if the charge was supported by 'positive and credible evidence … or by such evidence as, if not explained or contradicted, shall … raise a strong presumption of … guilt'.[13] Even after justices received discretion as to bail in 1848,[14] it remained unusual for defendants to receive bail.[15] As a consequence, throughout the nineteenth century most persons accused of an indictable offence would be held in prison to await trial. Such trials would be heard either at quarter sessions, which sat four times per year, or at assizes, which sat twice per year. Depending on how soon after his committal for trial the relevant court sat next, a suspect could be detained for weeks or even months. The detention period for suspects in Wakefield

England, Germany and France, Cambridge, MA., 1974, 15-45; *The Origins of Adversary Criminal Trial*, Oxford, 2003, 40-47.

[7] The court of quarter sessions, presided over by justices of the peace, had general jurisdiction, excluding treason, until the Quarter Sessions Act 1842 removed capital offences and those punishable by transportation from the justices' jurisdiction. These cases were the preserve of the assizes, presided over by the royal judges, which travelled on circuit hearing the most serious cases. See J. S. Cockburn, *A History of the Assizes, 1558-1714*, Cambridge, 1972.

[8] Langbein, *Origins*, 45.

[9] House of Commons, *Statement of the Number of Persons Committed to the Different Gaols in England and Wales, 1805-17* (189, 1818) (84,916 bills presented, 14,215 rejected ('No Bill found, and, Not Prosecuted')).

[10] House of Commons, *A Return of the Number of Persons, Male and Female, Committed to the Several Gaols in England and Wales, for Trial at the different Great Sessions, Assizes and Quarter Sessions, 1805-1808* (549, 1810).

[11] Ibid.

[12] Home Office, *Tables showing the Number of Criminal Offenders in the Year 1838* (241, 1839), 110.

[13] Criminal Justice Administration Act 1826, s. 1.

[14] Indictable Offences Act 1848.

[15] 'Criminal Business at Assizes', 107 *Law Times*, 1 July 1899, 212 (reproducing a report from the General Council of the Bar on the workings of the assize system).

Prison in 1834, for example, ranged between four days and thirteen weeks,[16] while at Milbank Penitentiary they ranged between eight days and six months.[17] The injustice inherent in such practices is obvious: the *Law Times* decried cases in which a person was subjected to 'positive punishment on a mere presumption of guilt, before he is proved to be guilty in due form of law'.[18] This injustice was magnified in the case of those defendants whose indictments were rejected by a grand jury, and those who were acquitted at trial. In Essex between 1812 and 1822, such persons accounted for a third of those committed for trial.[19] In 1845, Justice Coleridge estimated that 8,000 out of 30,000 detained before trial were released when grand juries refused to indict.[20] Even in the case of defendants subsequently convicted, the imposition of a sentence shorter than the detention period was not uncommon. At the Devonshire sessions in February 1834, for example, twenty of the sixty-four cases tried resulted in such an outcome.[21] One correspondent to *Lloyd's Weekly Newspaper* calculated that these twenty cases involved an aggregate pre-trial detention period of 644 days compared with an aggregate punitive period of 345 days.[22]

Pre-trial detention had ill-effects beyond injustice. The magistrates at Guildford suggested in 1837 that the prospect of long detention periods deterred some potential prosecutors from proceeding with minor cases.[23] When such prosecutions were brought, juries might hesitate to convict, thereby jeopardising the 'moral effect of the verdict of a jury.[24] And judges often felt compelled to reduce the appropriate sentence to take account of the pre-trial detention period.[25] Furthermore, contemporaries claimed that this detention exposed accused persons to hardened convicted offenders, thereby acting as 'universities for the propagation of criminal knowledge, in which students took their degrees in vice'.[26] Thus, long periods in pre-trial detention could frustrate the basic moral and corrective aims of the criminal law.

2. Expense of Criminal Trials

The victim, as prosecutor, bore primary responsibility for all the costs of the prosecution, which could be formidable. At the February 1834 Devonshire Quarter Sessions, for example, the

[16] Select Committee on Gaols and Houses of Correction in England and Wales, *First Report* (HL 1835, 438), Appendix 1.
[17] Ibid, Appendix 3.
[18] 'Criminal Law Procedure', 25 *Law Times*, 21 April 1855, 38.
[19] See Mr Western, MP, *Parliamentary Debates*, series 2, vol.6, col. 1318, 27 March 1822 (HC) (1,374 out of 4,291).
[20] 'The Administration of Justice', *The Economist*, 22 March 1845, 262.
[21] House of Commons, *Return of the People Arraigned and Tried before the Devonshire Quarter Sessions held on 25 February 1834* (1834, 143).
[22] Fiat Justitia, Letter to the Editor, 'Criminal Procedure in Cases of Larceny', *Lloyd's Weekly Newspaper*, 18 July 1854, 9. The correspondent also referred to several trifling cases of larceny tried at the Dorset sessions in 1849 in which each defendant had spent at least five weeks in detention while receiving only minimal sentences of imprisonment. See also 'Defects of the Criminal Law', 28 *Law Magazine* (1842) 1 (discussing ten cases at the Maidstone Assizes in Kent in which the pre-trial detention period significantly exceeded the ultimate sentence).
[23] Commissioners of Criminal Law, *Third Report* (HC 1837, 79), 28 (letter to home secretary Lord John Russell, dated 14 Jan. 1837, submitted to the Commissioners as evidence).
[24] Ibid. See also 'Juvenile Offenders Act, 10 & 11 Vict., c. 82' (1847) 11 *Justice of the Peace* 561 (arguing that juries often acquitted defendants solely on account of the detention period, believing the defendant had been punished enough).
[25] Select Committee on Gaols, *First Report*, 24 (evidence of Samuel Hoare, Middlesex magistrate and chairman of the Committee of the Society for the Improvement of Prison Discipline); *Parliamentary Debates*, series 3, vol. 40, col. 246, 19 Jan. 1838 (per the Duke of Richmond). *See also ibid*, series 3, vol. 136, cols. 1874-1875, 26 Feb. 1855 (HL) (per Lord Brougham).
[26] *Parliamentary Debates*, vol. 19, col. 717, 13 May 1828 (HC) (per Edward Davenport, MP).

average cost of a prosecution came to over £6.[27] For context, the average annual wages for a labourer in 1800 was £12, which by 1850 had risen to £20.[28] A series of statutes, culminating in the Criminal Justice Administration Act 1826, required reimbursement from public funds of trial and pre-trial expenses, as well as expenses incurred by those acquitted at trial.[29] Initially, these reimbursements came from local funds, and the cost was enormous: the counties devoted one-fifth of the county rate to the payment of prosecution expenses in 1834.[30] In 1846, the prime minister, Sir Robert Peel, agreed that the treasury would defray these costs; within two years, the cost of doing so came to more than £400,000.[31] Such expenditures created an incentive to find a way to make prosecutions cheaper.

3. Wasteful Prosecutions

Lengthy pre-trial detention and the high cost of indictable prosecutions might have been justifiable in the context of serious crimes, but most indictable offences were minor. We have seen that larceny accounted for the vast majority of all committals for trial, and most of them concerned property of little value. An abstract of larcenies prosecuted in six counties in 1849, for example, showed that three-quarters concerned property worth ten shillings or less, and two-thirds were for property worth under five shillings.[32] A correspondent to *Lloyd's Weekly Newspaper* noted that 249 of the cases in this Abstract concerned property worth less than ten pence – seventeen percent of the total.[33] Each of these cases had to go through the whole panoply of jury trial, with all its attendant problems and costs. Defenders of the status quo argued that 'considerations of economy [must] not be allowed to outweigh … the impartial, unsuspected administration of justice, and … the protection of those who are accused of having committed crimes.'[34] Nevertheless, spending £6 to prosecute a theft of property worth less than ten shillings, with the defendant detained in gaol for several weeks awaiting trial, struck many contemporaries as ludicrous. The *Law Magazine*, for example, poured scorn on those 'who fancy that our national existence depends upon the law that every pilferer of an apple or a turnip must be tried by a British jury'.[35]

[27] House of Commons, *Return of the People arraigned in Devonshire* (sixty-four persons prosecuted, with total costs coming to £318 6s 6d). See also Commissioners on County Rates, *Report* (HC 1836, 58) 140 (extract from a letter from the Nottinghamshire magistrates giving examples of several prosecutions against juvenile thieves with costs ranging between £4 13s and £9 4s).
[28] W.H.R. Cutter, *A Short History of English Agriculture*, Oxford, 1909, Appendix IV.
[29] See John M. Beattie, *Crime and the Courts in England 1660-1800*, Oxford, 2008, 41-48.
[30] Commissioners on County Rates, *Report* (1836), 5. The county rate was levied by quarter sessions at levels necessary to discharge the various obligations placed by statute on the local authorities. For an overview of the history of the county rate, see ibid, 3-4.
[31] Commissioners on Costs of Prosecutions, *Report* (HC 1859 Sess. 2, 2575), vii.
[32] House of Commons, *Abstract of Larcenies in Quarter Sessions in Berkshire, Dorset, Somerset, Southampton (including the Isle of Wight), Sussex and Wiltshire, during the Year ending December 1849* (1850, 204).
[33] Fiat Justitia, Letter to the Editor, 'Criminal Procedure in Cases of Larceny', *Lloyd's Weekly Newspaper*, 18 July 1854, 9.
[34] 1 *Jurist (n.s.)*, 17 March 1855, 87.
[35] 'Defects of Criminal Law', 28 *Law Magazine* (1842) 1, 30.

III. Summary Jurisdiction as a Solution

Summary trial was both quick and cheap, and offered a practical solution to the problems associated with jury trial.[36] Summary jurisdiction had been in existence for centuries,[37] and by the eighteenth century had been extended to such an extent that Blackstone warned that jury trial was in danger of being replaced entirely.[38] The trend towards expansion continued through the end of the eighteenth and into the nineteenth centuries. The Middlesex Justices Act 1792 and the Thames Police Act 1800 established stipendiary magistracies in London with the power to deal summarily with reputed thieves and suspicious persons.[39] The latter statute also gave magistrates the power to summarily convict a person for possession of goods suspected of being stolen when that person was unable to account for the presence of the goods in question.[40] The Larceny Act 1827 permitted summary trial for several minor acts of stealing.[41] In some places, local legislation bolstered justices' summary powers further. Edward Rushton, stipendiary of Liverpool, for example, indicated that the city's justices had a vast summary jurisdiction by virtue of some sixty local Acts under which authorities issued around 11,000 summonses annually.[42] The combined effect of these statutes was to help 'summary proceedings outpace trial by jury as the routine method of disposing of criminal cases.'[43] Between 1827 and 1837, for example, summary committals to Cold Bath Fields Prison exceeded committals from jury trials by more than seven to one.[44] In 1838, some 30,000 of the persons arrested by the Metropolitan Police were convicted summarily, compared to 2,500 convicted by juries.[45]

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[36] A Barrister, *The Vagrant Act in relation to the Liberty of the Subject*, London, 1824, 45 (arguing that justices had summary powers out of the 'necessity of securing to the subject in certain cases, a cheaper and speedier redress of wrongs, than he could possibly obtain by the tedious and expensive mode of trial by jury'); Select Committee on Metropolitan Police Offices, *Report* (HC 1838, 578), Q.168 (evidence of Harrison Codd, police magistrate, explaining that the public preferred summary trials because they offered quick and cheap justice); James Traill, *A Letter to Lord Brougham on the Police Reports and the Police Bills*, London, 1839, 34 (arguing that the existence of summary jurisdiction proved that jury trial had been found to be inadequate).

[37] Alexander traces summary jurisdiction back to the Statutes of Labourers in 1351. G. Glover Alexander, *The Administration of Justice in Criminal Matters*, Cambridge, 1911, 37. Langbein discusses multiple fifteenth and sixteenth century statutes that allowed for summary processes in particular circumstances. Langbein, *Prosecuting Crime*, 66 *et seq*. See also William Lambard, *Eirenarcha, or The Office of the Justice of Peace*, London, 1582.

[38] 4 Bl. Comm. 277.

[39] 32 Geo. III, c. 53, s 17, and 39 & 40 Geo. III, c. 87, s. 12, respectively. These statutes permitted magistrates to convict such persons on the testimony of a reliable person (usually a constable) that the defendant was a person of evil reputation. The Vagrancy Acts of 1822 and 1824 consolidated these summary powers.

[40] 39 & 40 Geo. III, c. 87, s. 16. The Police Act 1822, s. 34, extended this power further. See also Bruce P. Smith, 'The Presumption of Guilt and the English Law of Theft, 1790-1850' 23(1) *Law and History Review* (2005), 133, 135 (noting that the summary courts were able to dispense with 'certain important procedural and evidentiary protections applicable in cases of larceny in the higher courts'). But see Norma Landau's critique, 'Summary Conviction and the Development of the Penal Law' 23(1) *Law and History Review* (2005), 173, and Smith's reply, 'Did the Presumption of Innocence Exist in Summary Proceedings' 23(1) *Law and History Review* (2005), 191.

[41] The 1827 Act reduced the number of larceny offences, and reduced the severity of punishments available. Sweeney points out that these Acts largely codified pre-existing summary offences, and therefore did not extend summary jurisdiction to any real degree. Thomas Sweeney, 'The Extension and Practice of Summary Jurisdiction in England, c.1790-1860', thesis submitted for the degree of Doctor of Philosophy, University of Cambridge, 1985, 119.

[42] Select Committee on the Execution of the Criminal Law, especially respecting Juvenile Offenders and Transportation, *Second Report* (HL 1847, 534), Q.1594.

[43] Bruce P. Smith, *Circumventing the Jury: Petty Crime and Summary Jurisdiction in London and New York City*, 1790-1855', thesis submitted for the degree of Doctor of Philosophy, Yale University, 1996, 414.

[44] Ibid, 415. Cold Bath Fields Prison was the principal prison for the county of Middlesex. ibid 201-2.

[45] John Mirehouse, *Crimes and its Causes, with Observations on Sir Eardley-Wilmot's Bill*, London, 1840, 7. The *Edinburgh Review* published figures showing that sixty percent of those committed to prison nationally in 1836 were committed summarily. 'Police of the Metropolis', 66 *Edinburgh Rev*iew (1838), 372, 376. Similarly, the

1. Extending Summary Jurisdiction

Justices thus dealt summarily with a considerable amount of minor criminal acts, but all indictable prosecutions required the intervention of a jury. A summary trial would remove the need for the lengthy pre-trial detention that was an inevitable part of the jury trial process. Reformers also pointed to the significant savings that could arise from extending summary jurisdiction.[46] Two justices from Shropshire estimated that such a move would save twelve percent of the county rate.[47] In the 1840s, the *Liverpool Mercury* estimated that the transfer of cases of theft of property worth less than five shillings would save the city £6,000 annually.[48] A correspondent to the *Times* estimated in 1848 that the country could save in excess of £130,000 if small larcenies were transferred to the jurisdiction of summary courts.[49] For context, recall that in 1846, the cost of indictable prosecutions to the public purse was around £400,000. Extending summary jurisdiction could thus save one-third of the prosecution costs.

Reformers also pointed to the fact that justices were already assuming summary jurisdiction over actions that in reality constituted felonies that formally required prosecution on indictment.[50] James Traill, a London police magistrate, told a parliamentary committee that '[m]agistrates are in the constant practice of summarily disposing of cases, in which the evidence, if fully taken, would establish a complete larceny.'[51] This statement suggests that magistrates deliberately eschewed taking comprehensive examinations of prosecutors and witnesses, specifically to oust the jurisdiction of the higher courts. The *Times* agreed, writing that many offences were dealt with summarily because justices chose to ignore factors that would bring the offences to the level of felony.[52] Sometimes they did so at the request of the parties involved: John Hardwick, a police magistrate, suggested that in nineteen cases out of twenty, prosecutors requested that petty larcenies be prosecuted summarily.[53] No doubt

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Quarterly Review published figures for 1845 which showed that magistrates were summarily disposing of nearly four times as many juvenile cases as they were committing for trial. 'The Ragged Schools", 79 *Quarterly Review* (1846-1847), 127, 133. See also 2 *Jurist*, 22 Dec. 1838, 1049 (setting out figures that showed that from 1834 to 1837, nearly ten times as many juvenile offenders aged between seven and sixteen were prosecuted in summary courts rather than by jury trial).

[46] See Select Committee on County Rates, *Report* (HC 1834, 542) Q.974 (1834) (evidence of John Clark, clerk of arraigns at the central criminal court); Commissioners on County Rates (n 36) 142 (extract from letter from E. Turner and W.E. Tallents).

[47] Commissioners on County Rates, *Report*, 142.

[48] 'The Juvenile Offenders and Small Larcenies Bill', *Liverpool Mercury*, 10 July 1849, 6.

[49] A Magistrate, Letter to the Editor, *The Times*, 7 Nov. 1848, 8, col. E. In a letter to *The Times* the following year, another correspondent suggested savings of between £150,000 and £200,000. A Magistrate, Letter to the Editor, 'Petty Larcenies', *The Times*, 9 July 1849, 5, col. F.

[50] See, for example, Select Committee on Metropolitan Police Offices, *Report* (HC 1837, 451) 183 (evidence of John Hardwick, police magistrate) and Q.571 (evidence of Harrison Codd, police magistrate); Select Committee on Metropolitan Police Offices, *Report* (1838), QQ.5 and 76 (evidence of Harrison Codd, magistrate at Worship Street Police Office).

[51] Select Committee on Metropolitan Police Offices, *Report* (1837) 183 (Appendix 1, clause 5).

[52] *The Times*, 26 Dec. 1838, 4, col. B

[53] Select Committee on Metropolitan Police Offices, *Report* (1837) Q.648. See also 'Criminal Procedure', 35 *Westminster Review* (1841) 1 ('[N]otwithstanding the slight pecuniary penalty which police magistrates are able to impose … summary conviction is the one earnestly preferred and sought by the party injured.'); Commissioners of Criminal Law, *Second Report* (HC 1836, 343) 89 (evidence of Lord Wharncliffe, chairman of the quarter sessions for the West Riding of Yorkshire, referring to a case in which he summarily imposed corporal punishment on a young boy who should have been committed, and that he did so with parental consent); Select Committee on Metropolitan Police Offices, *Report* (1838), Q.5 (evidence of Harrison Codd, police magistrate, stating that he and his colleagues 'were constantly applied to by the parties coming before us to act in a summary way'), and QQ.255 and 257 (evidence of Robert E. Broughton, chief magistrate at Worship Street Police Office, stating that the parents of first time juvenile offenders often sought a summary trial, as did many of the juvenile offenders).

prosecutors were attracted by the speed and cost-effectiveness of the summary courts, but convictions in such courts were also easier to achieve.[54] A conviction for larceny required objective evidence of the 'felonious taking [of] the property of another without his consent and against his will, with intent to convert it to the use of the taker.'[55] A conviction under the Vagrancy Act 1824, however, required the justice simply to make a subjective assessment of the defendant and his character.[56] As a result, justices were able to record a conviction in some cases that would have been lost before a jury.[57] Sweeney has calculated that in London in the 1830s, two-thirds of all persons convicted of acquisitive property crime were convicted summarily by justices rather than by juries.[58] Thus, the *Times* concluded that it would be 'better to give the direct power of summary trial, than to continue a system in which the law thus works by a sort of fiction, for fictions of law, which are always bad enough, are in criminal law absolutely monstrous'.[59]

Reformers also pointed to the Larceny Act 1827 which permitted the summary trial of minor acts of non-felonious theft such as stealing fruit or vegetables from a garden.[60] Many such thefts were morally indistinguishable from larcenies that required a jury trial.[61] William Miles, MP and chairman of Somerset quarter sessions, agreed with a parliamentary committee that it was anomalous that pulling up turnips was a summary offence but that stealing turnips once they had been pulled up required a full jury trial.[62] The *Quarterly Review* could see no reason why one justice should have the power to imprison a boy for up to six months for stealing a peach or up to twelve months for stealing a dog, while two justices should be denied the power to punish that same boy for stealing a chicken because this offence was deemed by the law to constitute a felony.[63] The Criminal Law Commissioners were equally trenchant:

> It cannot be a rational distinction, that if a man steals an apple blown from a tree, the facts which constitute his offence can only be investigated by a process

[54] John Clark, the clerk of arraigns at the central criminal court, told a Select Committee that it was much easier to convince one justice of the defendant's guilt than twelve jurors. Select Committee on Metropolitan Police Courts, *Report* (1838), Q.1432.

[55] *R v Hammon*, (1812) 2 Leach 1083, 1089. See also William Russell, *A Treatise on Crimes and Misdemeanors*, vol 3 (4th ed), London, 1865, 146 ('[Larceny is the] wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, without the consent of the owner.').

[56] Smith, 'Circumventing the Jury', 104. See also 'Police of the Metropolis', 66 *Edinburgh Review* (1838), 372, 379 ('Many an offender is sent to prison as a "reputed thief," or as "frequenting such a street with a felonious intent," when according to the true meaning of the existing law, he ought to have been either discharged or committed for trial.').

[57] Smith, 'Circumventing the Jury', 115 (citing a letter to the Home Office from the Thames Police Office, 5 March 1821).

[58] Sweeney, 'Extension and Practice', 173, Table 3.2(b). See also Peter King, *Crime and Law in England*, 1750-1840, Cambridge, 2009, 87.

[59] *The Times*, 26 Dec. 1838, 4, col. B.

[60] Larceny Act 1827, s. 42.

[61] Select Committee on the Third Report of the Criminal Law Commissioners, *Report* (HC 1837, 451), 61 (evidence of Charles Bathurst, chairman of Gloucestershire quarter sessions); National Archives HO 45/888/1 (Presentment from the grand jury for Somerset to Justice Coleridge, forwarded by him to the home secretary on 6 April 1845). See also 'On the Expediency of Extending the Summary Jurisdiction over Petty Larcenies', 2 *Justice of the Peace* (1838), 785 (complaining that justices were already empowered to deal with cases worth hundreds of pounds but that the most trifling larceny remained beyond their authority).

[62] Select Committee on the Third Report of the Criminal Law Commissioners, *Report*, 46. The attorney general, Sir John Jervis, gave further examples of these anomalies at *Parliamentary Debates*, series 3, vol. 108, col. 1133 20 Feb. 1850, as did Lord Chief Justice Campbell at *Parliamentary Debates*, series 3, vol. 132, col. 55, 30 March 1854 (HL).

[63] 'Police', 37 *Quarterly Rev*iew (1828), 489, 491.

> applicable to the highest crimes; while, if he cuts down and steals the tree itself, he may be tried and punished summarily by a single magistrate.[64]

Thus, legislative practice had already conceded the principle of summary trial for minor acts of theft,[65] and reformers argued that an extension of summary jurisdiction over minor felony larcenies would not result in any material increase in justices' powers.[66] As Traill put it, jury trial would be no more threatened by such extended powers than the tower that had stood for a thousand years would be 'shaken by the removal of the little stones or rubbish that have gathered through the course of time round its base'.[67]

IV. Building Confidence in Summary Jurisdiction

The defects inherent in the jury trial system were substantial and widely acknowledged, but a viable alternative had to exist before that system could be replaced. Summary jurisdiction had promise, but its viability as a replacement for jury trial in felony cases was very much in question, both as to the quality of justices and as to the procedures followed in summary trials. Justices qualified for their position by virtue of property ownership, and were rarely legally trained.[68] Henry Brougham famously told parliament in 1828 that justices were the 'worst constituted tribunal on the face of the earth'.[69] Even stipendiary magistrates did not have to possess a legal training until 1835.[70] Commentators frequently criticised justices for harsh sentencing practices that came to be known as *Justices' justice*.[71] The trade union movement

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[64] Commissioners of Criminal Law, *Third Report*, 10. The Larceny Act 1827, section 38 made it a summary offence to steal trees growing in specified locations. The theft of an apple affixed to a tree (i.e., growing) was a summary offence under s.42 of the same statute. This provision did not apply to the theft of an apple that had been removed from the tree. See also 'Police of the Metropolis', 66 *Edinburgh Review* (1838), 372, 378 (agreeing that there was no rational principle underlaying the distinction between summary and non-summary offences).

[65] Commissioners of Criminal Law, *Third Report*, 10. In 1850, Sir John Pakington noted that the 1827 Act had been enacted with little concern for the future of jury trial. *Parliamentary Debates*, series 3, vol. 110, col. 504, 18 April 1850 (HC).

[66] Select Committee on Gaols, First Report, 135 (evidence of Thomas C. Higgins, visiting justice of Bedford Gaols); Select Committee on Metropolitan Police Offices, *Report* (1837), QQ.435-57 (evidence of James Traill, police magistrate); Select Committee on Metropolitan Police Offices, *Report* (1838), Q.259 (evidence of Robert Edwards Brougton, chief magistrate at Worship Street Police Office). See also 'Police of the Metropolis', 66 *Edinburgh Review* (1838), 372, 377 ('[If the] summary jurisdiction of magistrates be already so wide, without any apparent prejudice to the institution of trial by jury, there can, we apprehend, be little danger in extending it somewhat further….').

[67] Traill, *Letter to Lord Brougham*, 29.

[68] See Bentley, *English Criminal Justice*, 20-21.

[69] Henry Brougham, *Present State of the Law: The Speech of Henry Brougham in the House of Commons, on Thursday, February 7, 1828* (3rd ed.), London, 1828, 39. A decade later, Thomas Wakley, MP, was equally unimpressed by magistrates: 'A more incompetent body could no where be found. A body of men more characterised by ill-temper, faction, and the most besotted ignorance, could not be found than the justices of the peace of this country'. *Parliamentary Debates*, series 3, vol. 53, col. 1138, 29 April 1840 (HC).

[70] The Middlesex Justices Act 1792 allowed for the appointment of stipendiary magistrates, and among the first such magistrates were three clergymen, two starch-dealers, and a former lord mayor. Smith, 'Circumventing the Jury', 19. The Municipal Corporations Act 1835, s.99, required stipendiaries to be barristers of at least five years' standing, a requirement raised to seven years by the Municipal Corporations Act 1882, s.161. By 1894, sixteen towns in England and Wales had stipendiary magistrates, in addition to London and Manchester. 'The Home Office and the Magistracy', 58 *Justice of the Peace* (1894), 571.

[71] See 'Justices' justice', *The Times*, 17 Nov. 1843, 5 (noting that the term had 'passed into a proverb, expressive of that particular species of justice which is administered by the "Great Unpaid" in petty sessions assembled'). There are numerous references throughout the century to magisterial injustice in the pages of the *Times*, in law journals, and in Parliament. As to the first, see *The Times*, 7 Aug. 1840, 4, col. F (justices conniving with a local aristocrat to illegally evict a family); 'Justices' justice', *The Times*, 17 Nov. 1843, 5, col. C (inconsistent sentences imposed by magistrates); 'Justices' Justice – Mop Law', *The Times*, 23 Nov. 1842, 7, col. E (unfairly penalising a servant girl); 'Justices' Justice', *The Times*, 16 April 1844, 3, col. B (improper sentences). A good example from

was especially hostile to the justices, believing the magisterial bench to be inherently prejudiced against the working class.[72] In 1874, the Trades Union Congress unanimously called for the administration of the summary laws by stipendiary magistrates rather than an 'irresponsible, clerical, and unpaid magistracy'.[73] A trades-union deputation met the Home Secretary in 1875 to complain about the extent of summary jurisdiction which they claimed constituted 'serious infractions of the most important constitutional right we possess'.[74]

Because of such concerns, suggestions for expanding summary jurisdiction came with various limitations, the most important being that summary power should be exercised only by at least two justices.[75] Chief Justice Tindal of the Court of Common Pleas suggested that giving summary power to one justice would not command public support.[76] Sir Peter Laurie, lord mayor of London, suggested that there be more than one justice involved; otherwise decisions might be based on caprice and temper.[77] Summarising these views, the *Jurist* wrote in 1835,

> [T]he provision for the presence of more than one magistrate has evidently been founded on the supposition, that, by discussion, errors of judgment would be corrected, any leaning or prejudice obviated, and ebullitions of a hasty temper checked. To arm a single magistrate ... with an unlimited power of adjudication ... must be confessed to be a dangerous experiment. The mere possession of such an absolute power has a tendency to corrupt the mind. The limitation of the power,

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the law journals can be found at 8 *Jurist (n.s.)*, 24 May 1862, 267 (reporting on a case in which a nine year old boy was imprisoned at hard labour in default of paying a fine of five pounds for poaching). Members of parliament also raised complaints about justices' actions. See *Parliamentary Debates*, series 3, vol.13, cols.738-739, 15 June 1832 (HC) (a police magistrate refusing to hear exculpatory evidence and insulting a defence witness); series 3, vol. 90, col. 1136, 11 March 1847 (HL) (Lord Brougham criticising a justice for committing four young boys to prison to await trial for two or three weeks for minor horseplay); series 3, vol. 175, col. 193, 9 May 1864 (HC) (criticism of a justice who convicted an entire family of eight people, including an eight year old boy, for sleeping under a tent, sentencing all to three weeks' imprisonment at hard labour); series 3, vol. 225, cols. 1379-1380, 13 July 1875 (HC) (complaint about a justice who sentenced a thirteen year old girl to fourteen days' imprisonment followed by four years in a reformatory for picking a flower to give to her aunt). For discussion, see Roger Swift, 'The English Urban Magistracy and the Administration of Justice during the Early Nineteenth Century: Wolverhampton, 1815-1860', 17 *Midland History* (1992), 75, 79.

[72] See D. C. Woods, 'The Operation of the Master and Servants Act in the Black Country, 1858-1875', 7 *Midland History* (1982), 93 (noting that the trade union movement complained so frequently about the partiality of justices that Parliament was forced to establish a Select Committee on Master and Servant to consider the law). See Select Committee on Master and Servant, *Report* (HC 1866, 449).

[73] Sixth Annual Trades Union Congress, *Report*, London, 1874, 22.

[74] Eighth Annual Trades Union Congress, *Report*, London, 1875, 5 (setting out a memorial to the home secretary on 11 November 1875, and the discussions between the parties). This meeting was also reported in *The Times*. 'Summary Jurisdiction of Magistrates', *The Times*, 12 Nov. 1875, 8, col. A. The union delegates expressed their delight with the Conspiracy and Protection of Property Act, 1875, which regulated union picketing. Section 9 gave defendants (usually trade unionists) the choice between jury or summary trial if they faced imprisonment or a fine of £20 or more.

[75] See, for example, Select Committee on the Execution of the Criminal Law, *Report*, Q.647 (per Rev. Whitworth Russell, Inspector of Prisons); Select Committee on Criminal Commitments and Convictions, *Report* (HC 1828, 545), 48 (per John Phelips, chairman of a criminal court in Somerset) and 66 (per Francis Maule, barrister); Select Committee on Metropolitan Police Offices, *Report* (1838), Q.1284 (per Sir Peter Laurie, lord mayor of London); Select Committee on the Third Report of the Criminal Law Commissioners, *Report*, 47 (per John Disney, chairman of the Essex sessions).

[76] Select Committee on County Rates, *Report*, Q.819. Similarly, Thomas Starkie, one of the Criminal Law Commissioners who strongly endorsed the extension of summary jurisdiction to juveniles, told a parliamentary committee that giving summary power to more than one justice would reduce objections to this proposal. Select Committee on the Third Report of the Criminal Law Commissioners, *Report*, 5.

[77] Select Committee on Metropolitan Police Offices, *Report* (1838), Q.1273. Laurie went on to give the example of a justice who had suffered repeated thefts from his farm stock being particularly merciless to anyone brought before him charged with similar offences. Ibid, Q.1280.

> which is caused by the division of it with a colleague, must diminish the apprehended mischief.[78]

With the exception of the Metropolitan Police Courts Bill 1839,[79] every bill introduced into parliament until 1847 to extend summary jurisdiction required at least two justices to decide larceny cases summarily.[80] Most bills also limited the extent of the proposed extensions of jurisdiction, by offence – invariably larceny or simple larceny – and sometimes by the value of the property stolen.[81] The penalty that the justices could impose also was limited, usually to imprisonment for less than six months. The purpose of these limitations was to limit the damage that the justices could do. More importantly, the earlier bills preserved a semblance of jury trial by providing that the defendant could object to a summary trial.[82] Thereafter, the bills provided that the justices could commit the defendant to quarter sessions if they thought it suitable or if there were aggravating circumstances. The earlier approach was resurrected in the bill that became the Juvenile Offenders Act 1847, and was included in all bills from then on.[83] The Criminal Justice Bill 1855 explicitly required one of the justices to ask the offender whether he objected to a summary trial;[84] reformers specifically pointed to that provision as evidence that they were not seeking to destroy trial by jury.[85]

1. Summary Trial Procedures

Some magistrates in the 1830s argued that the public already had confidence in the summary courts.[86] Most commentators recognised, however, that improvements to the summary courts and to the procedures employed in those courts, would be necessary. John Roebuck, MP, opposing an extension of the 1847 Act, painted a memorable picture of a summary trial:

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[78] 2 *Jurist*, 28 July 1838, 625. The *Jurist* went on to point to the importance that the suspicion that the poor naturally felt towards their judges was not increased by giving absolute power to individual justices. Ibid.

[79] See discussion in Section VI.

[80] See Bill to extend powers of summary convictions of juvenile offenders HC Bill (1829) [113], Bill to provide for more speedy and summary trial of persons accused of simple larceny HC Bill (1833) [421], Bill to amend law of larceny relating to young offenders, and persons tried for a second offence HC Bill (1833) [207], Bill to alter and amend the law of larceny relating to young offenders under a certain age HC Bill (1837) [224], Bill to authorise summary conviction of juvenile offenders in cases of larceny HC Bill (1837) [321], Bill to regulate and enlarge summary jurisdiction of justices of the peace HC Bill (1839) [178], Bill to authorise summary conviction of juvenile offenders in cases of larceny and misdemeanour HC Bill (1840) [48], Bill for more speedy trial and punishment of juvenile offenders HC Bill (1847) [136].

[81] The values varied from bill to bill, but most ranged between one shilling to ten shillings. The highest value was £5, in the Bill to regulate and enlarge summary jurisdiction of justices of the peace HC Bill (1839) [178].

[82] See the Bills in n.80 introduced in 1829 and 1833. Unusually, the Bill to amend the law of larceny relating to young offenders, and persons tried for a second offence HC Bill (1837) [207] proposed to allow summary jurisdiction if the defendant agreed, or to be tried by a petty sessions jury.

[83] Bill for the more speedy trial and punishment of juvenile offenders HC Bill (1847) [136]; Bill to extend provisions of Acts for more speedy trial and punishment of juvenile offenders to larcenies of small amount HC Bill (1849) [402]; Bill for further extension of summary jurisdiction in cases of larceny HC Bill (1850) [31].

[84] Bill for diminishing expense and delay in the administration of criminal justice in certain cases HL Bill (1855) (61).

[85] See, for example, the attorney general's comments in relation to the 1855 bill. Parliamentary Debates, series 3, vol. 139, cols. 1870-1871, 6 Aug. 1855 (HC).

[86] *See*, *e.g.*, Select Committee on Metropolitan Police Offices, *Report* (1837), Q.650 (evidence of John Hardwick, police magistrate) and Q.961 (evidence of William Ballantine, senior magistrate at Thames Police Office); Commissioners of Criminal Law, *Third Report*, 29 (letter from Serjeant Thomas D'Oyly to Commissioner Thomas Starkie); Select Committee on the Third Report of the Criminal Law Commissioners, *Report*, 55, 57 (evidence of John Disney, Chairman of the Essex Sessions) and 51 (evidence of John Cunningham, justices' clerk in petty sessions, Essex); Select Committee on Metropolitan Police Offices, Report (1838), Q.168 (evidence of Harrison Codd, police magistrate) and Q.245 (evidence of Robert Broughton, chief magistrate at Worship Street Police Office).

> The offender was brought into a back parlour in the squire's house by the constable of the parish. The squire had another squire to aid him, neither the one nor the other knowing the least of the law, but both having strong prejudices in the case. There was no bar .... There was not even a reporter of newspaper present .... The fact was, a trial under such circumstances was a denial of justice to the poor man.[87]

For some, improvements were a simple practical necessity. The *Justice of the Peace*, the unofficial mouthpiece for justices and other local authorities, acknowledged in 1837 that the 'defects which now exist in the machinery of the justices' jurisdiction, will be felt with a tenfold force' if that jurisdiction was increased without extensive improvements.[88] The *Justice of the Peace* was especially concerned at the absence of proper accommodation for the petty sessions.[89] Other commentators suggested that improving the operation of the summary courts might disarm some of the opposition to extending summary jurisdiction.[90] Of particular concern was the issue of publicity in the summary courts,[91] many of which sat in public houses[92] or even the JP's own living room.[93] One of Jervis' Acts, the Summary Jurisdiction

[87] Parliamentary Debates, series 3, vol. 110, col. 505, 18 April 1850 (HC). Roebuck's comments provoked considerable debate regarding the level of informality in summary trials. Several proponents of summary jurisdiction contended that Roebuck was ignorant of the true position and that there was plenty of publicity attached to summary hearings. See also ibid, cols. 506, 507-8, 508 (contributions from Henry Aglionby, MP, Charles Packe, MP, and Sir John Pakington, MP, respectively). Pakington was forced to concede, and to express his disapproval of, the use by magistrates of public houses as courtrooms. Ibid, col.513.

[88] 1 *Justice of the Peace* (1837), 354.

[89] Ibid. *The Times* was similarly concerned; in an editorial in 1838, *The Times* wrote of the need to attract men of appropriate personal and moral character to act as stipendiary magistrates, and the need to build proper courtrooms and employ proper administrative support staff. *The Times*, 20 Dec. 1838, 4, col. A. Only when these measures had been taken would the *Times* support an increase in justices' jurisdiction. See also AJP, Letter to the Editor, 'Summary Jurisdiction for Small Larcenies', *The Times*, 4 Jan. 1839, 3, col. F (arguing that much practical work needed to be done, such as removing the need to use public houses as courtrooms, before justices' jurisdiction could be expanded).

[90] Lord Denman, for example, stated that he was willing to dispense with a jury in minor cases 'provided a good and efficient tribunal was established to decide upon offences of this nature'. *Parliamentary Debates*, series 3, vol. 93, col. 700, 18 June 1847 (HL).

[91] See, for example, Select Committee on the Third Report of the Criminal Law Commissioners, *Report*, iv (concluding that extending summary jurisdiction would necessitate making 'other Provisions to ensure Deliberation and Publicity to the Proceedings'); Select Committee on the Execution of the Criminal Law, *Report*, Q.33 (evidence of Charles Law, recorder of London, testifying that the absence of publicity and poor procedures in the police courts made the expansion of summary jurisdiction 'rather a hazardous experiment') and Q.126 (Serjeant John Adams, assistant judge at the Middlesex Sessions, arguing that an expansion of summary jurisdiction would result in cases being 'withdrawn[n] from the public eye'); 'The Bill Against Trial by Jury', 11 *Law Magazine (n.s.)* (1849), 155 (arguing that public confidence would suffer if criminal business was transferred from 'open courts at assizes and general sessions to the quasi privacy of the room where the two justices and the policeman are to dispatch the case in the auto-da-fe fashion'). See also Select Committee on Gaols, *Second Report*, 120 (evidence of Rev. Whitworth Russell, Chaplain to Milbank Penitentiary); Select Committee on Metropolitan Police Offices, *Report* (1838), Q.1273 (evidence of Sir Peter Laurie, lord mayor of London).

[92] In 1845 a parliamentary return showed that nearly half of all petty sessional districts held their sessions in inns, hotels, or other private rooms. House of Commons, *Return of the Description of the Building in which Justices of the Petty Sessions Districts hold their Usual Sessions* (HC 1845, 606).

[93] King, *Crime and Law in England*, 84; Bentley, *English Criminal Justice*, 22-23. See also Douglas Hay, 'Property, Authority, and the Criminal Law', in Douglas Hay et al (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (New York, NY, 1975), 34 ('[I]n the parlour of the Justice of the Peace, *stare decisis* and due process were not always so much in evidence as in the high courts'); Edward W Cox, *The Summary Jurisdiction Act 1879, with Analysis and Practical Notes*, London, 1879, vii (noting the practice of magistrates, especially in rural areas, of hearing cases in which persons were in custody in their own residences). In parliament, Lord Campbell criticized the practice of justices hearing cases in their own homes, which he described as a 'proceeding in familiâ, not in curiâ'. *Parliamentary Debates*, series 3, vol. 136, col. 1879, 26 Feb. 1855 (HL).

Act 1848, along with the Petty Sessions Act 1849, eventually addressed these issues.[94] The former regularised the procedure followed in the summary courts, while the latter statute empowered county quarter sessions to provide suitable court buildings.[95] By the middle of the century, therefore, summary hearings were on their way to being something the public could immediately recognise and trust as court proceedings.

V. Jury as Protector

The nineteenth century witnessed an attitudinal change towards the jury, a change that facilitated the movement away from jury trial. At the start of the nineteenth century, the jury was celebrated for its protective function as the 'grand bulwark of . . . liberties'.[96] Blackstone argued that the administration of justice should not be left in the hands of a select group of professional judges, because such men would 'have frequently an involuntary bias towards those of their own rank and dignity'.[97] Further, the presence of a jury prevented judges appointed by and answerable to the Crown from using their position to 'imprison, dispatch or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure'.[98] Thus, the jury operated as a barrier 'between the liberties of the people, and the prerogative of the crown'.[99] An excellent example of the jury's protective function arose in 1794 from the jury acquittals in the treason trials of leading members of the London Corresponding Society: Thomas Hardy, John Thelwall and John Horne Tooke.[100]

As the nineteenth century progressed, however, the jury's protective function diminished in importance.[101] The *Law Times* pointed out that the 'nearer a writer lives to the period when a great boon has been wrested from arbitrary and irresponsible power by the people whence he has sprung, and of which he forms a member, the higher will be the consideration wherewith he regards the triumph achieved'.[102] The development of judicial independence had reduced the risk of subservient actions by judges,[103] thereby undercutting one of the central rationales for the Blackstonian view of jury trial.[104] Further, there were other, more effective means of controlling arbitrary power:

> The printing-press and the steam-engine are after all the best guardians of the liberty and privileges of Englishmen. The general diffusion of education, through the instrumentality of the first, and the rapid dispersion of intelligence by the latter,

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[94] 11 & 12 Vict., c.43 and 12 & 13 Vict., c.18, respectively. Sir John Jervis was Attorney General from July 1846 to July 1850, and piloted three statutes (Jervis' Acts) through parliament in 1848 to reform the role of the justices of the peace.

[95] Bentley points out the 1849 Act did not entirely succeed in its goal, and it was not until the enactment of the Licensing Act 1902 that magistrates were finally forbidden to hold hearings in licensed premises. Bentley, *English Criminal Justice*, 22-23.

[96] 4 Bl. Comm., 342.

[97] 3 Bl. Comm., 379. Blackstone went on to say that 'it is not to be expected from human nature that the few should always be attentive to the interests and good of the many'. Ibid.

[98] 4 Bl. Comm., 378.

[99] Ibid, 343.

[100] See Alan Wharam, *The Treason Trials, 1794*, Leicester, 1992.

[101] 'Trial by Jury', 26 *Solicitors' Journal*, 1 April 1882, 341 ('[The jury was necessary in a] ruder state of society, when the personal security of the subject and the rights of property were less secure from the encroachments of the Crown and the violence of the powerful than at the present day').

[102] 'Trial by Jury', 11 *Law Times*, 2 Sept. 1848, 485

[103] This process occurred during the eighteenth century and was still underway as Blackstone was writing. I have discussed this at greater length elsewhere; see Conor Hanly, 'The Decline of Civil Jury Trial in Nineteenth-Century England', (2005) 26 *Journal of Legal History* 253, 255-257.

[104] See 3 Bl. Comm., 379-381.

> afford the safest guarantees against arbitrary or despotic power on the part of a Government, and against danger from the overthrow of the laws of property by corrupt or tyrannical magistrates, that can possibly exist.[105]

Even the most partisan defenders of jury trial came to recognise that the jury was not always necessary: At an 1834 dinner commemorating the 1794 Treason Trial acquittals, at which trial by jury was literally the toast of the occasion, the main speaker stated – to applause – that a jury was not required in all cases.[106]

The importance of the judge in a trial was increasingly recognised, to the extent that the *Law Magazine* was able to point out that 'trial by jury is trial by judge and jury ... if you were to pick twelve men, who, without assistance of a judge, were called on to try causes, the system would be a ludicrous farce'.[107] The judge usually did not need to try very hard to communicate his opinion of the case. In 1850, the *Times* wrote that the 'mere pantomimical expression of disgust or incredulity on the part of the presiding magistrate will be sufficient to neutralize the hypothesis of an advocate, or to shake the testimony of a witness'.[108] The *Times* suggested that in ninety-nine cases out of one hundred, the prisoner's fate ultimately rested with the judge rather than the jury.[109] Similarly, Charles Trower asked 'how often has not [the jury's verdict] depended upon, and the key to it consisted in, the previous summing up by the Judge?'[110] Judges also could use more direct methods to control juries, such as demanding an explanation for a verdict[111] or instructing the jury to reconsider their verdict.[112] Many commentators were concerned that in their efforts to guide juries to correct verdicts, judges sometimes overstepped their constitutional roles and undermined respect for the institution of trial by jury. The *Liverpool Mercury* complained in 1822 that judicial criticism would have 'a direct tendency to bring into contempt that palladium of British liberty, the Trial by Jury'.[113] The *Jurist* wrote that the independence of juries was as important as the independence of the judiciary:

> If [the jurors] are to be brow-beaten and insulted with impunity whenever they differ from the judge – if they are expected on all occasions to agree with his view of the facts, as well as of the law, under pain of being taunted with partiality or prejudice – the true function of a jury will have ceased, and it will no longer remain, what it has been termed, 'the palladium of our liberties', but will be rendered a

[105] 'Trial by Jury', 11 *Law Times*, 2 Sept. 1848, 485. See also 'Trial by Jury', 26 *Solicitors' Journal*, 1 April 1882, 341 ('[Public opinion had become an] effective check upon any corruption or partiality on the part of the judge'); 'The Juries Bill', 8 *Law Journal*, 22 Feb. 1873, 118, 119 (arguing that the development of the press had done away with the protective function of trial by jury, and the only reason to maintain the institution of the jury was its utility at deciding issues of fact); 'Trial by Jury – Should it be Abolished?', 74 *Law Times*, 18 Nov. 1882, 42 (reproducing a paper by Joseph Brown to the National Association for the Promotion of Social Science, arguing that judges were responsible to both the house of commons and to the public press, the latter of which almost rivalled the commons in power).

[106] 'Trial by Jury', *Morning Chronicle*, 6 Nov. 1834, 3.

[107] 'Trial by Jury' (1859) 7 *Law Magazine (3rd Ser)* 318, 339.

[108] *The Times*, 29 Mar. 1850, at 4, col. D.

[109] Ibid.

[110] Charles F. Trower, *The Anomalous Condition of English Jurisprudence*, London, 1851, 88.

[111] *Ash v Ash* (1697) Comb 357-58; *Beardmore v Carrington and Others* (1764) 2 Wils KB 244.

[112] *R v Meaney* (1862) Le & Ca 214. Towards the end of the nineteenth century, Sir Harry Poland, one of nineteenth-century England's leading criminal lawyers, expressed the view that a trial judge clearly had the right – and sometimes the duty – to order a jury to reconsider a verdict. 'Power of Judge to Refuse to Receive a Verdict in a Criminal Case and to Direct Jury to Reconsider their Verdict', 87 *Law Times*, 25 May 1889, 65.

[113] 'Trial by Jury', *Liverpool Mercury*, 2 Aug. 1822, 40.

machine in the hands of the judge – a mere *lit de justice*[114] to register his decrees, without the exercise of independent thought or free action.[115]

VI. Incremental Reform

In the space of eighteen months in 1837-38, three separate parliamentary committees recommended that justices be given the power to deal with minor felonies.[116] On foot of the third report especially, Lord John Russell, the home secretary, and Fox Maule, MP prepared the Metropolitan Police Courts Bill 1839. The bill proposed to extend the summary jurisdiction of police magistrates appointed in London by the home secretary to include the theft of any chattel, money or valuable security, or receipt of any such property knowing it to be stolen.[117] The proposal was not limited by the age of the offender, nor by the value of the property in question. The sole limitation on the magistrate's jurisdiction was the absence of aggravating features that would render insufficient the maximum penalty available to the magistrate (a fine of £5 or up to three months' imprisonment).[118] These proposals, more radical than anything ever previously advanced, provoked immediate protest. The *Jurist* labelled the bill 'such a tyrannical interference of the law with private liberty, under pretence of securing good order, as was never before witnessed'.[119] Parliamentarians in both houses objected to the transfer of so many offences to non-jury courts as a 'violation of every sacred principle which had hitherto been held sacred in the administration of criminal justice'.[120] Other commentators argued similarly.[121] A further concern was the 'enormous amount of patronage [that] was to be vested in the hands of the Secretary of State for the Home Department' through his power to appoint the London magistrates.[122] Lords Lyndhurst and Brougham expressed their concerns over the

[114] A *lit de justice* was an institution through which a French legislative assembly was required to accept the King's will. Sarah Hanley, *The 'Lit de justice' of the Kings of France: Constitutional Ideology in Legend, Ritual and Discourse*, Princeton, NJ, 1983; Mack P. Holt, 'The King in Parliament: The Problem of the Lit de Justice in Sixteenth Century France', (1988) 31 *Historical Journal* 507.

[115] 5 *Jurist (n.s.)*, 16 April 1859, 421. Ten years later, *Punch* made a similar comment: '[I]f Judges bring their juries into the Court's contempt, the moral strength of [the jury as a bulwark of liberty] will be sensibly dimmed'. 'Judge v. Jury', *Punch*, 27 March 1869, 130. See also 'Judges and Juries', 97 *Law Times*, 14 July 1894, 240 (arguing that judicial criticism of juries that gave verdicts with which the judge disagreed would lead eventually to the abolition of jury trial).

[116] Commissioners of Criminal Law, *Third Report*; Select Committee on the Third Report of the Criminal Law Commissioners, *Report*; Select Committee on Metropolitan Police Offices, *Report* (1838).

[117] Metropolitan Police Courts HC Bill 1839 [57], cl.26.

[118] Ibid. The bill offered no definition or examples of such aggravating features, thereby leaving magistrates to determine on their own whether the case would be suitable for summary trial.

[119] 3 *Jurist*, 31 Aug. 1839, at 737.

[120] *Parliamentary Debates*, series 3, vol. 50, col. 188, 12 Aug. 1839 (HL) (Lord Lyndhurst). For similar parliamentary protestations, see *Parliamentary Debates*, series 3, vol. 47, col. 1302, 3 June 1839 (HC) (George Darby, MP); series 3, vol. 49, col. 533, 19 July 1839 (HC) (Charles Law, recorder of London); series 3, vol. 49, col. 1051, 31 July 1839 (HC) (Sir Thomas Fremantle, MP); series 3, vol. 50, cols. 184, 189, 12 Aug. 1839 (HL) (Lord Brougham).

[121] See, for example, 3 *Jurist*, 17 Aug. 1839, 689 (arguing that the institution of jury trial would be diminished in general estimation by such a large transfer of jurisdiction to the summary courts); *The Times*, 7 Aug. 1839, 6, col. A (arguing that summary justice 'involves in its very nature such a violation of the constitutional spirit of our laws' that it could be justified only by special circumstances); *The Times*, 13 Aug. 1839, 4, col. E (arguing that the extension of summary jurisdiction in this bill opened the 'way to an indefinite proscription of the more constitutional mode of dispensing justice').

[122] *Parliamentary Debates*, series 3, vol. 49, col. 531, 19 July 1839 (HC) (Charles Law, recorder of London). See also col. 1039 (Law decrying the willingness of the bill's advocates to 'intrust the power of committing for felony to an officer who was removable at the pleasure of the Crown'). Law also tried unsuccessfully to insert a provision into the bill that would guarantee police magistrates their positions during good behaviour. Ibid 911-912.

independence of police magistrates who could be removed at the pleasure of the Crown.[123] The *Times* wrote that leaving criminal adjudication to a government-appointed magistrate 'involves such a perilous and unconstitutional suppression of trial by jury, the main safeguard of British justice, as … may well be regarded with the utmost suspicion and distrust'.[124] Several contributors stressed that they were not necessarily opposed to summary jurisdiction in principle, but they were concerned that this bill did not define the offences that could be determined summarily.[125] Ultimately, the Bill's opponents were successful and the House of Lords rejected the summary jurisdiction provisions in the Bill.[126]

1. Juvenile Offenders

This defeat was a vindication for two Criminal Law Commissioners who had argued for a more incremental approach to extending summary jurisdiction. David Jardine told the house of lords that the public would be shocked if jury trial were to be removed from too great a range of offences.[127] Similarly, William Wightman had argued that summary jurisdiction should be extended in respect of juvenile offenders first, and then evaluated prior to considering a similar extension in respect of adult offenders.[128]

Reformers had long expressed concern about the treatment of juveniles by the criminal justice system. Sir John Eardley-Wilmot, chairman of the Warwickshire quarter sessions and the leading advocate for the interests of juvenile offenders, argued that early imprisonment resulted in a juvenile losing his sense of shame as well as his prospects for subsequent improvement, which virtually guaranteed that he would continue in a life of crime.[129] Eardley-Wilmot had been an early advocate of extending summary jurisdiction to juvenile crime; in 1827, he published an influential pamphlet in which he argued that the early imprisonment of children was a primary cause of crime.[130] He argued that minor thefts committed by juveniles should be triable summarily by two justices, using Peel's Acts as a model.[131] Such a system would allow the infliction of immediate punishment, which in turn would reduce the possibility of exposure to hardened offenders, the disgrace of a public trial, and the stigma of a verdict, as well as reducing expense.[132] Over the course of the next decade, Eardley-Wilmot and other parliamentarians introduced several bills to implement some such scheme.[133]

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[123] *Parliamentary Debates*, series 3, vol. 50, cols. 188, 189, 12 Aug. 1839 (HL).
[124] *The Times*, 9 Aug. 1839, 6, col. B.
[125] See, for example, *The Times*, 7 Aug. 1839, 6, col. A; *The Times*, 13 Aug. 1839, 4, col. E; *Parliamentary Debates*, series 3, vol.49, col.1051 (HC) (Captain T. Wood and Sir Thomas Fremantle).
[126] Parliamentary Debates, series 3, vol. 50, col. 192, 12 Aug. 1839 (HL). *The Times* gave principal credit for the rejection of the summary jurisdiction provisions to Charles Law, recorder of London. *The Times*, 18 Oct. 1839, 4, col. C.
[127] Select Committee on the Criminal Law Commissioners' Third Report, *Report*, 36.
[128] Ibid, 29.
[129] John Eardley-Wilmot, *A Letter to the Magistrates of Warwickshire on the Increase of Crime in General*, London, 1820, 10-12. See also his testimony before various parliamentary committees: Select Committee on Criminal Commitments, *Report*, 11 and 26; Commissioners on County Rates, *Report*, QQ.191-92.
[130] John Eardley-Wilmot, *A Letter to the Magistrates of England on the increase of Crime and an Efficient Remedy*, London, 1827.
[131] Ibid, 15-16.
[132] Ibid, 20 and 24.
[133] See, for example, A Bill to Extend the Power of Summary Convictions of Juvenile Offenders, HC Bill (1829) [113]; A Bill to Alter and Amend the Law of Larceny relating to Offenders under a certain Age, HC Bill (1833) [207]; A Bill to Alter and Amend the Law of Larceny relating to Offenders under a certain Age, HC Bill (1837) [224]; A Bill to Authorise the Summary Conviction of Juvenile Offenders in certain Cases of Larceny, HC Bill (1837) [321]; A Bill to Authorise the Summary Conviction of Juvenile Offenders in certain cases of Larceny and Misdemeanour, HC Bill (1840) [48].

Simultaneously, most official committees and commissions that considered the issue between 1827 and 1837 supported extending summary jurisdiction to juveniles in order to protect them and to reduce expense.[134] Most importantly, the Criminal Law Commissioners, whose third report focused directly on juvenile crime, formally recommended that two justices should have the power to summarily determine larceny charges against offenders aged under fifteen providing the value of the property stolen did not exceed ten shillings.[135] In 1840, Eardley-Wilmot tried again; this time, the house of commons passed his bill but it failed in the upper house.[136] It was not until 1847 that parliament finally enacted the Juvenile Offenders Act which permitted two or more justices to deal summarily with any offender aged under fourteen years[137] who was charged with simple larceny or any offence punishable as simple larceny.[138] To exercise this jurisdiction, the justices had to observe certain formalities: they had to be in petty sessions assembled,[139] in open court, at the usual place for such sessions.[140] The accused had the absolute right to object to a summary trial at the conclusion of the prosecution's case, and to demand jury trial at quarter sessions.[141] The Act did not explicitly require the justices to inform a defendant of this right, but the *Justice of the Peace* and the *Law Times* argued that such a requirement was implicit in the Act.[142] Thus, the Act was couched in terms that explicitly maintained a right to jury trial even for minor larcenies, suggesting a degree of nervousness on the part of the Act's proponents.

[134] See, for example, Select Committee on Criminal Commitments, *Report*, 9; Select Committee on County Rates, *Report*, xx; Inspector of Prisons, *Report*, 90-91; Commissioners of Criminal Law, *Third Report*; Select Committee on Metropolitan Police Offices, *Report* (1838), 23-26. But see Commissioners on County Rates, *Report*, 21 (arguing against different tribunals and consequences for adult and juvenile offenders).

[135] Commissioners of Criminal Law, *Third Report*, 5.

[136] A Bill to Authorise the Summary Conviction of Juvenile Offenders in certain cases of Larceny and Misdemeanour, HC Bill (1840) [48]. Sir John Pakington, the sponsor of the Juvenile Offenders' Act 1847, argued that the experience of the 1840 Bill demonstrated that the house of commons had accepted the principle of his bill. *Parliamentary Debates*, series 3, vol. 92, col. 40, 28 April 1847 (HC).

[137] As originally drafted, the 1847 legislation applied to children up to the age of fifteen, but the age was reduced to fourteen by a Select Committee. See A Bill for the More Speedy Trial and Punishment of Juvenile Offenders, HC Bill (1847) [435]. It is unclear why the Committee changed this limitation; Willmore pointed out that the age of fourteen tallied with the common law view of the age of criminal responsibility. Graham Willmore, *Is Trial by Jury Worth Keeping?*, London, 1850, 15.

[138] Juvenile Offenders Act 1847, s.1. Acts punishable as simple larceny included a variety of offences contained in ss. 5, 26, 29, 36, 37 38, 42, 44 and 45 of the Larceny Act 1827, along with stealing ore from mines in Cornwall under 2 & 3 Vict., c. 58, s. 10. Charles S. Greaves, *Act for Conviction of Juvenile Offenders 10 & 11 Vict., c.82*, London, 1847, 31.

[139] The *Justice of the Peace* interpreted this requirement to mean that the justices had to be assembled in their regular petty sessions. 11 *Justice of the Peace* (1847), 590, 605 (response to letters from A Constant Subscriber and A Subscriber).

[140] If petty sessions were normally held in more than one place, then all such places would constitute the usual place for the purposes of the 1847 Act. 11 *Justice of the Peace* (1847), 668.

[141] Juvenile Offenders Act 1847, s. 1.

[142] 20 *Justice of the Peace* (1856), 381 (response to a letter from JP); 9 *Law Times*, 11 Sept. 1847, 500. Nevertheless, Torrens M'Cullagh, MP told the house of commons in 1850 that the clerk of the peace for Portsmouth had told him that in sixty-six cases prosecuted under the 1847 Act, none of the defendants had been informed of their right to choose jury trial. *Parliamentary Debates*, series 3, vol. 110, col. 499, 18 April 1850 (HC).

2. Extension to Under-Sixteens

The 1847 Act was broadly welcomed.[143] The *Law Times*, for example, wrote that the Act was 'not a *step* merely, but *a stride*, in the right direction.[144] The Act was also a success: The right to jury trial was rarely exercised – a return of all those returned for trial for larceny in six counties in 1849 showed only twenty-two offenders aged under fourteen.[145] By contrast, the Middlesex sessions in 1846 alone had committed for trial 181 offenders aged under fourteen, 176 of them for larceny or stealing from the person.[146] Further, the cost of a summary prosecution under the 1847 Act was some ninety percent lower than the cost of a prosecution at quarter sessions.[147] The success of the Act in turn provided justification for its extension to older children, with several parliamentarians noting how well the 1847 Act had worked.[148] Parliament extended the 1847 Act to children under sixteen years in 1850,[149] with virtually no debate on the principle of summary jurisdiction. Even Charles Law, recorder of London, who had led the opposition to the 1839 Bill, accepted that there were few qualms about such an extension.[150] Parliament also took the opportunity to strengthen the defendant's power to choose jury trial. Section 2 of the 1850 Act specifically required one of the justices hearing a case brought under the Juvenile Offenders' Acts to ask the defendant before giving his defence whether he would prefer a jury trial. That Parliament felt the need to introduce this provision vindicated comments from Torrens M'Cullagh, MP that the choice provision contained in the 1847 Act was insufficient to protect defendants' rights.[151]

3. Adult Offenders

The apparent success of the 1847 Act provided a basis for an extension of summary jurisdiction to adult offenders. The *Justice of the Peace*, for example, argued that the 1847 provisions should have been extended to all minor offences that were not worth the expense of a prosecution.[152] Two bills, published in 1849 and 1850, proposed to extend the 1847 Act to all larcenies in which the property stolen had a value under five shillings or one shilling,

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[143] Serjeant John Adams, chairman of the Middlesex sessions, was one of the few commentators who opposed the introduction of summary jurisdiction for minor juvenile offences. He informed the Middlesex grand jury in 1849, for example, that the Juvenile Offenders Act not only deprived the magistrates of the assistance of a jury, but also removed the presence of the Bar as a safeguard. 'Middlesex Sessions – Summary Jurisdiction', 13 *Law Times*, 7 July 1849, 328-29.

[144] 9 *Law Times*, 11 Sept. 1847, 500. The *Justice of the Peace* was only sorry that the Act was limited to simple larcenies. 'Justices' Jurisdiction under the Juvenile Offenders' Act', 11 *Justice of the Peace* (1847), 721.

[145] House of Commons, *Abstract of Larcenies in Quarter Sessions*. The youngest was aged eight; the majority of child offenders (thirteen) were aged twelve or thirteen.

[146] Select Committee of the House of Lords on the Execution of the Criminal Law, especially respecting Juvenile Offenders and Transportation, *Second Report* (HL 1847, 534), 210 (Appendix to Minutes of Evidence, summary of a return submitted by Serjeant Adams).

[147] Official figures for 1856 indicate that the average cost of a prosecution under the 1847 Act was twenty-two shillings. House of Commons, *Return of Judicial Statistics relative to Police and Constabulary, Criminal Proceedings and Prisons, 1856* (HC 1857, 2246) xiv. The average prosecution at quarter sessions in 1856 came to more than £10 (i.e., 200 shillings). ibid.

[148] See, for example, *Parliamentary Debates*, series 3, vol. 107, col. 104, 10 July 1849 (HC) (Sir George Grey, home secretary); series 3, vol. 108, col. 1135, 20 Feb. 1850 (HC) (Sir William Miles, MP and chair of Somerset quarter sessions); series 3, vol. 109, col. 1199, 20 March 1850 (HC) (Charles Law, recorder of London); series 3, vol. 110, col. 510, 18 April 1850 (HC) (Sir John Pakington).

[149] Larceny Act 1850, s. 1.

[150] *Parliamentary Debates*, series 3, vol. 109, col. 1199, 20 March 1850 (HC).

[151] See n.142.

[152] 'The Juvenile Offenders Act, 10 & 11 Vict., c.82', 11 *Justice of the Peace* (1847), 561.

respectively, regardless of the age of the offender.[153] Both bills met determined opposition, again led by Charles Law, the recorder of London, who argued that these measures would 'strike a blow against the best franchise that every Englishman enjoyed, namely of being tried by a jury of his countrymen'.[154] Both attempts failed in Parliament, although the 1850 bill – stricken of the wider provision - was enacted to extend the 1847 Act to offenders aged under sixteen. These bills were merely opening skirmishes, however, and battle was joined in earnest over the Criminal Justice Bill in 1854, introduced in the house of lords by Lord Chancellor Cranworth. The bill proposed to allow two justices to determine small thefts summarily regardless of the age of the defendant.[155] The reformers' primary focus was the inefficiency of jury trial when applied to minor thefts. Lord Chief Justice Campbell told the house of lords that he had just returned from the assizes, and in every circuit he had found persons awaiting trial for 'offences of the most trivial character, such as stealing a loaf of bread, a pound of bacon, a pair of old shoes, or a few turnips of the value 1d'.[156] This was no exaggeration: an abstract of prosecutions in six counties in 1849 shows that, out of some 1,500 larceny cases, more than one-quarter involved property worth a shilling or less.[157] More than one in eight cases involved property worth less than one shilling, and three cases involved property worth less than one penny.[158]

Serious opposition to the bill emerged in the house of commons. There, the bill's proponents again pointed to the waste inherent in trying minor thefts before juries, and the problems that pre-trial detention caused.[159] The attorney general also pointed to a provision in the bill requiring the defendant's consent to summary trial as a protection of the accused's rights.[160] The bill therefore proposed merely to use the petty sessions to 'dispose of a class of cases that should never have been brought before the higher courts'.[161] Leading the opposition, however, Sir Thomas Chambers, MP argued that few defendants would spend more than three weeks in prison awaiting trial, and those who were acquitted at trial were not necessarily innocent of the charges.[162] He denied the effectiveness of the consent provision, arguing that in rural areas the police would conspire to prevent any real choice being exercised.[163] Further, Chambers argued that justices would not respect the boundary between simple larceny and more aggravated offences.[164] Instead justices would simply ignore the aggravating features in order to expand

[153] Bill to extend the provisions of the Acts for the more speedy trial and punishment of juvenile offenders, and to apply the same to the trial and punishment of larcenies of small amount, HC Bill (1849) [402]; Bill for the further extension of summary jurisdiction in cases of larceny, HC Bill (1850) [31].
[154] See *Parliamentary Debates*, series 3, vol. 109, col. 1200, 20 March 1850 (HC). See also Parliamentary Debates, series 3, vol. 110, col. 500, 18 April 1850 (HC) (Sir George Strickland) and col.497 (Torrens M'Cullagh, MP)
[155] Bill for diminishing expense and delay in the administration of criminal justice in certain cases, HL Bill (1855) (148)
[156] *Parliamentary Debates*, series 3, vol. 132, col. 54, 30 March 1854 (HL).
[157] House of Commons, *Abstract of Larcenies in Quarter Sessions*.
[158] Ibid.
[159] See, for example, *Parliamentary Debates*, series 3, vol. 137, col. 1168, 26 March 1855 (HC) (Robert Palmer, MP noting the case of a man who pleaded guilty to stealing two gallons of beans but whose prosecution nevertheless cost over £16; George Hadfield, MP, referring to seventeen cases of larceny involving property worth just over 17 shillings that cost £150 to prosecute).
[160] Parliamentary Debates, series 3, vol. 139, col. 1870, 6 Aug. 1855 (HC).
[161] Ibid.
[162] Ibid, col. 1867.
[163] Ibid, col. 1868. Chambers did not specify how the police might bring about this result.
[164] Ibid, col. 1870.

their jurisdiction.[165] As a result, Chambers argued that the bill would effectively abolish trial by jury.[166]

Despite this opposition, the Criminal Justice Act was enacted and came into effect in August 1855. The Act allowed two or more justices (or any stipendiary or metropolitan magistrate acting alone) to deal summarily with any case of simple larceny involving property worth less than five shillings.[167] The justices retained discretion to commit suspects to trial at quarter sessions in cases containing aggravating factors, such as a prior conviction.[168] The maximum penalty that could be imposed under the Act was three months' imprisonment.[169] The Act required the trial court to ask the defendant for his consent to being tried summarily after all the prosecution witnesses had been heard, and if the defendant refused, he would be committed for trial.[170] The Act also granted justices the power to take a guilty plea from anyone charged with simple larceny of property worth less than five shillings.[171] The Act required that summary hearings be held in open court, and the courts' sittings were to be publicly advertised.[172]

VII. Effect of the 1855 Act

The effect of the Act was felt immediately. There were 25,972 persons committed for trial in 1855; the following year, there were 19,437 such committals, a drop of 25 percent.[173] Most of this decline was due to a drop in committals for larceny, which fell by 6,939.[174] The overall trajectory of committals continued to fall for the rest of the century, reaching 10,149 in 1900.[175] In that year, only a relative handful of larcenies (4,220) were tried before juries. But almost ten times that number (39,630) were tried summarily for indictable larcenies.[176] Prior to the 1847 and 1855 Acts, all of these summary cases would have required a full jury trial for determination. This points to another success of the move towards summary jurisdiction: a higher level of prosecutions for larcenies. As noted, 1856 saw a drop of 6,535 committals for trial for larceny from 1855, but 11,272 prosecutions for larceny were brought under the 1855 Act.[177] By 1874 there were more prosecutions brought under the 1847 and 1855 Acts (17,606) than committals for all classes of crime (13,769).[178] Thus, the introduction of these statutes prompted an increase in the number of prosecutions for indictable crime overall. It seems likely

[165] Ibid.
[166] Ibid, col.1867. Seymour Fitzgerald, MP also argued that once the principle of summary trial for adult felonies was conceded, summary jurisdiction could be expanded without limitation. Ibid, col.1167.
[167] Criminal Justice Act 1855, s. 1. Justices could also deal summarily with cases of attempted simple larceny and attempted larceny from the person up to the same value. ibid. The value of the stolen property was to be determined by the justices. 'The Practice under the Larceny Summary Jurisdictions Act and the Juvenile Offenders Acts', 26 *Law Times*, 6 Oct. 1855, 30.
[168] Section 1 of the Act specifically precluded summary jurisdiction in cases in which the defendant had a prior conviction, as a result of which the case was punishable by transportation or penal servitude. See also 19 *Justice of the Peace* (1855), 668 (response to a letter from A Subscriber, advising that a boy who broke into a house and stole a half-sovereign therefrom was properly committed for trial).
[169] Criminal Justice Act 1855, s. 1.
[170] Ibid, s. 2.
[171] Ibid, s. 3. Justices could also deal with guilty pleas to charges of larceny from the person and larceny as a clerk or servant of property worth up to five shillings.
[172] Ibid, s. 9.
[173] House of Commons, *Return of Judicial Statistics 1856*, viii.
[174] Ibid, 72.
[175] House of Commons, *Judicial Statistics, England and Wales, 1900, Part I: Criminal Statistics*, Cd. 953, 1902, 29, Table A.
[176] Ibid, 30, Table B.
[177] House of Commons, *Return of Judicial Statistics 1856*, xiv.
[178] House of Commons, *Return of Judicial Statistics 1875, Part I*, C.1595, 1876, 62.

that many of these summary prosecutions would not have been brought had a full jury trial been necessary.[179]

A further benefit of the switch to summary jurisdiction was a substantial financial saving. In 1856, the *Judicial Statistics* recorded 11,272 prosecutions under the 1855 Act and a further 2,031 cases under the 1847 Act.[180] The average cost of these prosecutions was recorded at £1 14s 9d and £1 0s 2d, respectively.[181] The average cost of a jury prosecution came to £9 17s 4d, seven times greater than a prosecution under the 1855 Act, and almost ten times greater than the cost of a case brought under the 1847 Act. Using these figures, we can calculate that transferring lesser larceny cases to the petty sessions saved almost £110,000 compared to the cost of committing them for jury trial. For context, recall that in 1846, the public purse paid out some than £400,000 in respect of prosecutions. Thus, the extension of summary jurisdiction resulted in more prosecutions at a considerably reduced outlay.

VIII. Conclusion

Hay noted that the jury went '[f]rom being the epitome of English criminal law in the eighteenth century ... [to being] the little-used symbol of it in the nineteenth'.[182] In this article, I have argued that a large part of the reason for this transformation was the shift from jury trial to summary trial that occurred on foot of the three statutes enacted in the middle of the century. Prompted by efficiency concerns, reformers pointed to two issues in particular: the injustice and moral degradation that arose from long periods of pre-trial detention, and the waste of money inherent in sending low level larcenies to trial before a jury. Summary jurisdiction offered a solution to both issues – a system of trial that was both quick and cheap. Transferring low level indictable crime to the petty sessions, it was argued, would result in a more efficient criminal justice system and would encourage the prosecution of more minor crime. With the enactment of the Juvenile Offenders Act 1847 and the Criminal Justice Act 1855, the reformers were proved correct – the evidence suggests an increase in the number of minor larcenies being prosecuted but at a much lower cost to the public purse. Those who opposed this legislation did so on foot of the likely effect of extending summary jurisdiction on the institution of jury trial. On this point, the opponents were also proved correct. In 1856, the first year after the enactment of the 1855 Act, the number of persons committed for trial was down 25 percent on the previous year. Most of this reduction was accounted for in the reduced committals for larceny. And the decline continued: notwithstanding some fluctuations, the *Judicial Statistics* show a downward trajectory for committals to the end of the century: between 1855 and 1900, annual committals for trial more than halved.

There are some parallels with the use of civil juries in the nineteenth century.[183] In both cases, reformers overcame entrenched opposition by moving incrementally and building confidence in an alternative method of trial. And in both instances, the persons most affected by the reforms seemed happy with the changes. Under the Common Law Procedure Act 1854, the litigants had to agree to a bench trial, and that they did so in increasing numbers through the century suggests general satisfaction with the 1854 Act. Similarly on the criminal side:

[179] Jackson makes this point in relation to summary prosecutions brought after the enactment of the Summary Jurisdiction Act 1879. Richard M Jackson, 'The Incidence of Jury Trial in the Past Century' (1937) 1 *Modern Law Review* 132, 136.
[180] House of Commons, *Return of Judicial Statistics 1856*, xiv.
[181] Ibid.
[182] Douglas Hay, 'The Criminal Prosecution in England and its Historians' (1984) 47 *Modern Law Review* 1, 4.
[183] See Hanly, 'The Decline of Civil Jury Trial in Victorian England'.

defendants charged under the 1847 and 1855 Acts were entitled to insist on a jury trial; the fact that prosecutions under these statutes proliferated so quickly suggests that defendants had few qualms about being tried by magistrates. No doubt the maximum punishments available made the summary option rather more attractive – three months' imprisonment at petty sessions against seven years' transportation or two years' imprisonment if convicted on indictment.[184] It seems likely that opponents of the 1855 Act would have been emboldened had defendants routinely rejected summary trial and demanded a jury. That they did not made a reversal of the legislation impossible.

The expansion of summary jurisdiction goes a long way to explain the decline in the number of persons committed for jury trial, but there were other factors as well that are beyond the scope of this article. Wiener, for example, points to the Victorian civilising offensive that resulted in a marked reduction in the level of interpersonal violence.[185] If fewer serious crimes were being committed, it makes sense that fewer persons would be committed for trial by jury. Thus, the general pacification of the country to which Wiener refers is likely a factor in the reduced committal figures. Another factor is the increasing use of guilty pleas across the nineteenth century. At the start of the century, judges maintained the traditional common law policy of dissuading defendants from pleading guilty.[186] In 1842, Lords Denman and Campbell informed the house of lords that this policy had been abandoned.[187] By the end of the century, just under 40 percent of persons prosecuted on indictment pleaded guilty.[188] A guilty plea obviates the need for a trial; if more defendants plead guilty, the use of criminal juries must decline. More research is required to determine the precise impact that guilty pleas had on the decline of jury trial.

This article has shown that the extension of summary jurisdiction contributed substantially to the decline in the use of the criminal jury. This is not to suggest, however, that criminal jury trial was unimportant after 1855. The decline in the use of criminal juries was gradual, and thousands of juries continued to be empanelled each year. Often, they heard the most serious cases, which as Wiener notes, generated the most "official and public interest".[189] Some of these juries actively resisted the "criminal law's civilising offensive".[190] But it remains true that the transfer of so much criminal litigation to the petty sessions reduced the predominance of jury trial as a dispositive mechanism. Further, the battles of the mid-century culminating in the 1855 Act succeeded in normalising summary criminal trials for indictable offences. This became apparent during the debates on the Summary Jurisdiction Act 1879, which dramatically extended the jurisdiction of justices of the peace – not a single objection was raised concerning the impact on trial by jury.

[184] See the Criminal Justice Act 1855, s. 1 and the Larceny Act 1827, s. 3 respectively. The 1827 Act was replaced by the Larceny Act 1861, which provided in s.4 that the maximum penalty available was three years' penal servitude or two years' imprisonment with or without hard labour.
[185] Martin Wiener, *Men of Blood*, Cambridge, 2004, 289.
[186] See David J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865*, Oxford, 1998, 14.
[187] Parliamentary Debates, series 3, vol. 63, col. 1515, 14 June 1842 (HL).
[188] House of Commons, *Judicial Statistics, Part I – Criminal Statistics 1898*, Cd. 123, 1900, 45 (Table G) (11,965 prosecutions; 4,421 guilty pleas).
[189] Wiener, *Men of Blood*, 8.
[190] Ibid, 289.