The Emergence of Public Prosecution in London, 1790-1850

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INTRODUCTION

Historians of English criminal justice administration have long asserted that criminal prosecution in England before the second half of the nineteenth century was overwhelmingly “private” in nature.¹ Before the mid-nineteenth century, so the received wisdom goes, “prosecution was almost invariably the sole responsibility of the victim.”² As the subject’s leading historian has observed, “the typical prosecution” in England in the eighteenth and early nineteenth century was “at the initiative of a private citizen who was the victim of a crime and who conducted the prosecution in almost all cases.”³ Indeed, Parliament did not even establish a public prosecutor’s office until 1879, and, thereafter, the office only gradually

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1. See, e.g., David Bentley, English Criminal Justice in the Nineteenth Century 7 (1998) (“The prosecution of criminals was in the eighteenth and early nineteenth century regarded as a private rather than a public responsibility, a matter for the victim.” (citation omitted)); James Fitzjames Stephen, A General View of the Criminal Law of England 155 (London, Macmillan 1863) (“[T]he collection... and preparation of the evidence to be produced at the trial... is in England left entirely in the hands of the attorney for the prosecution... [who] is in no sense of the word a public officer”); Douglas Hay, The Criminal Prosecution in England and Its Historians, 47 Mod. L. Rev. 1, 4 (1984) (“The role of the private prosecutor was overwhelmingly important in practice as well as in theory until well into the nineteenth century.”).


assumed prosecutorial responsibilities in a small subset of criminal cases.

Considered from a comparative perspective, England’s apparent disinterest in public prosecution before the second half of the nineteenth century appears strikingly anomalous. By 1800, countries on the European Continent had long come to rely on public officials to investigate and conduct criminal cases. Even within Britain itself, public prosecution existed by the early years of the nineteenth century: in Scotland, by that time, an official known as the “Procurator Fiscal” essentially “monopolized all serious criminal prosecutions.” And in the United States, which adopted the principal aspects of English criminal law and procedure, states, counties, and cities routinely relied upon public prosecutors to investigate, manage, and argue a broad range of criminal cases by the early years of the nineteenth century.

Most commentators have attributed England’s comparatively late development of public prosecution to a seemingly exceptional national commitment to civil liberties. As early as 1863, in reflecting on “the


   In most countries the duty of making a preliminary investigation into the circumstances of an offence, collecting evidence for the trial, and managing the case in court, is in the hands of public officers. Throughout the Continent officers are to be found answering more or less to the French Procureur Général, Procureur de la République, and Juge d’Instruction. Even in Scotland the Procurator Fiscal and his officers have somewhat analogous duties . . . . In England, . . . the prosecution of offences is left entirely to private persons, or to public officers who act in their capacity of private persons and who have hardly any legal powers beyond those which belong to private persons.


6. Hay & Snyder, supra note 2, at 28.

absence of a public prosecutor" in England, James Fitzjames Stephen proclaimed that the French system of prosecution, which relied upon "elaborate inquiry" by professional police and magistrates prior to trial, "would never be endured" by the English.\textsuperscript{8} Writing in 1983, Douglas Hay surmised that the "attachment" of English political elites to private prosecution "probably derived above all from their abhorrence of the alternative"—namely, "state prosecution."\textsuperscript{9} More recently, Allyson May has claimed that "[a]n historic, deep-rooted mistrust of an authoritarian state, and fear of abuses of state power . . . explains why criminal prosecutions [in England] remained in the hands of private individuals well into the nineteenth century."\textsuperscript{10}

Yet the delayed emergence in England of an official system of public prosecution until the latter half of the nineteenth century remains a historical puzzle.\textsuperscript{11} Between 1750 and 1850, England's central government undertook a series of ambitious initiatives in criminal justice administration that altered the nation's substantive criminal law, transformed the organization of the police and magistracy, and authorized the construction of houses of correction and, later, penitentiaries.\textsuperscript{12} Yet despite such developments, Parliament failed to enact legislation creating an official prosecutorial office until the last quarter of the nineteenth century—this, despite decades of persistent and vocal lobbying.\textsuperscript{13} In the

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8. Stephen, supra note 1, at 169-70. \\
9. Hay, supra note 3, at 171; accord Hay, supra note 1, at 10 (describing the "strongly-held belief . . . that private prosecution was an essential constitutional safeguard against possible executive tyranny, a belief which served to preserve in England the right of prosecution relatively unimpaired into the twentieth century"); Hay & Snyder, supra note 2, at 4 (noting that the English traditionally attached "constitutional significance" to the belief that "prosecutions were almost entirely left to the victim of crime."). \\
11. See John H. Langbein, Response, 26 J. LEG. HIST. 85, 87 (2005) ("The deep puzzle is why the concern about civil liberties . . . was so much more salient in England than on the Continent."). \\
13. As early as the 1790s, leading public officials in England had argued for the establishment of public prosecutors. See, e.g., The Report of the Select Committee Appointed by the House of Commons, Relative to the Establishment of a New Police in the Metropolis &c. and the
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absence of a public prosecutor’s office, victims of crime who sought to prosecute offenses in the higher courts managed as best they could, defraying the costs of prosecution (including private counsel, when retained) by banding together in “prosecution societies” or seeking governmental subsidies. In short, in the higher courts, as Peter King has succinctly observed, “[i]f the victim refused to react, the judicial system remained inert and ineffective.”

Yet while private victims typically provided the necessary impetus for prosecuting cases of felony in the higher courts, this Article argues that public officials in London between roughly 1790 and 1850 played considerable (and considerably underappreciated) roles in prosecuting cases of misdemeanor in the city’s lower criminal courts. In the “police offices” of the metropolis, established throughout London in 1792, persons suspected of petty theft were, in fact, routinely arrested, prosecuted, tried, convicted, and sentenced in ways that dispensed with the involvement of private victims altogether. In many such cases, public officials rather than private victims carried out the essential investigative and forensic tasks of criminal prosecution.

For reasons that we will explore, proceedings in the police offices of late eighteenth- and early nineteenth-century London have rarely occupied the attention of historians. But we cannot understand English criminal justice administration between 1790 and 1850 or the nature of the English state’s involvement in criminal prosecution during this period unless we shed more light on the criminal procedure used in the metropolitan police offices. As I have argued elsewhere, summary (i.e., nonjury) proceedings in the police offices permitted criminal justice administrators confronted

CONVICT ESTABLISHMENT 76 (London, R. Shaw 1799). In the 1820s, Sir Robert Peel observed in the House of Commons that, if Parliament “were legislating de novo, without reference to previous customs and formed habits,” it should “not hesitate to relieve private individuals from the charge of prosecution in the case of criminal offences justly called by writers upon law—Public Wrongs.” 3 RADZINOWICZ, supra note 12, at 259 n.2 (emphasis added). Agitation for the establishment of public prosecutors continued into the 1850s, when a parliamentary subcommittee recommended that some form of public prosecution be established. HOUSE OF COMMONS SELECT COMMITTEE ON PUB. PROSECUTORS, REPORT (1856). For discussions of the debates surrounding the issue, see CLIVE EMSLEY, CRIME AND SOCIETY IN ENGLAND 1750-1900, at 194-97 (3d ed. 2005); W.R. Cornish, Defects in Prosecuting—Professional Views in 1845, in RESHAPING THE CRIMINAL LAW: ESSAYS IN HONOUR OF GLANVILLE WILLIAMS 305 (P.R. Glazebrook ed., 1978); Hay & Snyder, supra note 2, at 37; and May, supra note 10.


15. PETER J. KING, CRIME, JUSTICE, AND DISCRETION IN ENGLAND, 1740-1820, at 17 (2001) (“It was the victim who provided the momentum, the driving force that moved a dispute towards a trial in the major courts.”).

16. As King has observed, “Misdeameanour and summary justice are still relatively understudied.” Id. at 5 n.10.
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with cases of suspected theft to avoid several evidentiary pitfalls associated with trials for theft-related felonies in the higher courts. This Article argues that summary proceedings in the metropolitan police offices in theft-related cases also frequently dispensed with those individuals long considered virtually indispensable to the prosecution of property-related offenses: private victims themselves.

My argument proceeds in six parts. Part I describes a “classic” case of private prosecution at the Old Bailey (London’s main criminal court for the trial of felony offenses) in the late eighteenth century. Part II argues that the system of private prosecution relied upon at the Old Bailey in theft-related cases confronted several pitfalls, ranging from difficulties in detecting the commission of offenses, to the disinclination of victims to prosecute, to the hurdles of securing favorable decisions from grand and trial juries. Part III shifts the discussion to the metropolitan police offices, demonstrating how cases of petty theft could be investigated, initiated, and conducted by public officials associated with those institutions even in instances where victims of theft could not be identified at all. Part IV demonstrates how summary proceedings in the police offices in cases of suspected theft addressed each of the pitfalls inherent in England’s system of private prosecution for felony previously identified in Part II. Part V then seeks to identify the extent to which public prosecution in the police offices characterized criminal justice administration in London before 1850 and to outline the reasons why historians have failed to acknowledge the existence of this distinctive mode of prosecution for so long. Part VI concludes by reflecting on the implications of the Article’s findings for our understanding of English criminal justice administration in the late eighteenth and early nineteenth century.

I. PRIVATE PROSECUTION AT THE OLD BAILEY

Prominent studies of English criminal justice administration in the eighteenth and early nineteenth century agree that private prosecutors essentially monopolized the system of criminal prosecution, especially in cases involving allegations of theft. As Hay has observed, the prosecution of “virtually all thefts” in England before 1850 was “left to the general public.” Similarly, in his pioneering study of English criminal justice administration in Sussex and Surrey from 1660 to 1800, John Beattie concluded that “[o]nly in rare cases” did appointed constables “actively

17. Smith, supra note 12.
18. “That meant that responsibility for the . . . entire conduct of the prosecution was thrown on the victim or his or her family.” Hay & Snyder, supra note 2, at 23. In his research on late eighteenth-century Staffordshire, Hay determined that constables prosecuted “[a] few” cases involving “theft against individuals” in each decade, but that such cases were “probably special.” Id. at 21.
prosecute offenses against property.”

And, most recently, Peter King has determined from his exhaustive study of criminal justice administration in eighteenth- and early nineteenth-century Essex that law enforcement officials “only took responsibility for prosecutions involving property appropriation in *very exceptional circumstances*, such as major coining or forgery cases.”

The virtually universal understanding that private victims monopolized the prosecution of offenses against property in England before the mid-nineteenth century can be illustrated by a paradigmatic case tried at the Old Bailey in the early 1790s. On the morning of July 11, 1793, Granville Sharp—abolitionist, legal theorist, parliamentary reformer, linguist, and amateur inventor—had his silk handkerchief stolen from his pocket while walking up London’s Chancery Lane. Initially, Sharp had failed to detect the loss, preoccupied as he was with “looking in [his] pocket book for a memorandum.” But the alleged perpetrators—George Wightman,

19. Beattie, supra note 14, at 35; accord Hay & Snyder, supra note 2, at 21 (noting that “although parish constables . . . prosecute[ed] a small proportion of cases, . . . [such cases] very rarely concerned theft against individuals.”).
21. The leading force in the English anti-slavery movement from the late-1760s until his death in 1813, Sharp co-founded the Society (originally, the Committee) for the Abolition of the Slave Trade in 1787. On Sharp’s abolitionist activities, see generally Edward Charles Ponsonby Lascelles, Granville Sharp and the Freedom of the Slaves in England (1928).
25. In the late-1790s, Sharp offered the War Office the concept for a primitive form of “bullet-proof vest,” consisting of a bale of wool designed to deflect musket shots. For biographical details, see Prince Hoare, Memoirs of Granville Sharp, Esq.: Composed from His Own Manuscripts and Other Authentic Documents in the Possession of His Family and of the African Institution by Prince Hoare; with Observations on Mr. Sharp’s Biblical Criticisms, by the Right Rev. The Lord Bishop of St. David’s (London, printed for H. Coburn 1820).
26. George Wightman and George Mackay, Old Bailey Proceedings Online (Sept. 11, 1793) (t17930911-14). During the period addressed by this Article, accounts of trials at London’s Old Bailey were published under titles such as The Whole Proceedings on the King’s Commission of the Peace, Oyer and Terminer, and Gaol Delivery for the City of London and also the Gaol Delivery for the County of Middlesex Held at Justice Hall in the Old Bailey, and are commonly referred to as the Old Bailey Sessions Papers (OBSP). This Article cites to the accounts available through the Old Bailey Proceedings Online [hereinafter OBP], a digital archive of surviving editions of the OBSP currently covering the period from 1674 to 1834. See The Proceedings of the Old Bailey, London 1674 to 1834,
an eighteen-year-old, and George Mackay, a youth of fourteen—were spotted by a roving constable, who had initially seen the boys at the corner of Chancery Lane and Fleet Street. After suspecting the two boys of mischief, seeing Mackay approach "close to" Sharp, and then spotting Wightman run away shortly thereafter "with [a] handkerchief in his hand," the constable chased down Wightman, grabbed him "by the collar," and picked up a handkerchief that the boy had tossed into the street. Approached by the arresting officer, Sharp checked his pocket and confirmed that his property was missing. After the constable noted that the handkerchief that he had retrieved was stitched with the initials "G.S.," the officer duly pocketed the evidence so that it could be produced at trial should Sharp elect to prosecute the two youths.27

Sharp did so, and the suspects appeared at the Old Bailey two months later to answer an indictment for petty larceny.28 In the courtroom, Sharp and the arresting officer, unaided by counsel, briefly narrated their stories under oath.29 In response, the two suspects, unrepresented by counsel30 and unsworn,31 fended for themselves as best they could. Mackay stated flatly that he had never seen his codefendant before the time of their arrests. Wightman, for his part, claimed that he had found the handkerchief in question in the street but, with his next nervous breath, invited the presiding judge to consider sending him into service as "a soldier or a sailor." After the jury found both defendants guilty, the judge acceded to Wightman’s request: the two newly minted convicts were "Sent to Sea," there to serve as cannon fodder in England’s undermanned

http://www.oldbaileyonline.org (July 2005). References to the OBP include the name(s) of the defendant(s), the date of the proceeding, and the OBP reference.

27. Wightman and Mackay, OBP, supra note 26.

28. In theory, picking pockets fell within the legal category of "stealing privately from the person"—an offense ostensibly punishable by death. However, as Beattie has observed, the offense of "stealing privately" appears to have been rarely prosecuted in the eighteenth century, likely because of difficulties associated with detecting its commission. Even when prosecuted, moreover, the offense "was not universally regarded ... as deserving of hanging." BEATTIE, supra note 14, at 423. By contrast, an indictment that charged a defendant with petty larceny—the theft of goods valued at less than a shilling—eliminated the prospect of a capital sentence. Id. at 182.


30. Counsel began to represent defendants accused of felonies at the Old Bailey in the 1730s. On the entry of defense counsel, see LANGBEIN, supra note 29, at 167-77. In the early years of the nineteenth century, roughly a quarter of criminal defendants at the Old Bailey were represented by counsel. See MAY, supra note 29, at 35 (25.7% in 1805); Beattie, supra note 29, at 227 tbl.1 (28% in 1800).

31. Although English criminal defendants were permitted to speak at trial, they could not provide testimony under oath until 1898. See Criminal Evidence Act, 1898, 61 & 62 Vict., c. 6; C.J.W. ALLEN, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND 123-80 (1997).
navy, then engaged in a recently declared but rapidly expanding war against Revolutionary France.32

To observers at the Old Bailey in the early 1790s, the case of George Mackay and George Wightman would have appeared utterly unremarkable—with the exception, perhaps, of its high-profile and eccentric prosecutor.33 Indeed, the two young suspects had been detected, arrested, prosecuted, tried, and sentenced in a manner completely consistent with then current theories of how English criminal justice administration was supposed to work. The victim (aided by a vigilant constable, to be sure) had promptly detected that his property had gone missing. The constable (with a bit of effort, true) had arrested the perpetrators “red-handed.” The victim, despite the trifling amount in controversy, had opted to prosecute rather than to overlook the wrong or reach a settlement with the suspects.34 The grand jury, which had heard evidence only on the prosecutor’s behalf, had returned a “true bill.”35 The trial jury, after hearing the testimony and viewing the handkerchief with its tell-tale initials, had convicted the defendants—most likely, after little or no deliberation.36 The judge, untroubled by lawyers for either side, had entered a sentence that, in the context of an escalating and exceptionally violent war, would address both the critical manpower needs of the English state and incapacitate the convicts—quite possibly forever.37


33. Even here, onlookers would probably not have been surprised. Then, as now, prominent social status was no protection against victimization. As a fifteen-year-old, the future Home Secretary and Prime Minister Robert Banks Jenkinson was robbed of his watch on the road from London to Kent, and highway robbers targeted three other future Home Secretaries, as well as the prominent politicians Edmund Burke and Charles James Fox. See Simon Devereaux, Convicts and the State: The Administration of Criminal Justice in Great Britain during the Reign of George III, at i-3 (1997) (unpublished Ph.D. dissertation, University of Toronto) (observing that “[t]he list could be extended”) (on file with author).


35. On eighteenth-century grand jury practice, see LANGBEIN, supra note 29, at 45.

36. Trial jurors did not even sit together in the same section of the Old Bailey’s courtroom until 1738, and deliberations thereafter were usually exceedingly brief. See id. at 21-25.

37. On a per capita basis, more Britons died in the French Revolutionary Wars than in any other military conflict in British history. See generally CLIVE EMSLEY, BRITISH SOCIETY AND THE FRENCH WARS, 1793-1815 (1979). As contemporary depictions attest, those veterans who did manage to return to England often lacked the nimble hands and speedy feet necessary for successful pickpocketing: the devastating effects of cannon shot and “reforms” in surgical technique rendered wartime amputations common. For a particularly graphic treatment, see G.J. GUTHRIE, A TREATISE ON GUN-SHOT WOUNDS, ON INJURIES OF NERVES, AND ON WOUNDS OF THE EXTREMITIES REQUIRING THE DIFFERENT OPERATIONS OF AMPUTATION (2d ed. London, Burgess & Hill 1820) (recording the
Finally, and most importantly for our purposes, the case of Mackay and Wightman also comports with our modern-day scholarly understanding of criminal prosecution in late eighteenth- and early nineteenth-century England: the private victim of the theft—not a public prosecutor—bore the responsibility for initiating and managing the prosecution.

To be sure, public officials performed certain aspects of the two principal tasks of modern-day prosecutors: the investigation of crimes and the presentation of evidence to the ultimate fact-finder. Before trial, as Sharp's prosecution of the two young pickpocketers suggests, constables could play an important role in arresting suspects and investigating offenses. In turn, statutes dating from the 1550s required justices of the peace (JPs), in cases of felony, to compile statements from the accused, the complainant, and material witnesses and to bind over these individuals to appear at trial in the higher courts.

At trial, a variety of public officials might assume forensic roles in presenting evidence. For example, the law officers of the crown traditionally tried cases, such as treason, deemed to affect the critical interests of the state. From time to time, the Solicitor-General conducted the trials of persons indicted for notorious crimes of violence. Several governmental and quasi-governmental entities—including the Mint, the Bank of England, the Post Office, and the Treasury—employed officials "whose responsibility included investigating and prosecuting criminal cases on behalf of the department." In turn, magistrates (or their clerks) periodically appeared at the Old Bailey to authenticate confessions or opinions and practice of British Army surgeons near the end of the Napoleonic Wars). For depictions of amputee veterans (or those claiming to be), see Bruce P. Smith, Circumventing the Jury: Petty Crime and Summary Jurisdiction in London and New York City, 1790-1855, at 251-61 (1996) (unpublished Ph.D. dissertation, Yale University) (on file with Sterling Library, Yale University).


39. In the case of Mackay and Wightman, the arresting constable also testified at trial. See supra notes 26-27 and accompanying text.


41. See, e.g., LANGBEIN, supra note 29, at 104 ("In crimes of state the law officers of the crown and their hirelings had been little better than henchman; in cases of ordinary crime the investigating and charging functions remained largely privatized, in the hands of the victim. Thus, the English had scant experience upon which to draw for constructing a system of impartial public prosecution.")

42. In 1798, for example, the Solicitor-General conducted the prosecution of one James Eyres, accused of murdering an individual associated with the Thames Police Office in a riot outside the office. See James Eyres, OBP (Jan. 9, 1799) (t17990109-5). In the early decades of the nineteenth century, magistrates in London occasionally conferred with the Home Office about the desirability of engaging lawyers to prosecute cases in the higher courts. In September 1830, for example, the police magistrate R.E. Broughton suggested to the Home Office that a "long and intricate" case be "conducted at the public Expence." Broughton to Home Office (Sept. 6, 1830), National Archives (NA): HO 59/2.

vouch for their voluntariness. 44 Finally, by the 1840s and 1850s, through a series of developments whose history remains only dimly understood, police officers in England’s major cities had assumed increasing responsibility for the conduct of criminal prosecutions in the higher courts. 45

It is clear, therefore, that public officials contributed in important ways to England’s so-called system of “private” prosecution well before the mid-nineteenth century. Indeed, three decades ago, John Langbein argued that the “origins” of public prosecution in England could be traced to the sixteenth century, when, in Langbein’s view, English magistrates “became the ordinary public prosecutors in cases of serious crime.” 46 According to Langbein, early modern JPs not only investigated cases prior to trial, as required by the Marian bail and committal statutes of 1554–55, but also served as “back-up prosecutors” when “private accusers” failed to appear at trial or when evidence “was not going to be sufficient.” 47 If, as Langbein contends, one should look to the mid-sixteenth century for the “origins” of public prosecution in England, how can this Article suggest that public prosecution only “emerged” in the nation’s largest city 250 years later?

The answer lies in the limited range of tasks performed by English public officials at trial compared to those dispatched by modern-day criminal prosecutors. Even with respect to the sixteenth and seventeenth centuries, where Langbein identifies periodic magisterial involvement at trial, historians have questioned whether magistrates routinely served as prosecutors in the higher courts. 48 By the eighteenth century, the forensic

44. See, e.g., Robert Davidson, OBP (Nov. 30, 1796) (t17961130-61); Samuel Mitchell, OBP (Jan. 9, 1805) (t18050109-10); William Skinn and Joshua Brown, OBP (Jan. 10, 1810) (t1810011-52).

45. Writing in 1984, Hay observed that “[o]ur findings about the role of the police in prosecutions in the nineteenth century are still, surprisingly, not very far advanced.” Hay, supra note 1, at 9. For preliminary assessments of the prosecutorial roles played by the English police by the mid-nineteenth century, see DAVID PHILIPS, CRIME AND AUTHORITY IN VICTORIAN ENGLAND: THE BLACK COUNTRY, 1835-1860, at 125 tbls.13(c) & 129-30 (1977) (arguing that police forces in Staffordshire and Worcestershire established between 1835 and 1860 involved themselves in prosecution “more regularly and systematically” than had previous officials); Jennifer S. Davis, Prosecutions and Their Context: The Use of the Criminal Law in Later Nineteenth-Century London, in POLICING AND PROSECUTION IN BRITAIN 1750-1850, supra note 2, at 397, 420 (noting that “by the 1870s, the police [in London] were . . . involved in the majority of all [prosecuted] thefts”); and Hay & Snyder, supra note 2, at 4 (“The new [police] forces already in existence in London and other parts of the country were emerging [by the 1850s] as de facto public prosecutors, although the law, for most purposes, regarded the prosecuting policeman as simply another private citizen.”).

46. Langbein, supra note 38, at 313; see also LANGBEIN, supra note 40, at 35-39.

47. Langbein observes as follows:

In this way the Marian scheme was making the JPs into back-up prosecutors. Private citizens . . . would continue to prosecute most cases. But when there were no private accusers, or when their evidence was not going to be sufficient, it was the JP who would investigate, bind witnesses, and appear at assizes to orchestrate prosecution.

Langbein, supra note 38, at 323.

48. For discussion of the extent to which JPs assumed prosecutorial functions at trial during the early modern period, see, for example, JOHN G. BELLAMY, CRIMINAL LAW AND SOCIETY IN LATE
roles played by magistrates at the Old Bailey fell far short of those performed by modern-day prosecutors. Although magistrates (or their clerks) could be called upon to authenticate confessions or attest to their voluntariness, the responsibility of "conducting the case at trial... was almost entirely left to the victim of the crime or his counsel." Put differently, although magistrates and police officers by the late eighteenth century performed prominent roles in pretrial investigation, they did not supplant private victims with respect to the forensic role of presenting evidence at trial.

In sum, through the last decade of the eighteenth century, prosecutions of felony cases in England's higher courts (most importantly, for our purposes, London's Old Bailey) continued to rely overwhelmingly on private victims to initiate and manage criminal prosecutions. When victims failed to appear at trial, judges at the Old Bailey routinely entered dismissals. Similarly, where indictments had been drafted alleging theft from "persons unknown," and actual victims failed to materialize by the time of trial, judges also dismissed at high rates. As we shall see in Part II, difficulties in identifying the proper private individual responsible for prosecuting a case at trial proved to be only one of several pitfalls facing English criminal justice administrators.

II. THE CHALLENGES OF PRIVATE PROSECUTION

At first blush, the case of Mackay and Wightman might suggest that the detection, prosecution, and conviction of suspected thieves occurred easily at the late eighteenth-century Old Bailey. In truth, prosecutions of theft-related cases could easily be derailed if they encountered pitfalls in any of a handful of critical phases: detection, arrest, case initiation, indictment, and trial.
A. Detection

As Sharp’s experiences on the streets of London illustrate, even sober and meticulous property owners, if temporarily distracted, might find it difficult to detect the loss of their personal items. When the faculties of victims were impaired—if, for example, they were asleep or drunk—even those crimes that required perpetrators to be in close physical proximity to their victims might prove difficult to detect.\(^{53}\)

Of course, many thefts occurred far from the individuals whose property was targeted. Persons intent on appropriating items from boats and warehouses on the Thames frequently focused on bulk items held in storage such as hemp, tobacco, rum, sugar, rope, coal, and metal whose loss would be difficult for property owners to detect.\(^{54}\) Likewise, the many building sites of eighteenth- and early nineteenth-century London proved easy targets for opportunistic thieves. Lead pipes and gutters could be reached by persons willing to climb walls or traverse roofs; metal could be removed from buildings by bending, twisting, or cutting; and scraps that had been removed could be melted in a modest fire, rendering them incapable of identification by their owners.\(^{55}\)

Although manufacturing and warehousing facilities could hire employees charged with thwarting misappropriation, the nature of the goods stored in such facilities and the goods’ close proximity to other workers could make detection difficult.\(^{56}\) The prospects of detecting thefts

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53. At least so much is suggested by the frequent victimization of persons who consort with prostitutes.


56. As John Styles’ study of embezzlement in the eighteenth-century English woolen industry demonstrates, medium-sized yarn manufacturers in Georgian Yorkshire could handle 6,000 pounds of yarn each year, making it extremely difficult for them to detect petty pilfering by the many outsiders typically employed in the manufacturing process. Although wool masters might compare the weight of finished yarn against that of the raw materials supplied to their workers, workers who had pilfered quantities of wool learned to increase the weight of the finished product that they returned by “throwing the wool upon wet stones,” “adding oil to make up the weight,” or “steaming the [yarn]
in settings that were less actively monitored, such as building sites, moored boats, or market gardens, must have been even more remote. And if darkness and isolation themselves were not sufficient to stifle detection, individuals who purloined cargo could readily transfer their contraband from the marked containers in which the original goods had been stored into bags that had been "previously dyed black" to obliterate any identifying marks. Like today, the so-called "dark figure" of undetected theft appears to have been considerable.

B. Arrest

Of course, persons who appropriated goods did not merely need to avoid detection by property owners. Theoretically, constables and watchmen possessed broad powers to arrest individuals suspected of committing felonies, including various types of theft. The Constable's Assistant, a manual for English constables published in 1808, instructed its readers that, in cases of felony, they should not only "give the earliest information in [their] power to the Magistrate, but also . . . use [their] utmost endeavours to apprehend the offender, without waiting for a warrant, and to keep him in safe custody till he can be carried before a Justice of the Peace." Although such guidebooks cannot be relied upon as literal descriptions of actual policing practices, recent studies have revealed that London-area constables and watchmen were considerably more zealous and more able than early historians had acknowledged, and that they demonstrated their abilities well before Parliament placed the metropolitan police on a centralized, professional footing in 1829.

With this said, the common law, at least in theory, imposed certain limitations on the powers of officers in the area of arrest. First, like property owners themselves, constables confronted the definitional complexity of the English law of larceny. For example, as The Constable's Assistant advised, the common law of larceny traditionally did not encompass "things that adhere[d] to the freehold" (i.e., fixtures); accordingly, "corn, grass, trees, lead upon a house, rails in a yard, and the


57. COLQUHOUN, supra note 54, at 57.


59. [SOC'Y FOR THE SUPPRESSION OF VICE], THE CONSTABLE'S ASSISTANT: BEING A COMPRENDIUM OF THE DUTIES AND POWERS OF CONSTABLES, AND OTHER PEACE OFFICERS; CHIEFLY AS THEY RELATE TO THE APPREHENDING OF OFFENDERS AND THE LAYING OF INFORMATIONS BEFORE MAGISTRATES 15 (1808) [hereinafter CONSTABLE'S ASSISTANT].

60. For recent histories stressing the relative effectiveness of the police in London before 1829, see Ruth Paley, "An Imperfect, Inadequate and Wretched System"? Policing London Before Peel, 10 CRIM. JUST. HIST. 95 (1989), and sources cited supra at note 12.
like” were “not the property of any one” unless “particular Acts of Parliament . . . made them so.” 61 Second, the common law constrained the ability of constables to conduct searches of suspects before arrest, depriving officers of the equivalent of what modern-day scholars refer to as “detain and search” powers. 62 Thus, for a constable who encountered a suspicious person at night on a dark urban street, determining whether the suspect possessed illicit contraband—whether it be twisted metal, bundled tobacco, lumps of sugar, or skeins of yarn—would have been no simple task.

It is doubtful, of course, that the “formal” law necessarily defined the “informal” contours of police authority. 63 We surely need to know more about the workaday practices of police officers and, to the extent possible, their attitudes about the law to know the degree to which the formal law actually limited their authority. But it does seem clear that officials occasionally encountered serious problems in seeking to arrest persons suspected of wrongdoing. In 1761, for example, John Nichols, “Rigger to the King and the East India Company,” testified to a committee of the House of Commons about the prevalence of thefts committed by operators of “bumboats”—small boats operated on the Thames by persons purportedly engaged in the business of selling food to sailors. As Nichols recounted, he had recently approached a pair of individuals in a bumboat who were suspected of stealing rope. When approached, “the Woman threw the Rope overboard, and told the Officer he might do his worst, for that he could not get any Proof.” 64 Although we must be cautious not to read too much into the woman’s words—uttered, as they were, in the heat of pursuit and recounted by Nichols after the fact—we should also not ignore the likely meaning of the taunt. If Nichols could not recover the rope tossed overboard by the suspected thieves, he would have little chance of determining the rope’s lawful owner—the person responsible for prosecuting the case in the higher courts.

C. Case Initiation

To be sure, if a constable or night watchman did manage to arrest a person with suspicious goods in his or her possession, an indictment could

61. CONSTABLE’S ASSISTANT, supra note 59, at 16.
62. Whether this rule operated as a significant impediment to English police officers in the eighteenth and early nineteenth centuries remains unclear, though interviews of police constables in the twentieth century suggested that they understood that the limitation existed. See Glanville Williams, Statutory Powers of Search and Arrest on the Ground of Unlawful Possession, 1960 CRIM. L. REV. 598.
64. 28 H.C. JOUR. 1026 (1760-61) (emphasis added).
be drafted even when a named victim could not be identified. As the legal commentator Edward Hyde East observed in 1800, a suspect could "be charged in the indictment with having stolen the goods of a person to the jurors unknown."65 However, judges routinely dismissed cases grounded upon indictments alleging theft from "persons unknown" in instances where victims did not appear at trial.66

Even when victims could be identified and chose to appear before magistrates to describe their losses, prosecutions could falter. Under the sixteenth-century statutes that continued to guide the pretrial practices of English magistrates until the mid-nineteenth century, victims who brought their complaints before magistrates were required to post a bond that could be forfeited if the complainant failed to prosecute.67 Parliament also sought to encourage prosecutions through the payment of costs and, in some instances, rewards.68 But even with such incentives in place, many individuals victimized by theft declined to prosecute, seemingly more interested in negotiating the return of their goods than in incurring the expense and inconvenience associated with proceedings in the higher courts.69 Other potential prosecutors may have been deterred by their distaste for the stringent penalties frequently meted out in the higher courts.70 Thus, despite the risk that a victim might forfeit his or her recognizance, and the fact that "compounding" a felony by reaching a settlement with the suspect was itself a punishable offense, numerous victims of theft simply opted not to prosecute.

D. Indictment and Trial

A prosecutor who decided to bring an action in the higher courts next faced a pair of significant challenges: obtaining a "true bill" from the grand jury and securing a conviction from the trial jury.

In modern American law, the grand jury is a highly malleable institution, a body largely controlled by prosecutors, except during its rare "runaway" phases.71 In the eighteenth century, by contrast, the grand jury

66. See Smith, supra note 12, at 140.
67. See supra text accompanying note 40.
68. On the payment of costs, see supra text accompanying note 14. On the reward system, see generally Beattie, supra note 14, at 50-55.
69. "Uppermost in most victims' minds once the crime had been discovered was the desire to get their goods back as quickly as possible." King, supra note 15, at 23.
70. See, e.g., Donna T. Andrew & Randall McGowen, The Perreasus and Mrs. Rudd: Forgery and Betrayal in Eighteenth-Century London 24 (2001) ("A prosecutor might experience uneasiness at the thought of hurrying an acquaintance to death and a sensitivity to the judgments his neighbors might make.").
71. See, e.g., Roger T. Brice, Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence, 39 U. Chi. L. Rev. 761, 764 (1972) (emphasizing the passivity of modern-day grand juries); Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, 80
played an active role in screening cases alleging felony before trial. In late eighteenth-century Surrey, for example, grand juries declined to find “true bills” with respect to roughly seventeen percent of the indictments that they considered. The inconvenience and costs involved in securing an indictment—as well as the roughly one-in-six chance of failure—represented yet another vexing hurdle in bringing a successful prosecution.

Of course, securing a “true bill” provided no assurance of success at trial, where acquittal rates in property-related cases hovered near fifty percent. In cases that involved the theft of commodities or other nondescript items, prosecutions could fail if witnesses could not lay a credible claim to the goods found in the defendant’s possession. In 1795, for example, Charles Fairfield was found not guilty of stealing “exotic plants” after a witness testified that the plant found in Fairfield’s possession was “the same sort” of plant stolen from the victim, “but not [necessarily] the same plant;” indeed, the witness expressed the view that it was “not possible for any man living to swear to it.”

The increased presence and activity of defense counsel at the eighteenth-century Old Bailey only further contributed to the problems faced by prosecutors in proving ownership of nondescript goods. For example, in 1784, James Scott, who had been indicted for stealing forty-four pounds of spermaceti, was acquitted after his counsel, William Garrow, subjected the prosecution’s witnesses to a withering cross-examination concerning the precise age, shape, color, and size of the “spermaceti cake” alleged to have been stolen from the victim. After the court instructed the jury that it was “incumbent” on the prosecution’s witnesses not to “swear rashly” at trial to the article’s purported identification, the jury acquitted the defendant.

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CORNELL L. REV. 260 (1995) (arguing that “as currently constructed, grand juries not only do not, but cannot, protect the accused from unfounded charges”); Ric Simmons, Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?, 82 B.U. L. REV. 1, 27 (2002) (arguing that “numerous federal rules affecting the grand jury serve to turn the grand jurors into little more than passive observers”).

72. BEATTIE, supra note 14, at 401, 402 & tbl.8.1. At the quarter sessions, the figure was 16.9%; at the assizes, the figure was 17.7%. Id.

73. According to careful quantitative studies, only about half of the persons tried in the higher courts of late eighteenth-century England were convicted. In property-related cases tried from 1782 to 1787 in the Home Circuit (i.e., at the assize courts of Surrey, Kent, Essex, Hertfordshire, and Sussex), trial juries delivered verdicts of not guilty in 34.1% of cases and “partial verdicts” (i.e., convictions for an offense less than that charged in the indictment) in 12.3% of cases, suggesting a “conviction rate” of 53.6%. See KING, supra note 15, at 232 tbl.7.2(a). In cases involving noncapital property offenses tried at the Surrey assizes from 1660 to 1800, juries returned guilty verdicts at a rate of 45.7%. See BEATTIE, supra note 14, at 425 tbl.8.4.

74. See Herrup, Investigative Responses, supra note 54, at 825 (characterizing proof “that the discovered items were actually the victim’s” as an “important” and “difficult” task).

75. Charles Fairfield, OBP (Sept. 16, 1795) (t17950916-73).

76. James Scott, OBP (Jan. 14, 1784) (t17840114-70).
III. PUBLIC PROSECUTION IN THE METROPOLITAN POLICE OFFICES

For a variety of reasons, criminal justice administrators faced considerable challenges in detecting offenses, initiating prosecutions, and securing convictions in the vast, bustling, and increasingly anonymous world of eighteenth- and early nineteenth-century London. As other scholars have noted, such challenges led to important innovations in the administration of criminal justice in the metropolis, including improved policing and street lighting. What has not been fully appreciated is the degree to which the endemic problem of theft in the metropolis also led to important innovations in the realm of prosecution.

Consider, first, a pair of cases resolved by magistrates in London’s police offices in the mid-1830s. In late October 1836, Thomas Murray, a self-described dealer in metal, appeared at the Thames Police Office on the north side of the Thames in Wapping. Officers had arrested Murray and a companion named Edward Bloxham with 400 pounds of lead in their possession. The lead found in the possession of the pair apparently had been “doubled up and beaten together in such size and shape as to be carried . . . under the clothes of the person conveying them,” suspended there “upon a belt fastened round the body or . . . from the braces [i.e., suspenders] or neck.”

When Murray appeared before the magistrate in attendance at the Thames Police Office, the magistrate instructed him to demonstrate “not only that he had purchased” the lead found in his possession “but also that it [had] been bought under such circumstances as would remove the suspicion attached to it.” Murray responded that he did “a deal of business

77. On the distinctive challenges faced by criminal justice administrators in seventeenth- and eighteenth-century London, see J.M. BEATTIE, POLICING AND PUNISHMENT IN LONDON, 1660-1750: URBAN CRIME AND THE LIMITS OF TERROR 4 (2001) (observing that the “level, intensity, and range” of offenses prosecuted in London “presented problems that exposed more clearly than elsewhere the inadequacies of the law and the system of criminal administration”); and LANGBEIN, supra note 29, at 108 (“The problems of crime and criminality associated with the social relations of the metropolis strained the inherited institutions . . . law enforcement . . .”).

78. Additional details of this and the following case are provided in Smith, supra note 12, at 149-54.

79. A short report of the incident is contained in the Police Gazette; or, Hue and Cry (cited hereinafter as POLICE GAZETTE), a publication associated with the police offices that contained information on stolen property, criminal suspects and military deserters at large, appearances by suspects, and committals by police magistrates. For further description of this source, see infra note 130. The initial entry in the Police Gazette relating to Murray’s case notes as follows: “EDWARD BLOXHAM and THOMAS MURRAY with unlawfully possessing, at Saint Giles, four hundred [pounds] weight of lead, which had been stolen.” Edward Bloxham and Thomas Murray (Thames Police Office [PO], 1836), POLICE GAZETTE, Oct. 24, 1836, NA: HO 62/18 (original capitalization retained in this and later extracts). References to the Police Gazette include the following information: the name of the defendant or defendants; the police office in which the proceeding occurred; the year in which the proceeding occurred; the issue of the Police Gazette in which the proceeding is reported; and the archival repository or published source in which the issue can be located. For additional details of Murray’s arrest, see William Ballantine & Thomas Clarkson to Samuel March Phillipps (Under-Secretary of State for Home Affairs), Dec. 6, 1836, Thames PO Letter Book, 11 June 1834-14 July 1842, London Metropolitan Archives (LMA): PS.T1/Letter book/3.
in the lead trade” and that he “[could not] speak to every piece of it.”\textsuperscript{80} After hearing Murray’s explanation, the magistrate convicted him and sentenced him to a five-pound fine, observing in a subsequent letter to the Home Office that Murray had “passed very lightly over the strong points of the case against him.”\textsuperscript{81}

Several months later, the Home Office received a petition from Lewis Leo, a self-styled “Collector of Broken Glass and Old Metal” living in Spitalfields in eastern London. Leo requested “the return of a Cart” that had been “forfeited” after his servant, Henry Samuels, had been convicted summarily at the Queen’s Square Police Office for “unlawful possession” of a quantity of brass.\textsuperscript{82} According to Leo, when Samuels had first appeared at the police office, the attending magistrate had adjourned the case to give Samuels “an opportunity to produce evidence that the said Goods were fairly and honestly purchased by him.” When Samuels appeared at the police office two days later, he claimed to have “produced the Person from whom he had bought the said Metal.” The magistrate then examined Samuels’s witness “touching the same,” who claimed that the suspect had “bought the said Metal [from] her, and also stated the person of whom she bought the same.” Despite this evidence, the magistrate convicted Samuels and ordered him to pay a forty-shilling fine or, in default of payment, to be “committed to the House of Correction for three weeks.” The magistrate also seized the horse and cart in which the metal had been found.\textsuperscript{83}

For our purposes, what is so profoundly striking about these two cases, and the many others like them that were disposed of summary in London’s police offices during this same period, is the utter absence of private prosecutors.\textsuperscript{84} In cases in the police offices involving persons arrested in suspicious circumstances where private victims did not appear, the arresting officer and attending magistrate themselves monopolized the proceedings—in so doing, dispensing with the involvement of private victims.

The enhanced role played by public officials in the initiation and

\textsuperscript{80} Ballantine & Clarkson to Phillipps, supra note 79.
\textsuperscript{81} Reference to Murray’s fine is contained in Phillipps to Thames PO, Dec. 2, 1836, Thames PO Letter Book, 11 June 1834-14 July 1842, LMA: PS.T/1/Letter book/3. On the police magistrates’ assessment of Murray’s testimony, see Ballantine & Clarkson to Phillipps, supra note 79.
\textsuperscript{82} “Petition of Lewis Leo, Praying the return of a Cart, forfeited by his servant on being Convicted of unlawful possession of Certain Metal,” Mar. 1837, NA: HO 59/8.
\textsuperscript{83} Davie Gregorie to Home Office, Mar. 6, 1837, NA: HO 59/8.
\textsuperscript{84} See, e.g., William Scott, George Glendenning, and David Side (Thames PO, 1836), POLICE GAZETTE, Sept. 29, 1836, NA: HO: 62/18 (“WILLIAM SCOTT, GEORGE GLEN DENNING, and DAVID SIDE, with unlawfully possessing, at the Tower, fourteen pounds weight of sugar, which had been stolen. — Convicted of a misdemeanor, and fined forty shillings each.”); Francis Courtenay (Thames PO, 1836), POLICE GAZETTE, Oct. 24, 1836, NA: HO 62/18, (“FRANCIS COURTENAY, with unlawfully possessing, at Lambeth, twenty-eight pounds weight of solder, which had been stolen, — Convicted of a misdemeanor, and fined forty shillings.”).
disposition of petty criminal cases in London resulted from two important developments in the late eighteenth and early nineteenth centuries that were particularly prominent in the metropolis: first, the precocious creation of a corps of salaried magistrates and police; and, second, the steady expansion of magistrates' summary jurisdiction over theft-related offenses.

As early as 1740, a Middlesex JP named Thomas DeVeil had taken upon himself the task of dispensing justice at regular hours from a "public office" at Bow Street, Covent Garden. During the succeeding tenure at Bow Street of Henry Fielding (1748-52) and his blind half-brother John (1754-80), the Office secured an allowance from the central government and instituted several measures designed to aid the detection, prosecution, and conviction of suspected offenders. These initiatives ranged from the creation of a body of constables attached to the Office (the famous "Runners"), to the publication of periodicals designed to spur the apprehension of criminal suspects, to heightened coordination with provincial magistrates concerning the apprehension of suspected offenders.

In 1792, on the eve of war with revolutionary France, Parliament passed a measure creating seven new "police" or "public" offices throughout metropolitan London (excluding the City) designed to complement the preexisting office at Bow Street. Each office received a brace of salaried magistrates, clerks, and police officers. Like the unpaid JPs who continued to sit on the commissions of the peace for London-area counties, the Lord Mayor and aldermen of the City of London, and the magistrates at Bow Street from which they drew much of their institutional inspiration, the "police" or "stipendiary" magistrates conducted pretrial examinations in cases of felony. But the magistrates who served in the police offices also exercised an increasingly broad summary jurisdiction over various types of petty theft—jurisdiction that, as the cases of Murray and Samuels attest, could dispense with private victims altogether.

As far back as the late sixteenth century, magistrates in London had seen fit to commit certain "pilferers" and "idle and disorderly persons" to
the Bridewell for brief stints of incarceration. On occasion, as Beattie’s pioneering research demonstrates, metropolitan magistrates also committed persons accused of more serious offenses such as pickpocketing, house-breaking, and shop-lifting who, at least under formal law, should have been committed for trial in the higher courts to face charges of felony.

During the course of the eighteenth century, Parliament increasingly passed a series of measures designed to expand or clarify the summary jurisdiction of magistrates in cases of petty theft—especially in London. In 1756, for example, Parliament enacted a measure designed to combat the “pernicious practice” of stealing metal “in or upon houses, outhouses, mills, warehouses, workshops, and other buildings” or located in “ships, barges, lighters, boats, and other vessels.” According to the statute’s preamble, officials had found it difficult to detect, prosecute, and convict suspects because the thefts were committed “in such [a] close and clandestine manner, that there can be no witness or witnesses to the same, but such as who . . . are partakers of the offence.” Accordingly, the act authorized constables to apprehend “every person . . . who may reasonably be suspected of having or carrying . . . at any time after sun-setting, or before sun-rising, any lead, iron, copper, brass, bell-metal, or solder, suspected to be stolen, or unlawfully come by.” If the suspect could “not produce the party or parties from whom he . . . [had] bought or received the [metal], or some other credible witness to depose upon oath [its] sale or delivery,” he “[was to] be adjudged guilty” of a misdemeanor and fined. Under the Lead and Iron Act, if the forfeited goods were not claimed from local officials within thirty days, they were to be sold “for the best price that can reasonably be had,” with half of the proceeds going “to the person or persons who . . . apprehend[ed]” the misdemeanant and the other half “to the poor of the parish” where the offense was committed.

Six years later, Parliament enacted the so-called “Bumboat Act,” which sought to deter the “many ill-disposed persons, using and navigating upon the river Thames” who, “under pretence of selling liquors, . . . tobacco, brooms, fruit, greens, gingerbread, and other such-like wares” to sailors, attempted “to cut, damage, and spoil the cordage, cables, buoys, and buoy ropes” of ships and to “fraudulently carry away the same.” The statute instructed constables and watchmen to arrest all persons “reasonably . . . suspected of having or carrying, or in any way conveying, any ropes, cordage, tackle, apparel, furniture, stores, materials, or any part of any

89. Beattie, supra note 77, at 28-29.
90. Lead and Iron Act, 1756, 29 Geo. 2, c. 30.
cargo or lading, stolen or unlawfully procured from or out of any ship or vessel” on the Thames. Officers who apprehended persons in these circumstances were to convey the suspects before a Thames-area magistrate. If the suspect failed to “produce the party or parties from whom he . . . [had] bought or received the [goods], or some credible person, to depose upon oath the sale or delivery thereof, or [failed to] give an account, to the satisfaction of such justice or justices, how he . . . came by the same,” he was to be convicted summarily and fined forty shillings or, in default of payment, sentenced to a one-month term of imprisonment. As with the Lead and Iron Act, successful prosecutors could be paid a portion of the forfeited goods’ value.91

On their face, these statutes (and others passed by Parliament that defined theft-related misdemeanors) said nothing about dispensing with private prosecutors. To the contrary, they typically included measures designed to inform private property owners that their items had been misappropriated and, accordingly, place them in a position to initiate a criminal action. The act enacted by Parliament in 1756, by way of example, required parish officials to seek to notify prospective owners of property found in the possession of suspects by posting a description of the property “in some publick paper” in London, causing “notice to be given by some public cryer,” and “fixing on the church or chapel door notice describing such lead, iron, copper, brass, bell-metal, or solder.”92

With this said, it is not clear how often magistrates actually sought to identify the owners of property found in the possession of suspects, especially where the goods were fungible and, as a result, the prospect of identifying the true property owner was likely to have been remote. As the cases of Murray and Samuels suggest, proceedings that required suspects to “account” satisfactorily for their possession of suspicious goods permitted magistrates to convict suspects even when private victims failed to materialize. Evidence suggests that, by the mid-1830s, public officials in London exercised extensive summary jurisdiction over persons possessing (or formerly possessing) property in circumstances deemed to be suspicious. As one police magistrate described to a parliamentary subcommittee in 1837, London’s police magistrates exercised summary jurisdiction over persons “found conveying goods suspected to have been stolen, and giving no satisfactory account of them,” persons “found upon search warrant in possession of property suspected to be stolen, and giving no satisfactory account,” and even those “appearing to have had prior

91. Bumboat Act, 1762, 2 Geo. 3, c. 28. Under the Lead and Iron Act, if the forfeited goods were not claimed from local officials within 30 days, they were to be sold “for the best price that [could] reasonably be had,” with half of the proceeds going “to the person or persons who . . . apprehend[ed]” the misdemeanor and the other half “to the poor of the parish” where the offense was committed. 29 Geo. 2, c. 30, § 4.
92. 29 Geo. 2, c. 30, § 4.
possession of property suspected to be stolen” but which they no longer possessed.93

Some statutes that conferred summary jurisdiction upon English magistrates dispensed altogether with the pretense that a private property owner had suffered actual harm, permitting magistrates to commit suspects to local houses of correction even before any person had been victimized. For example, so-called “Clause D” of the Middlesex Justices Act of 1792—the statute that created the metropolitan police offices—permitted police magistrates to convict summarily “persons of evil fame” and “reputed thieves” upon the oath of one or more “credible witnesses” if “there [was] just ground to believe that such person” was in an “avenue, street, or highway” with intent to commit a felony and the suspect was unable “to give a satisfactory account of himself . . . and of his way of living.”94 Later, under the Vagrancy Act of 1824, magistrates were authorized to convict summarily any “suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort . . . with intent to commit felony,” and to sentence the convicted offender to a three-month term in the house of correction at hard labor.95 In such cases, public officials arrested suspects and secured convictions in the absence of any demonstrated harm to an actual victim.

Situations in which private victims appear to have been rendered largely unnecessary are suggested by the following entries in the Police Gazette from the 1820s and 1830s, all of which describe the arrests of persons suspected of theft and their subsequent commitment to London-area houses of correction:

**William Lawler, and Benjamin Holland**, on suspicion of felony, by Benjamin Iberson, a Bow-street patrole. — Convicting of being reputed thieves, and committed, for two months, to the House of Correction, Cold Bath Fields.96

**Roger Judge**, with stealing a piece of lead pipe, the property of some person unknown: stopped in Stepney. — Discharged from the felony; but committed to the House of Correction for one month, for unlawfully possessing.97

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93. Letter from James Traill to Sir Benjamin Hawes, Chairman of the Police Comm. (Dec. 1, 1837), in **SELECT COMM. APPOINTED BY THE HOUSE OF COMMONS ON METROPOLIS POLICE OFFICES, REPORT 217 app. (1838)** (emphasis added) [hereinafter 1838 REPORT].
94. Middlesex Justices Act, 1792, 32 Geo. 3, c. 53.
96. William Lawler and Benjamin Holland (Queen Square PO, 1828), POLICE GAZETTE, Feb. 26, 1828, microformed on The Police Gazette, pt. 2, reel 2 (Adam Matthew Pubs.).
MATTHEW STERLING, with unlawfully possessing, in the West India Docks, fourteen ounces weight of candles, which had been stolen. — Convicted of a misdemeanor, and fined twenty shillings. ⁹⁸

WESTBY STEEL, with possessing, in the London Docks, ten ounces and a half weight of copper, which had been stolen. Convicted of a misdemeanor, and fined five shillings. ⁹⁹

WILLIAM PUNSTON, with possessing, on the Thames, twelve oranges and four pounds weight of raisins, which had been unlawfully obtained. — Convicted of a misdemeanor, and fined forty shillings. ¹⁰⁰

ABRAHAM BENDAHAM, with unlawfully possessing, at Whitechapel, two hundred and sixteen pounds weight of lead, which had been stolen. — Convicted of a misdemeanor, and fined forty shillings. ¹⁰¹

In each of these cases, the suspect had been found in suspicious circumstances with nondescript materials in his possession. In most, if not all, of these cases, detection of the offense by the private victim and identification of the goods by the true property owner likely would have presented considerable, if not insuperable, challenges. Yet in a legal regime that permitted suspects to be convicted when they failed to “account” satisfactorily to a magistrate or when they were found to have been loitering with “intent” to commit a felony, public officials had little reason to wait for private victims to show up to complain or to testify.

This is not to suggest that private victims played no role in proceedings conducted in the police offices. To the contrary, where property owners managed to detect their losses, they regularly proceeded to the police offices to complain. ¹⁰² In such cases, magistrates routinely conducted pretrial examinations and committed persons to stand trial at the Old Bailey. Private victims could play important roles even in cases that magistrates resolved summarily. In February 1828, for example, the attending magistrate at the Queen Square Police Office committed Henry Welch to the house of correction at Cold Bath Fields as a “rogue and vagabond” after Welch had been charged with “stealing a saw, the property of James Christie, of No. 11, Robert’s buildings, Pimlico,

⁹⁹ Westby Steel (Thames PO, 1836), POLICE GAZETTE, Oct. 28, 1836, NA: HO 62/18.
¹⁰⁰ William Punston (Thames PO, 1836), POLICE GAZETTE, Nov. 29, 1836, NA: HO 62/18.
¹⁰² See, e.g., Ann and Thomas Baker, OBP (June 4, 1794) (t17940604-19) (victim went to the Hatton Garden Police Office, secured a warrant, and had suspect searched); Ann Madden, OBP (Jan. 15, 1794) (t17940115-24) (victim came to the Shadwell Police Office and reported to an officer that he had been robbed).
carpenter." In that same month, the attending magistrate at the Hatton Garden Police Office committed Charles Selby to the house of correction for three months as a "reputed thief" upon "suspicion of stealing a pair of boots, from Robert Downes, of Portpool-lane, Holborn." In such cases, the private victims not only appear to have been identified, but themselves may have wished to proceed summarily rather than be bound over to prosecute in the higher courts. Other private individuals (described by certain contemporaries as "common informers") initiated prosecutions in the police offices not because they had been victimized, but because they sought to secure the fees associated with successful summary convictions.

It is certainly important to recognize the variety of "public" and "private" modes in which summary proceedings might operate. Thus, based on his study of eighteenth- and nineteenth-century rural Essex, King has revealed that summary proceedings initiated by private victims frequently resulted in private settlements between the complainant and the accused. Focusing on criminal procedure in London's police courts in the second half of the nineteenth century, Jennifer Davis has stressed the role of magistrates in resolving the private, interpersonal disputes of the city's working poor. But in characterizing summary proceedings in the police offices of metropolitan London, it is critically important to recognize the extent to which summary proceedings augmented the roles of public officials and diminished the involvement of private victims. As the cases of Murray, Samuels, and the many others who were similarly situated suggest, the prosecutorial role of public officials in the police offices was often paramount.

IV. THE ADVANTAGES OF PUBLIC PROSECUTION

Why did statutes that required suspects to "account" satisfactorily for suspicious goods found in their possession, or that permitted magistrates to convict persons found loitering "with intent," prove so appealing to parliamentarians and criminal justice administrators alike? By increasingly

103. Henry Welch (Queen Square PO, 1828), POLICE GAZETTE, Feb. 26, 1828, microformed on The Police Gazette, pt. 2, reel 2 (Adam Matthew Pubs.).


105. In 1837, the police magistrate R.E. Broughton observed that he had "heard prisoners say often, 'I wish your worship would dispose of it [i.e., the case] at once,' but not so often as the prosecutors." 1838 REPORT, supra note 93, at 37-38.

106. In April 1837, for example, the Home Office received a series of testimonials from London-area pawnbrokers complaining of the "very heavy penalties" imposed by magistrates based on the "cupidity" of "common informers." Petition, Apr. 14, 1837, NA: HO 59/7.

107. KING, supra note 15, at 84-94.

relying on public officials to detect offenses, arrest suspects, and initiate cases, these statutes helped bring greater numbers of theft-related cases to light. In turn, the evidentiary regime authorized by these statutes made it easier to secure convictions in the cases that ultimately did emerge. In short, summary proceedings in cases of suspected theft addressed each of the defects in private prosecution identified in Part II above.

A. Detection

Writing in the 1820s, the influential English treatise writer Thomas Starkie observed that statutes authorizing magistrates to adjudicate cases summarily generally focused on "the protection of property much exposed, and which . . . is difficult to identify." Starkie understood that statutes requiring persons to account satisfactorily for suspicious goods found in their possession conferred particular benefits to criminal justice administrators where detection was difficult. Although property owners might be unable to detect petty thefts from their boats or warehouses, it was at least conceivable that a police officer might notice a person furtively paddling a boat stocked with marine stores or pushing a wheelbarrow at night laden with metal.

By dispensing with the need for victims to detect such losses, statutes that targeted unexplained possession provided considerable latitude to constables and night watchmen. Indeed, as Clive Emsley has suggested, the willingness of police officers in London to confront suspicious persons on the streets and to initiate cases, even before the establishment of the Metropolitan Police in 1829, invites a fundamental revision of the view that law enforcement officials rarely responded to crime unless prompted by private victims. As we have seen, our paradigmatic case of private prosecution involving Granville Sharp itself involved the intervention of an active and observant constable. Indeed, even in relatively sleepy regions of rural England, constables routinely "stopped and searched" suspicious persons, including "[v]agrants and travellers with suspicious-looking bags."

One reason that police officers (at least in London) did not merely wait


110. It is . . . clear that at least in some metropolitan parishes there were determined attempts to ensure that the night watch was competent and capable a hundred years before the Metropolitan Police took to the streets [in 1829]. Some watchmen were fully prepared to stop men on suspicion . . . [E]vidence [from the 1810s] . . . suggests a watch system functioning in some parts of the metropolis which possessed men behaving in the active and observant way that, according to Whig historians, was introduced only with the new Metropolitan Police . . .

EMSLEY, supra note 13, at 224.

111. See supra Part I.

for the complaints of private victims is that these officers occasionally sought to profit from the services they provided. In 1837, for example, the salaried "surveyors" of the Thames Police Office complained to the Home Office that pending legislation threatened a valuable source of their funding: half the value of seizures that these officers secured under the Lead and Iron Act and Bumboat Act. Although employed by the state, these officers hoped to benefit, as well, from existing statutory incentives. In such instances, officials did not wait passively for an offense to be witnessed by a victim or for an arrest warrant backed by a private complaint to be issued before confronting a suspect.

B. Arrest

Statutes granting summary jurisdiction also appear to have expanded the powers of arrest possessed by police officers. Although constables traditionally could not apprehend suspected misdemeanants without a warrant, statutes extending summary jurisdiction typically dispensed with this requirement. Writing in 1960, Glanville Williams noted correctly that measures such as the Metropolitan Police Act of 1839—a direct heir to eighteenth-century statutes such as the Bumboat Act—permitted officers to detain and search persons reasonably suspected of conveying stolen goods without first making an arrest. Although Williams admitted that he failed to understand how such "detain and search" powers were more helpful to police officers than their traditional powers to search incident to an arrest, he noted that the English police officers that he interviewed in the middle decades of the twentieth century considered the distinction to be meaningful. Indeed, Williams surmised that the clearer articulation by Parliament of a police officer's ability to "detain and search" a suspect may have been even more important in the early decades of the nineteenth century, at "a time when it was not clear how far the police could search arrested persons."

113. Memorial from Thames Police Surveyors accompanying letter from W.J. Broderick & William Ballantine to Home Office, Feb. 16, 1837, NA: HO 59/8 (calling for an alteration in Section 44 of the police act, which gave "the whole produce of the seizures therein mentioned to the Receiver [i.e., a financial officer associated with the police offices]," although the Bumboat Act and Lead and Iron Act had permitted the officers themselves to receive "one moiety [i.e., a half] of such produce").

114. "In cases of Misdemeanor, the Constable cannot apprehend the offender without a warrant." CONSTANCE'S ASSISTANT, supra note 59, at 19.


https://digitalcommons.law.yale.edu/yjlh/vol18/iss1/2
If statutes conferring summary jurisdiction clarified the authority of arresting officers, these statutes also targeted certain time-honored techniques designed to frustrate prosecutions, such as tossing contraband into the Thames. The Thames Police Act, passed by Parliament in 1800, declared that persons who "let fall" or "threw" into the Thames "any materials, stores, or merchandizes" that previously had been the cargo of any ship "for the purpose of preventing the seizure or discovery" of such materials could be convicted summarily of a misdemeanor upon the attending magistrate's "satisfaction" that the suspect's actions had not "proceeded either from mere accident, or from some lawful cause." After 1800, although it still might prove impossible to arrest suspects with illicit goods actually in their possession, persons suspected of theft could be convicted for their evasive actions.

C. Case Initiation

As the cases of Murray and Samuels demonstrate, statutes that conferred summary jurisdiction upon magistrates and required suspects to "account" for possession permitted police officers to initiate prosecutions and to provide the modest evidentiary predicate necessary to sustain them. In the case of Murray, the officers who apprehended him appear to have initiated the prosecution merely by swearing to the circumstances of Murray's detection and apprehension. Similarly, despite Samuels's protestations of innocence, the surviving evidence suggests that no private victim ever emerged to testify against him either. In such cases, as the police magistrate Patrick Colquhoun crisply summarized in 1800, "the Examination of the Delinquent" provided the sole evidence needed for conviction.

D. Indictment and Trial

Summary proceedings, by their very nature, dispensed with both grand and trial juries. By circumventing the former, summary proceedings spared prosecutors the roughly one-in-six risk of failing to advance to trial. By bypassing the latter, prosecutors spared themselves the roughly fifty percent rate of failure; by contrast, conviction rates in summary

117. This is not to suggest that efforts by suspected criminals to dispose of probative evidence is unique to Hanoverian England. For a recent effort to address the problem of persons in police detention swallowing drugs, see Drugs Act, 2005, c. 17, § 5.
118. Thames Police Act, 1800, 40 Geo. 3, c. 87, § 15.
119. So much is at least suggested by the submission of the magistrates to the Home Office, which stated that officers were eligible for a portion of a penalty when "the facts sworn to by them are undisputed." Ballantine & Clarkson to Phillipps, supra note 79.
120. See sources cited supra notes 82-83.
121. COLQUHOUN, supra note 54, at 279.
122. See supra text accompanying note 72.
proceedings in the metropolitan police offices in the 1830s stood at roughly eighty percent.\textsuperscript{123}

During the 1840s and 1850s, the shift away from indictment and trial by jury became even more pronounced. In those decades, Parliament passed a series of statutes granting pairs of magistrates the authority to try cases of simple larceny involving juveniles (1847 and 1850) and, later, adults where the amount in controversy did not exceed five shillings (1855).\textsuperscript{124} Considered together, these statutes decisively and permanently altered the balance in England between summary proceedings and proceedings upon indictment in cases of petty theft.

V. THE SCOPE AND NATURE OF PUBLIC PROSECUTION BEFORE 1850

This Article has sought to identify a previously unexplored mechanism by which public officials in London’s police offices initiated and managed prosecutions in ways that dramatically reduced the role of victims by comparison to proceedings in the higher courts. How extensive was the scope of this particular mode of public prosecution in the metropolitan police offices?

Although a detailed answer to this question is beyond the scope of this paper, it is possible to offer several general observations.\textsuperscript{125} At the outset, it is important to note that the state of the surviving records makes it difficult to answer this question with any degree of certainty. The cases of Murray and Samuels can be reconstructed because these individuals petitioned the Home Office for relief. Yet while such petitions (and the records associated with them) provide unique and invaluable insight into the conduct of summary proceedings, these sources do not provide any sense of the volume of similar cases over time.\textsuperscript{126} Moreover, outside the City of London, records relating to the day-to-day practices of London’s magistrates survive only sporadically before the mid-nineteenth century, and virtually none relate to proceedings in the police offices.\textsuperscript{127} Although

\textsuperscript{123} For data on conviction rates in summary proceedings, see Smith, \textit{supra} note 12, at 159.

\textsuperscript{124} The three statutes were the Juvenile Offenders Act, 1847, 10 & 11 Vict., c. 82, the Juvenile Offenders Act, 1850, 13 & 14 Vict, c. 37, and the Criminal Justice Act, 1855, 18 & 19 Vict., c. 126.

\textsuperscript{125} I intend to take up these quantitative issues in greater detail in a forthcoming book, tentatively entitled \textit{Magistrates, Theft, and the Law in London, 1760-1860.}

\textsuperscript{126} Although persons convicted summarily occasionally challenged their convictions—either by appealing to London-area courts of quarter sessions or by petitioning the Home Office—such challenges were relatively rare.

\textsuperscript{127} With the exception of letter books from the Thames Police Office, and related correspondence in the Home Office papers of the National Archives, virtually no records associated with the metropolitan police offices survive before 1850. Records of magisterial business in the City of London, by contrast, are considerably more complete. Minutes Books from the Guildhall Justice Room survive for the period 1752-96. See Guildhall Min. Bk., LMA: CLA/005/01/001 et seq. Records from the Mansion House Justice Room survive from 1784 to 1821. See Mansion House Min. Bk., LMA: CLA/004/02/001 et seq. Records relating to the practices of JPs in Middlesex survive for scattered years before 1850. See, e.g., Lambeth Rotation Office Minute Book, 1791-92, LMA:
three “calendars” recording summary convictions returned by magistrates in Middlesex survive in the London Metropolitan Archives for the periods 1774-86, 1787-93, and 1794, they shed little light on the relative roles of private victims and public officials in the process of prosecution. In turn, contemporary quantitative estimates of magisterial business are also lacking. For example, although Colquhoun estimated that London-area magistrates had convicted 2,500 defendants under the Bumboat Act between 1762 and 1800, it is impossible to confirm Colquhoun’s estimate or to determine the percentage of those convictions that were initiated and managed predominately by public officials.

In the absence of detailed archival records chronicling procedures in the police offices, historians seeking to estimate the number of prosecutions initiated and conducted by officials associated with those institutions must rely on other materials. One such source is The Police Gazette, which includes brief entries recording the initial appearances of suspects in the police offices, committals of suspects for purposes of reexamination, and outcomes of summary proceedings themselves—most frequently, through short-term committals to London-area houses of correction. Unfortunately, the entries are so cursory that one cannot determine with certainty the precise contributions of private individuals and public officials to cases that are identified. What can be said is that The Police Gazette and other contemporary sources document numerous cases similar to those of Murray and Samuels, where suspects were arrested with nondescript goods in their possession, where police officers seemingly initiated the prosecutions, and where no private victim or complainant is


128. At best, the records provide a sense of the types of offenses that magistrates disposed of summarily. Among the entries, offenses involving petty theft abound. There were the prosecutions of Ann Lawless, “for unlawfully purloining one pound two ounces yellow Piedmont silk and three pounds fourteen ounces of yellow Bengal silk;” of Richard Mills, for “having in his possession a quantity of Russia Bar Iron suspected to have been stolen;” and of Daniel Jones, for “having in his possession one tarpaulin and a quantity of old rope” stolen from a vessel on the Thames. See Ann Lawless (Oct. 23, 1779); Richard Mills (Aug. 22, 1783); Daniel Jones (Feb. 11, 1785), LMA: MSJ/CC/1 (1774-86). Norma Landau sensibly refers to the returns as being “suspiciously low.” Norma Landau, The Trading Justice’s Trade, in LAW, CRIME AND ENGLISH SOCIETY, 1660-1840, supra note 12, at 46, 66.

129. COLQUHOUN, supra note 54, at 47.

130. See supra text accompanying notes 96-101. The Police Gazette originated in “information sheets” published by Sir John Fielding in the 1770s. On the eighteenth-century origins of the Police Gazette, see 3 RADZINOWICZ, supra note 12, at 47-54 (1957). In recent years, copies of the Police Gazette that survive in English and Australian archives for the periods 1797-1840 and 1848-50 have been made available on microfilm by Adam Matthew Publications. See Adam Matthew Publications, The Police Gazette, Publisher’s Note, http://www.adam-matthew-publications.co.uk/digital_guides/police_gazette_part_2/Publishers-Note.aspx. Copies of the Police Gazette from 1828-39, including portions for 1836 not contained in the existing microfilm series, can be found in the National Archives in the series HO 62/1-22.
identified.\textsuperscript{131}

Why have historians been so slow to recognize the important and distinctive mode of public prosecution employed in London’s police offices—a mode of prosecution that emerged well before the creation of a public prosecutor’s office in England during the 1870s and even before the supposed advent of “police prosecution” in the nation’s higher criminal courts during the 1840s and 1850s?\textsuperscript{132}

The most important reason for this neglect is that our legal-historical knowledge of summary proceedings remains so incomplete—especially with respect to London.\textsuperscript{133} Within the dimly lit realm of the city’s police offices, we continue to know very little about the ways that defendants came before magistrates, the nature of the evidence that officers adduced, or the types of arguments that suspects made.\textsuperscript{134}

Moreover, to the limited extent that historians have addressed the realm of magisterial justice, they have tended to stress the role played by summary proceedings in resolving disagreements between private disputants. Thus, our leading scholar of summary proceedings has analogized the magistrate’s “central role” in such proceedings to that of an “arbitrator or mediator.”\textsuperscript{135} But while summary proceedings, especially in rural areas, often may have possessed an “arbitrátorial character,” it is by no means clear that such a characterization properly captures the dynamics of cases like those of Murray and Samuels that were tried in the police offices of late eighteenth- and early nineteenth-century London.\textsuperscript{136} In cases where defendants confronted public officials, not private victims, the proceedings arguably resembled plea bargaining more than arbitration.\textsuperscript{137}

In turn, historians who have sought to explain the comparatively late

\textsuperscript{131} See supra text accompanying notes 96-101. Contemporary newspaper reports of proceedings in the police offices occasionally furnish detail not included in the Police Gazette. In March 1837, for example, Thomas Murray published a detailed letter in The Times that described his efforts to seek recovery of his confiscated lead from the Thames police magistrates. The letter also alluded to a libel action filed by Murray against the unnamed publisher of “a morning journal,” which resulted in a financial settlement. See Thomas Murray, Letter to the Editor, Times (London), Mar. 23, 1837, at 6D.

\textsuperscript{132} Although the most comprehensive historical treatment of English prosecution in the eighteenth and nineteenth century briefly addresses the role of the police in summary proceedings, the discussion focuses largely on the period after 1850. See Davis, supra note 45. An important exception to this generalization is the scholarship of Leon Radzinowicz, which emphasizes the extensive powers exercised by officials at the Thames Police Office in the early decades of the nineteenth century. See 2 RADZINOWICZ, supra note 12, at 388-404 (1957). For commitments by magistrates at the Thames Police Office, see supra text accompanying notes 98-101.

\textsuperscript{133} See supra text accompanying note 16.

\textsuperscript{134} Here, the perceptions of the accused may be the most difficult to reconstruct. As Hay has observed, “those most subject to prosecutions, [were] not much given to publishing or otherwise recording their thoughts.” Hay, supra note 1, at 7.

\textsuperscript{135} KING, supra note 15, at 86.

\textsuperscript{136} Id. at 83.

\textsuperscript{137} For a brief analysis of summary proceedings and plea bargaining as alternative means of bypassing trial by jury, see Bruce P. Smith, Plea Bargaining and the Eclipse of the Jury, 1 ANN. REV. LAW & SOC. SCI. 131 (2005).
The development of public prosecution in England arguably have accepted the rhetoric of contemporary participants too readily. Although opponents of public prosecution frequently employed the rhetoric of civil liberties, it is by no means clear that these putative libertarian concerns necessarily outweighed others, such as the financial interest of the organized bar in preventing inroads on their virtual monopoly over criminal prosecution.\(^{138}\) As early as the 1780s, proponents of measures designed to establish a salaried police and magistracy in London felt comfortable dismissing civil libertarian opposition to their designs as self-interested cant.\(^{139}\) Given that opposition to “French”-style criminal justice administration in the 1780s and 1790s did not prevent the creation of a professionalized police force and magistracy in London, it is not surprising that outcry about civil liberties failed to prevent public prosecution from emerging in the very institutions where these salaried officers and magistrates toiled.

Finally, the inadequacies of the categories of “private” and “public” have bedeviled efforts to characterize the extent of public participation in prosecution before 1850. On the one hand, the stark dichotomy suggested by these terms fails to capture the extent to which “public” and “private” modes of prosecution were interrelated. As Cynthia Herrup has argued, “[t]he most profitable framework for understanding English law enforcement is not one built between opposing walls of private and public control, but rather one that attempts to analy[z]e the continuous mixing of private and public elements of authority.”\(^{140}\) On the other hand, as Hay has trenchantly observed, “[t]he difficulty of disentangling the actions of [private] complainants from the actions of the police . . . has yet to be resolved.”\(^{141}\) Complicating matters further, as David Lieberman has incisively noted, is the fact that “[e]ighteenth-century English law utilized

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\(^{138}\) Tracts from the 1850s make clear that members of the organized bar figured prominently in the opposition to public prosecution in that decade. For a particularly illuminating example, see Sir LYTTELTON H. BAYLEY, THE PUBLIC PROSECUTOR: OR OBSERVATIONS ON THE REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF COMMONS 37 (London, Butterworths 1857) (criticizing “the hasty and unjust scheme” to establish public prosecutors advocated by the previous year’s parliamentary subcommittee).

\(^{139}\) In 1786, for example, a defender of the government’s initiative to establish salaried police and magistrates in London derided the measure’s critics as follows:

In defence of themselves they will talk of the dignity of . . . the Constitution . . . [T]hey will say it is novel to apprehend felons . . . in the night—that breaking open houses to search for felons . . . is unlawful—that the whole is a French Police . . . that those of his Majesty’s subjects who have the misfortune to reside in . . . London, will have no civil liberty remaining after such a Bill is passed.


\(^{140}\) Herrup, Investigative Responses, supra note 54, at 829.

\(^{141}\) Hay, supra note 1, at 9.
the terms 'private' and 'public' with a frequency and range sufficient to frustrate any precise or simple definition."\textsuperscript{142}

With all of this said, however, the term "public," as Lieberman has made clear, was "routinely" defined in eighteenth- and early nineteenth-century England to "refer to the institutions and agents of state authority."\textsuperscript{143} Hired and supervised by the Home Office and paid by the Treasury, the magistrates and police officers who worked in London's police offices between 1792 and 1850 were critically important agents of state authority. The efforts that they invested in investigating offenses, arresting suspects, initiating cases, and securing convictions were "public" in any practical and meaningful sense of the term.

VI. THE IMPLICATIONS OF PUBLIC PROSECUTION

What are the principal implications of this Article's findings for our understanding of English criminal justice administration in the late eighteenth and early nineteenth century?

For over a century, legal commentators have attributed England's seeming resistance to public prosecution to the nation's supposedly exceptional commitment to civil liberties.\textsuperscript{144} The notion has achieved currency not only among historians of English criminal justice administration, but among scholars in other fields as well. Struck by the apparently profound differences between English- and American-style prosecution in the period before 1850, Lawrence Friedman, our leading historian of American law, has speculated that "the concept of public responsibility for prosecuting criminals rang a bell in the colonial [American] mind" that, for unknown reasons, failed to toll on the other side of the Atlantic.\textsuperscript{145} From a very different perspective, one scholar associated with the law-and-economics movement has drawn the happy libertarian lesson that "[c]rimes do not have to be prosecuted by police and public prosecutors" in order to be dealt with successfully.\textsuperscript{146}

In truth, the English state involved itself in the process of prosecution

\textsuperscript{143} Id. at 157 (emphasis added).
\textsuperscript{144} See supra text accompanying notes 8-10.
\textsuperscript{145} LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 30 (1993).
considerably more than has previously been appreciated. As in so many other areas during the “long eighteenth century,” the English state innovated, discovering more effective ways to wield its considerable power.147 Given the political sensitivity associated with “public” prosecution, it is not surprising that English criminal justice administrators vested prosecutorial power in public officials who toiled in tribunals removed from the glare of the Old Bailey, and in a manner that permitted contemporaries (and later historians) to cling to the illusion of “private” prosecution.

This is not to say that the methods used by police officers to insinuate themselves into the process of initiating and managing criminal prosecutions in the police offices were necessarily confined to those low-level tribunals. It is particularly interesting to discover that, in the early decades of the nineteenth century, officers who had arrested persons with suspicious goods in their possession were also occasionally securing convictions at the Old Bailey in cases where it seems unlikely that private victims could have been identified.148 This suggests an intriguing, though still untested, hypothesis: that the model of public prosecution that proved so successful in the police offices may have spread, by the early decades of the nineteenth century, from the police offices to the higher courts. If so, we may be closer to understanding what is perhaps the most critical prosecutorial development of the later nineteenth century: the rise of “police prosecution” in the higher courts.149

CONCLUSION

In a short, brilliant, and regrettaably overlooked essay written in 1955, Glanville Williams examined the curious survival in English legal theory of the concept of “private” prosecution. Reflecting on the stark realities of English criminal justice administration, Williams castigated lawyers and legal commentators who claimed “absurdly” that England had no “public” prosecutions, noting that those who denied that England had “a system of public prosecution” denied it “on the verbal ground that a policeman or


148. See, e.g., John Richardson, OBP (Oct. 23, 1822) (t18221023-79) (involving a prosecution for stealing lead from “persons unknown” based upon the testimony of a watch superintendent and another person who assisted in the arrest).

149. “The increasing role of the police as prosecutors from the middle of the nineteenth century has been largely ignored by historians and there has been no detailed study, even on a regional basis, of precisely how, when and why the police came to predominate as prosecutors.” EMSLEY, supra note 13, at 195.
official who prosecute[d]" did so, as a matter of legal theory, "as a private person and not in pursuance of any official power."150 As Williams noted, "a prosecution by a policeman or other official is brought in pursuance of superior orders or under statutory authority and at public expense, so that it is unreal to describe it as a private prosecution."151

For decades, students of English criminal justice administration have confronted a perplexing question: Why did the English state tolerate for so long its ramshackle and unreliable system of private prosecution? My answer is deceptively simple: It didn’t. More than thirty years ago, Langbein observed trenchantly that the chief defect of private prosecution was its unreliability; under a system of private prosecution, as he dryly remarked, "[t]here will be cases where there are no aggrieved citizens who survive to prosecute, and others where the aggrieved citizens will decline to prosecute, or be inept at it."152 By resorting to summary proceedings that eased detection, aided apprehension, spurred the initiation of cases, bypassed juries, and required suspects to "explain away" their guilt, the English state developed a system of prosecution that addressed these defects and, more strikingly, dispensed with private victims as well.

151. Id. at 603.
152. Langbein, supra note 38, at 318.