When it is said that a defendant to a criminal charge is presumed to be innocent, what is really meant is that the burden of proving his guilt is upon the prosecution. This golden thread runs through the web of the English criminal law. Unhappily Parliament regards the principle with indifference—one might almost say with contempt. The statute book contains many offences in which the burden of proving his innocence is cast on the accused.¹


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must both produce evidence of guilt and persuade the fact-finder "beyond a reasonable doubt."² The claim that "every man is presumed to be innocent until he is proved guilty" has been described as "dear to the hearts of Englishmen" and as an omnipresent feature of English criminal law.³ In 1895, the United States Supreme Court declared the "presumption of innocence in favor of the accused" to be "the undoubted law, axiomatic and elementary"—a protection that "lies at the foundation of the administration of our criminal law."⁴ Befitting its lofty stature in Anglo-American legal culture, the presumption has become associated, over time, with that most famous of Blackstonean maxims: "[I]t is better that ten guilty persons escape, than that one innocent suffer."⁵

But how robust was the presumption of innocence in late eighteenth- and early nineteenth-century English criminal law? Recently, Allyson May has argued that the presumption developed in the eighteenth century along with a series of procedural and evidentiary protections benefiting defendants tried at the Old Bailey, including the right to counsel, the notion of

². Scholarly understandings of the presumption differ. In the words of a prominent American treatise, the presumption "is generally taken to mean no more than that the prosecution has . . . the burden of producing evidence of guilt in order to avoid a directed verdict" and "of persuading the fact-finder of guilt beyond a reasonable doubt in order to secure a conviction." Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law (St. Paul, Minn.: West Publishing Co., 1986), §1.8, 81 (emphases added). According to two leading English commentators, the presumption of innocence means no more than "that the prosecution is obliged to prove the case against [the defendant] beyond reasonable doubt." Sir Rupert Cross and Colin Tapper, Cross on Evidence, 7th ed. (London: Butterworths, 1990), 125. But see George P. Fletcher, "Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases," Yale Law Journal 77 (1968): 880 n. 2 (arguing that the presumption of innocence and "beyond reasonable doubt" standard of proof are historically and philosophically distinct).

³. See Williams, Proof of Guilt, 151 (describing the presumption as "dear to the hearts of Englishmen") and David Fellman, The Defendant's Rights Under English Law (Madison: University of Wisconsin Press, 1966), 104 ("English law always starts with a strong presumption against the commission of a crime") (emphasis added).


⁵. William Blackstone, Commentaries on the Laws of England, vol. 4, Of Public Wrongs (1769), 352. Judicial opinions crediting the maxim to Blackstone include, for example, Coffin, 156 U.S. at 455–56 (attributing versions of the maxim to Fortescue, Hale, and Blackstone) and United States v. Green, 538 F.2d 437, 441 (D.C. Cir. 1976) ("It is a cardinal principle of Anglo-American jurisprudence that, in Blackstone's immortal words, better ten guilty persons should go free than one innocent person be convicted."). Over time, commentators have expressed widely disparate views as to the optimal ratio of "guilty" to "innocent." See Alexander Volokh, Aside, "n Guilty Men," University of Pennsylvania Law Review 146 (1997): 173–211.
the prosecution’s “case,” and the “beyond-reasonable-doubt” standard of proof. This article argues that many English criminal defendants in the late eighteenth and early nineteenth centuries did not benefit from a presumption of innocence but, rather, struggled against a statutory presumption of guilt. In the starkest cases, defendants labored under a presumption of guilt when charged with violating one of numerous statutes passed by Parliament during the eighteenth and early nineteenth centuries designed to combat various forms of misappropriation. Under these statutes, persons detected in possession of goods such as metal, rope, textile materials, or wood who failed to “account” adequately for their possession could be convicted by magistrates in “summary proceedings,” which dispensed with certain important procedural and evidentiary protections applicable in cases of larceny tried in the higher courts.


7. See Blackstone, Commentaries, 4:277 (“By a summary proceeding I mean principally such as is directed by several acts of parliament . . . for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge.”). On the eighteenth-century English magistracy generally, see Norma Landau, The Justices of the Peace, 1679–1760 (Berkeley: University of California Press, 1984). For details on the origins of the stipendiary
Unfortunately, historians still know comparatively little about summary proceedings despite their critically important role in the administration of criminal justice in eighteenth- and early nineteenth-century England. This article advances two principal claims. First, English criminal justice administrators from roughly 1750 to 1850 routinely resorted to summary proceedings in cases of suspected petty theft because of the challenges of securing convictions in the higher courts for the felony of simple larceny. Second, English criminal justice administration in this era is best viewed as a “two-tiered” system, in which heightened procedural and evidentiary protections for defendants tried in the higher courts for felonies coexisted with a system of reduced protections for defendants tried summarily for misdemeanors.

The article has five parts. Part I examines the obstacles to securing convictions for the felony of simple larceny at London’s Old Bailey in the early years of the nineteenth century. Part II, by contrast, explores the case studies of three persons tried summarily in the “police offices” of London in the 1830s for larceny-related misdemeanors. Part III examines several of the statutes passed by Parliament during the eighteenth and early nineteenth centuries that required suspects to “account” for certain materials found in their possession or face summary conviction. Part IV demonstrates that summary proceedings, compared to trials for larceny in the higher courts, furnished several distinct evidentiary advantages to English criminal juc-

[Note: The reference to the page number in the margin is not relevant to the content of the document and can be ignored.]
Presumption of Guilt

I. Prosecuting Larceny at the Old Bailey in the Early Nineteenth Century

Although historians have hotly contested the nature of English criminal justice administration in the eighteenth and early nineteenth centuries, they have agreed that property-related offenses dominated the landscape of the English criminal law.\(^9\) Of these, the offense of simple larceny stood out, accounting for over 60 percent of property-related cases tried at the Old Bailey from the 1780s to the 1820s.\(^10\)

The common law defined simple larceny as “the felonious and fraudulent taking and carrying away, by any person, of the mere personal goods of another, neither from the person, nor by night in the house of the owner.”\(^11\) By the eighteenth century, legal commentators typically divided proof of simple larceny into four elements: (1) that the accused “took” the property (“caption”); (2) that the accused “carried away” the property (“asporta-


tion”); (3) that the property was “personal” (and not “real”); and (4) that the accused had acted with “felonious intent.”

Despite the apparent simplicity of these elements and the centrality of the law of larceny to English criminal justice administration, several obstacles conspired to frustrate potential convictions for the offense. Some of these pitfalls involved weaknesses in the pretrial process. Because thieves frequently operated at night and often targeted nondescript goods (such as wool, coal, wood, or rope), property owners might fail even to detect the loss of their items. Moreover, if victims of theft did discover that their goods had gone missing, they might still decline to prosecute, deterred by the inconvenience and cost of trial, by the relative ease of negotiating a settlement with the suspect, or by qualms about the severity of the accused’s possible punishment. Finally, a victim who sought to try a case at either the quarter sessions or the assizes then faced the significant legal hurdle of obtaining a “true bill” from the grand jury.

As we shall see, private prosecutors who successfully cleared these hurdles might still confront the following significant evidentiary challenges at trial: (1) proving that the goods found in the defendant’s possession were actually the prosecutor’s; (2) overcoming the tactics of defense counsel, including efforts designed to impeach the prosecutor’s claims to ownership; (3) proving that the goods found in the defendant’s possession had indeed been stolen (i.e., establishing the so-called “corpus delicti” of larceny); (4) capitalizing on the evidentiary significance of the corpus delicti; and (5) ultimately convincing the petty jury to convict.


13. For discussion of the ways that summary proceedings addressed these problems in the pretrial process, see Bruce P. Smith, “Summary Justice and the Myth of Private Prosecution in England” (paper presented at the annual meeting of the North American Conference on British Studies, Portland, Ore., October 2003). On the difficulties of detecting thefts, see Patrick Colquhoun, A Treatise on the Commerce and Police of the River Thames (1800; reprint ed. [Montclair, N.J.: Patterson Smith, 1969]), 87 (“the pillage is often not discovered until the articles are wanted”); on the reluctance of victims to prosecute, see King, Crime, Justice, and Discretion, 23 (“Uppermost in most victims’ minds once the crime had been discovered was the desire to get their goods back as quickly as possible”); on the distaste for capital sanctions, see Donna T. Andrew and Randall McGowen, The Perreaus and Mrs. Rudd: Forgery and Betrayal in Eighteenth-Century London (Berkeley: University of California Press, 2001), 24 (observing that “[a] prosecutor might experience uneasiness at the thought of hurrying an acquaintance to his death and a sensitivity to the judgments his neighbors might make”); and on the hurdles caused by the grand jury, see Beattie, Crime and the Courts, 402, table 8.1 (“Grand Jury Verdicts in Surrey by Court of Trial, 1660–1800”) (demonstrating that grand juries in Surrey returned verdicts of ignoramus in over 11 percent of cases involving capital property offenses and over 17 percent of cases involving noncapital property offenses).
Establishing the Goods as the Prosecutor’s

First, a prosecutor seeking a conviction for larceny needed to convince the jury that goods found in the defendant’s possession were actually the prosecutor’s. Not surprisingly, victims of theft who could produce at trial one or more eyewitnesses to the alleged offense had good prospects of success.14 Prosecutors who could combine eyewitness testimony with positive identification of the goods found in the possession of defendants enjoyed even better odds. In 1803, the baker Edward Osman testified at the Old Bailey that he had spotted the defendant, Thomas Cox, “with a loaf under each arm.” But Osman clinched the conviction after he confidently identified the bread, claiming to the jury that it was his practice to mark his bread “with a particular large W, different from all other bakers in London.”15 Two years earlier, Andrew Davidson successfully prosecuted William Jolly at the Old Bailey for stealing a handsaw after Davidson claimed to have seen the saw “at the pawnbroker’s” and recognized it “by a piece being broke off near the handle, and the maker’s name.”16 Similarly, in a prosecution at the Old Bailey in 1803 alleging the theft of a “wherry-boat,” a witness named Abraham Hodges testified that he had “built [the boat], and marked her with this marking-iron, [with] five of the marks . . . punched in her bottom, and four in her keel; I am sure she is the same boat.”17 Hodges helped secure a conviction despite the fact that an estimated 3,000 “wherry boats” plied the Thames at that time.18

On the other hand, prosecutions for larceny could easily fail if trial jurors had reason to question prosecutors’ claims to ownership. Here, the nature of the goods typically stolen in London—what might be termed the “material culture of theft”—could raise significant problems of proof. In 1801, for example, James Richardson prosecuted James Smith on a charge of feloniously stealing “an inch and [a] quarter plank” of wood from Richardson’s business. At trial, Richardson provided the following self-assured testimony: “I am positive it was our plank, because we had

14. Understandably, prosecutions supported by direct, eyewitness testimony tended to fare better at the Old Bailey than those supported by indirect, circumstantial evidence. Based on data from 1780, George Fisher has argued that defendants who faced “pure circumstantial evidence” were approximately twice as likely to be acquitted as those who confronted sworn eyewitnesses. Fisher, “The Jury’s Rise as Lie Detector,” *Yale Law Journal* 107 (1997): 644.
15. Thomas Cox, OBSP (1803, 3d sess.), Case No. 214.
16. William Jolly, OBSP (1801, 1st sess.), Case No. 31.
17. Jonathan Boothman (aka George Rhode), OBSP (1803, 5th sess.), Case No. 442. Wherries were craft used on the Thames to transport goods from larger ships. See Colquhoun, *Treatise (River Thames)*, 14.
several out of the same tree, and it is an inch and quarter plank, which we
gave a particular order for, and I rather suppose there is no such thing
in London beside."19 Despite Richardson’s assurances, the jury acquitted
the defendant, likely disbelieving Richardson’s claim that his lost wooden
plank had no peer in all of London.

Admittedly, under English law, persons apprehended with goods in their
possession could be indicted for larceny even when the actual owner of
the goods could not be determined before trial. Writing in 1800, the legal
commentator Edward Hyde East observed that a suspect could “be charged
in the indictment with having stolen the goods of a person to the jurors
unknown.”20 Consistent with East’s statement of the law, the Old Bailey
Sessions Papers (OBSP) reveal numerous prosecutions for larceny where
the owner of the goods had not been identified before trial. However,
although further quantitative study is warranted, it is my impression that
prosecutions grounded on indictments that alleged theft from “persons
unknown” (or from any one of several prospective owners) fared poorly
at trial compared to prosecutions where actual victims had been identified
in the indictment.21 The fate of an indictment brought in 1803 against one
Samuel Thomson, accused of stealing two wax leather calf-skins from a
lengthy list of potential owners, appears to have been typical: “There being
no evidence to bring the charge home to the prisoner, he was not put on
his defence.”22 In that same year, judges at the Old Bailey dismissed an
indictment against John Stedman alleging theft of clothing from two dif-
ferent owners: “There being no evidence to bring the charge home to the
prisoner, [the defendant] was ACQUITTED.”23 In these cases, the presid-
ing judges appear to have entered the equivalent of a directed verdict of
acquittal—perhaps because the actual victims of theft capable of speaking
to the goods’ loss and identity never materialized.24

19. James Smith, OBSP (1801, 1st sess.), Case No. 20 (emphasis added).
21. With the aid of the Old Bailey Sessions Papers Online, I am currently engaged in a
quantitative study of this phenomenon. I am indebted to Joanna Innes and an anonymous
reviewer for Law and History Review for suggestions concerning this subject.
22. Samuel Thomson, OBSP (1803, 2d sess.), Case No. 145.
23. John Stedman, OBSP (1803, 3d sess.), Case No. 186 (capitalization in original).
24. Writing in 1820, the French observer Cottu noted that “[i]f the evidence is not suf-
iciently strong, the judge seldom waits for the verdict, and is the first to announce that the
prisoner must be acquitted.” Charles Cottu, On the Administration of Criminal Justice in
in John H. Langbein, “The Historical Origins of the Privilege Against Self-Incrimination at
Surviving Cross-Examination

Prosecutors’ efforts to identify their goods could be made even more difficult by defense counsel, who emerged at the Old Bailey in the 1730s and became increasingly active thereafter.

Consider the fortunes of John Smith, who prosecuted Richard May in 1803 for allegedly stealing a pair of shoes valued at 4 shillings that Smith claimed to have left hanging outside his shop. At trial, May’s defense counsel crisply cross-examined Smith as to Smith’s purported identification of the shoes:

Q: What is there remarkable in the shoes?
A: They are very badly made and closed; they are bad altogether.
Q: You would not swear there are not many others made like them?
A: No.25

After hearing this meek concession, the jury acquitted the defendant.

Similarly, in a case involving the theft of several ducks, the barrister John Gurney successfully rattled the testimony of Robert Puller, a servant who had appeared at the Old Bailey in support of his master. During his direct examination, Puller testified that he had heard a noise at night and had gone “out into the yard,” where he “heard the ducks cry” and “saw the prisoner.” Unfortunately for Puller, “it was so dark that [he] could not see whether [the suspect] had [a duck] in his hand or not.” After chasing the intruder over the fence, catching him, and giving him “a blow on the side of his head,” Puller “found a bag with three live ducks in it.” On direct, Puller testified gamely that “[he] never lost sight of [the suspect] all the way” and, upon apprehending him, had “counted the ducks, and found two short of the number.” After hearing this testimony, Gurney subjected the servant to a withering cross-examination:

Q: How many ducks had you in the yard?
A: Twenty-one dozen and five [i.e., 257].
Q: You do not mean to swear to [the identity of] the ducks [allegedly stolen]?
A: No, I cannot.
Q: There was nothing remarkable in the colour of those ducks?
A: No.
Q: Did you count them over?
A: No; the man that counted them is not here.26

26. Gurney also criticized the servant for cutting his client with a sword:

Q: You fought stoutly, and gave him a pretty handsome cut; that mark upon his cheek, which he will carry to his grave, is your cut, is it not?
When Puller’s master, Titus Farmer, appeared at trial, he could only aver feebly that he “believe[d] the ducks to be [his]” but that he could not “positively swear to them.” After hearing from four character witnesses called on the defendant’s behalf, the jury returned a verdict of not guilty.  

For twenty-first century readers, whose material possessions come in distinctive colors, models, and brands and are often stamped with identification numbers, it requires an imaginative leap to recapture the dramatically different material world of late eighteenth- and early nineteenth-century England. During that time, wealth—at least among the lower and middling classes—frequently resided in humble goods such as wood, metal, rope, and vegetables, which were virtually indistinguishable from similar items held by others. The nature of this early modern material culture had serious implications for the prosecution of larceny: Wooden planks, “badly made” shoes, and nondescript ducks might well be too commonplace for property owners to identify credibly at trial as their own.  

This is not to suggest that, in the struggle between ownership and acquisition, property owners simply capitulated. As Peter King has revealed in his magnificent study of crime and criminal justice administration in eighteenth- and early nineteenth-century Essex, coal owners might lace their coal piles with colored beans and farmers might insert “specially knotted string” into their hay bales to assist the materials’ identification should they be purloined. But King’s evidence also reveals a sobering fact: These primitive forms of surveillance seldom generated prosecutions, triggering only 2.2 percent of prosecutions for larceny tried at the Essex Quarter Sessions in which a particular method of detection could

A: Yes.
Q: What did you cut him with, a cutlass?
A: Yes.


27. Thropp, OBSP (1803, 6th sess.), Case No. 499.

28. Contrast the challenges posed by the current scourge of automobile theft in the United Kingdom, which, according to a recent Home Office estimate, accounts for roughly 25 percent of recorded crime. The use of VIN numbers and Automatic Number Plate Recognition, among other detection tools, has led to a roughly 70 percent recovery rate for stolen cars. See “Tackling Vehicle Crime: A Five Year Strategy,” http://www.crimereduction.gov.uk/vrcat2.htm#chap1. Compared to rope, wood, or metal, the sheer variety of styles, colors, and model years of automobiles no doubt also assists recovery efforts.


be identified. Even the considerable resources of the English state could be frustrated by thieves intent on disguising the true ownership of stolen goods: Although the Crown, by the latter decades of the eighteenth century, required suppliers of cordage to mark it with “a white thread, laid the contrary way” and suppliers of bolts to mark them with “the King’s arrow,” such designations could “easily be removed” by enterprising pilferers. By contrast, pieces of coal, scraps of wood, or bits of metal would have been virtually impossible for property owners even to attempt to mark effectively as their own.

Proving the Corpus Delicti of Larceny

Contemporary observers understood that victims of theft might face difficulties in proving that defendants had committed larceny. In his influential three-volume treatise on the law of evidence published in the 1820s, Thomas Starkie noted that, in cases alleging larceny, “the caption and asportation can seldom be directly proved by an eye-witness” and, thus, “presumptive [i.e., circumstantial] evidence must in general be resorted to” by the prosecution. Starkie further recognized—again, quite realistically—that “[t]he most usual and cogent evidence . . . [of the defendant’s wrongdoing] consist[ed] in proof of the prisoner’s possession of the stolen goods.”

So much seemed clear. Unfortunately for prosecutors, the mere fact that a defendant had been apprehended with goods suspected to have been stolen might pay few benefits at trial. From the late seventeenth century onward, legal commentators urged that, to support a conviction for larceny, the prosecution should first be required to prove what modern lawyers call the “corpus delicti,” that is, that the goods found in the defendant’s possession had indeed been stolen from someone. As Starkie counseled, “a prisoner ought not to be convicted of stealing the goods of a person unknown, upon such [presumptive] evidence, without proof that a felony ha[d] actually been committed.” Put differently, “mere evidence of the possession of property by the prisoner, for which he cannot account, without evidence

31. Ibid., 21, table 2.1 (“Detection Methods, Essex Quarter Sessions Depositions [Larceny Only], 1748–1800”).
to identify it with that proved to have been stolen, [was] insufficient” to establish guilt.34  

The corpus delicti rule applies in virtually all modern Anglo-American jurisdictions, though it possesses by now a distinctly musty odor.35 Legal scholars care little about the doctrine and know even less about its historical origins.36 Commentators typically assert that the doctrine sought to prevent the wrongful convictions of defendants who had confessed to crimes that they had not, in fact, committed. In the words of one recent judicial decision, “the English corpus delicti rule . . . served the limited function of ensuring that a defendant could not be convicted of a crime to which he had confessed if that crime never occurred.”37 In truth, English legal commentators from the 1670s onward urged that the prosecution be required to prove the corpus delicti not only in cases where defendants had confessed, but in all instances in which prosecutors sought to rely upon certain types of presumptive evidence. Significantly, the type of presumptive evidence considered most dubious was the suspect’s unexplained possession of goods found in his or her possession.

We can get a sense of the distrust for such evidence from Matthew Hale’s Pleas of the Crown, written in the late seventeenth century but published in the 1730s. Hale warned that “[he] would never convict any person for stealing the goods cujusdam ignoti [i.e., of an unknown person] merely because [the defendant] would not give an account how he came by them, unless there were due proof made, that a felony was committed of these goods.”38 To support this strict rule, which Hale urged that judges apply in prosecutions alleging either murder or larceny, he cited to a pair of cases in which defendants tried for homicide had been convicted and hanged—only to have the alleged victims turn up alive after the executions.39

34. Starkie, Law of Evidence, 2:841 (emphasis added).
39. Ibid. Hale apparently relied on two cases: (1) a 1611 case from Warwickshire, cited in Coke’s Third Institute, in which an uncle was executed for the murder of his niece, who later returned; and (2) a case that he believed to have arisen in Staffordshire, whose details are unknown. See John Henry Wigmore, Evidence in Trials at Common Law, ed. James H. Chadbourn (Boston: Little, Brown, 1978), 7:545 [hereafter “Wigmore on Evidence”]. As suggested by Wigmore, the latter case may have been that of the Perry family, three of whom were convicted and executed in Gloucestershire in 1660 for the death of William...
In his *Commentaries*, published several decades later, William Blackstone praised the “two rules” identified by Hale that were “most prudent and necessary to be observed:”

1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: and, 2. Never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances [Hale] mentions, where persons were executed for the murder of others, who were then alive, but missing.40

Indeed, it was only at this important juncture of the *Commentaries* that Blackstone expressed the maxim that would be remembered, over time, only in part: “[A]ll presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.”41

Early nineteenth-century commentators on the law of evidence echoed the views of Hale and Blackstone, urging that prosecutors be required to prove that the goods found in a defendant’s possession had actually been stolen.42 Of course, we must not assume that the pronouncements of legal commentators described actual practice in the criminal courts. As John Henry Wigmore observed, although English judges in the late eighteenth and early nineteenth centuries exhibited “some indication of a willingness to erect Lord Hale’s caution into a definite rule of law,” they ultimately

Harrison, the steward of Lady Campden. Harrison had failed to return from a local round of tax collecting and was thought to have been murdered. He ultimately returned to England after the executions, claiming to have been abducted, forced onto a sailing vessel, and sold into slavery in Turkey. See *Perrys’ Case*, 14 How. St. Tr. 1312 (1660). For additional details of these bizarre events, see S. M. Phillipps, *Famous Cases of Circumstantial Evidence; with an Introduction on the Theory of Presumptive Proof* (New York: J. Cockcroft, 1875), 50–52, and Bruce P. Smith, “The ‘Campden Wonder’ and the Problem of the Missing Body” (paper presented at the annual meeting of the American Society for Legal History in Washington, D.C., November 2003).

41. Ibid.
42. Thus, Leonard MacNally affirmed in 1802 that “[a] defendant should never be convicted for stealing the goods of a person unknown, merely because they are found in his possession, and he refuses to give an account how he came by them; unless there are due proofs made that a felony was committed of these goods.” Leonard MacNally, *The Rules of Evidence on Pleas of the Crown, Illustrated from Printed and Manuscript Trials and Cases* (Dublin: H. Fitzpatrick, 1802), 2:580. A year later, East observed that “in prosecutions for stealing the goods of a person unknown, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious . . . for it is not enough that the prisoner is unable to give a good account how he came by the goods.” East, *Pleas of the Crown*, 2:651.
came to view the corpus delicti rule as “nothing more than a general expression of caution, not a definite rule.” With that said, English judges periodically invoked the doctrine into the nineteenth century in directing verdicts of acquittal—even when proof of the defendant’s wrongdoing seemed compelling. In Regina v. Dredge (1845), for example, a shopkeeper in Wiltshire who owned a large toy shop apprehended a boy carrying a doll, six toy houses, and other items suspected to have been stolen. At trial, the shopkeeper narrated the facts of the boy’s apprehension, described how the items had been concealed under the boy’s smock, and asserted, for good measure, that the doll found on the boy displayed the owner’s “private mark.” Despite this showing, Mr. Justice Erle acquitted the child, after concluding that the corpus delicti had not been established and “for all that appeared, the prisoner might have come by the property in an honest manner.” Although we should not read too much into this case—where the corpus delicti rule may well have been invoked to spare a youthful offender—such decisions served, yet again, as dispiriting reminders of the challenges of proving larceny in the higher courts.

**Overcoming the Limits on Presumptive Evidence**

Even if a prosecutor managed to prove the corpus delicti, he might still be unable to exploit this evidence at trial to the extent that he anticipated or wished. By the early decades of the nineteenth century, a body of law had developed in both England and America that limited the evidentiary uses of a defendant’s unexplained possession of stolen goods. Although articulated in various ways, the basic legal rule held that the burden of proof could be transferred from the prosecutor to the defendant only if the prosecutor first showed that the defendant had “exclusive and unexplained possession of stolen property recently after the theft.”

These requirements could have serious consequences even in cases that might initially have seemed airtight. In Rex v. Adams, a prosecution for larceny tried at the Hereford Assizes in 1829, Joseph Powell charged the defendant, Charles Adams, with stealing an ax and other tools. Powell managed to prove at trial “that he [had] missed the tools on a certain day,” while a second witness established that the tools had been found “in the possession of the prisoner three months after they were missed”—a


45. The summary is from *State v. Hodge*, 50 N.H. 510, 511 (1869), a case from the New Hampshire Supreme Court that surveyed Anglo-American law on the evidentiary significance of a defendant’s unexplained possession of goods proven to have been stolen.
showing that seemingly satisfied the *corpus delicti* rule. Despite this proof, the presiding judge, Baron Parke, entered a directed verdict of acquittal “without calling on the prisoner for his defen[s]e,” noting that “possession of stolen property three months after it was lost, was not such a recent possession as to put the prisoner upon sh[o]wing how he came by it, unless there was evidence of something more than the mere fact of the property being in his possession at that distance of time after the loss of it.”

Similarly, in *Regina v. Cooper*, a case tried at the Essex Assizes in 1852, the defendant was accused of stealing a mare that had gone missing from the prosecutor in December 1849 and had been found in the accused’s possession six months later. Once again, the court entered a directed verdict of acquittal, concluding that “there was no case to go to the jury” because the defendant’s possession was not “sufficiently recent.” In the words of Mr. Justice Maule, “[w]here a man is found in possession of a horse six or seven months after it is lost, and there is no other evidence against him but that possession, he ought not to be called to account for it.” In short, even in evidentiary circumstances that might have appeared damning, defendants accused of larceny might slip through prosecutors’ hands.

**Proving Larceny to the Petty Jury**

Prosecutors faced additional challenges in securing convictions for larceny. By the late eighteenth century, the simple elements of larceny had become entangled in a thicket of case law characterized by maddening distinctions between “personal property” (which came within the law of larceny) and “real property” (which did not); horses (which did) and dogs (which did not); and plants cut and severed from the earth (which did) and those still in the ground (which did not). Prosecutors who failed to negotiate these tortuous distinctions likewise faced the prospects of having their cases founder.


47. 3 Car. & K. 318 (Essex Summer Assizes, 1852), in F. A. Carrington and A. V. Kirwan, *Reports of Cases Argued and Ruled at Nisi Prius, in the Courts of Queen’s Bench, Common Pleas, & Exchequer; Together with Cases Tried on the Circuits, and in the Central Criminal Court, from Hilary Term, 6 Vict. to Trinity Term, 8 Vict.* (London: S. Sweet, 1845), 3:318.

We must be careful, of course, not to overstate the degree to which prosecutions in cases of larceny turned on such legal niceties. Because criminal trials in the late eighteenth and early nineteenth centuries remained speedy affairs and most defendants continued to lack counsel, many cases probably turned not on legal issues but, instead, on the jurors’ assessment of the character of the defendant, the motivations of the prosecutor, the credibility or social status of the witnesses, or the perceived severity of the possible sentence. Moreover, although our knowledge of proceedings in courts of quarter sessions remains incomplete, it seems doubtful that the JPs who staffed those courts exhibited the legal punctiliousness of the judges who presided at the Old Bailey.

What cannot be doubted, though, is that prosecutions for larceny brought before juries (and judges) confronted highly uncertain prospects. As John Beattie’s evidence from Sussex and Surrey demonstrates, trial juries returned verdicts of “not guilty” in approximately 35 percent of cases involving property offenses during the latter decades of the eighteenth century. In a significant percentage of cases, therefore, the investments of private prosecutors yielded disappointing results.

49. May has estimated that defense counsel appeared in only 26 percent of cases at the Old Bailey in 1805. See May, The Bar and the Old Bailey, 35, table 1. Detailed information about acquittals is generally lacking for two reasons: first, trial juries traditionally have not disclosed the reasons for their verdicts; and, second, the Old Bailey Sessions Papers in the late eighteenth and early nineteenth centuries tended to give especially short shrift to cases resulting in acquittals. “Except between 1779 and 1787 and perhaps after 1792, the late-century Sessions Paper[s] reported most cases that ended in acquittal in summary fashion only—reciting the indictment and the result, but omitting the evidence.” Fisher, “Jury’s Rise,” 640 n. 294 (italics omitted).


51. Beattie, Crime and the Courts, 411, table 8.3 (“Trial Jury Verdicts in Surrey [Quarter Sessions and Assizes Together], 1660–1800”). Similar rates of acquittals in property-related cases have been calculated for other English jurisdictions. See King, Crime, Justice, and Discretion, 231–42, 247–49 (discussing the joint contribution of the jury unanimity rule, jury nullification, and juror “independence” to acquittal rates) and Gwenda Morgan and Peter Rushton, Rogues, Thieves and the Rule of Law: The Problem of Law Enforcement in North-East England, 1718–1800 (London: UCL Press, 1998), 69 (finding that 20 percent of indictments for larceny in Northumberland “fell by the wayside” because of defects in the indictment and other factors).
Consider, by contrast, the experiences of three persons tried for larceny-related offenses in the mid-1830s in the police offices of metropolitan London. On October 24, 1836, Thomas Murray, a self-styled metal dealer, appeared before the attending magistrate at the Thames Police Office at Wapping New Stairs, on the north side of the Thames near Execution Dock. Officers had arrested Murray and a man named Edward Bloxham in the parish of Saint Giles with 400 pounds-weight of lead in their possession, which had apparently been “doubled up and beaten together in such size and shape as to be carried . . . under the clothes,” suspended there “upon a belt fastened round the body or . . . from the braces [i.e., suspenders] or neck.” According to the magistrates at the Thames Police Office,

52. My reconstruction of Murray’s case is primarily drawn from letter books at the London Metropolitan Archives (LMA) recording correspondence between the Thames Police Office and the Home Office. See Letter Books of Magistrates at Thames Police Office, Wapping, 1804–42, shelfmark PS.T/1/Letter books/1–5 (microfilm X83/1–2) [hereafter Thames PO Letter Book]. (I am grateful to Louise Falcini for sharing with me her transcriptions of these letter books.) Additional details on the arrest are included in the Daily Police Report, a daily report of activities in the metropolitan police offices that exists in the National Archives in a series from 1828 to 1839. See HO 62, Home Office: Daily Reports from Metropolitan Police Offices (1828–39). The Report noted that “Edward Bloxham and Thomas Murray, [were charged] with unlawfully possessing, at Saint Giles, four hundred weight of lead, which had been stolen.” Daily Police Report, 24 October 1836, HO 62/18. “Execution Dock” referred to the location between Wapping New Stairs and King Edward’s Stairs at which “pirates, mutineers, and other seafaring men” were hanged from the late sixteenth until the mid-nineteenth century. See Marcus Rediker, Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates, and the Anglo-American Maritime World, 1700–1750 (Cambridge: Cambridge University Press, 1987), 24–27.

53. William Ballantine and Thomas Clarkson to Samuel March Phillippns (Under-Secretary of State for Home Affairs), 6 December 1836, Thames PO Letter Book. The records do not identify the individuals—described as “officers”—who actually apprehended Murray and Bloxham, though it seems likely that an officer (or officers) assigned to the Thames Police Office made the arrests. In the late 1830s, the Thames Police Office employed roughly seventy constables and thirty-one supervising “surveyors.” On the staffing of the Thames Police Office, see Sir Leon Radzinowicz, A History of English Criminal Law and its Administration from 1750, vol. 2, The Clash between Private Initiative and Public Interest in the Enforcement of the Law (New York: Macmillan, 1957), 529–32. Police officers appointed under the Metropolitan Police Act of 1829 went on duty in the parish of St. John, Wapping, in January 1830, and it is thus conceivable that Murray was arrested by a member of this force. In 1837, the police magistrate John Hardwick of the Lambeth Street Police Office observed that constables assigned to that particular office focused their efforts on cases of assault and expected the metropolitan police officers to arrest suspected thieves. See Clive Emsley, The English Police: A Political and Social History, 2d ed. (London: Longman, 1996), 29 (citing Parliamentary Papers 1837 [451] XII, Metropolis Police Offices, 603).
this technique of transforming lead into “plumbers’ pins” was favored by “workmen” who pilfered lead from “all premises” in the metropolis where “works [were] in progress.”

When Murray appeared at the police office, the attending magistrate, Thomas Clarkson, instructed him to demonstrate “not only that he had purchased [the lead] but also that it [had] been bought under such circumstances as would remove the suspicion attached to it.” According to the clerk’s transcript of the proceeding, Murray provided the following response:

I do a deal of business in the lead trade. I can’t speak to every piece of it. I purchased it in the way of trade of master plumbers in exchange—if a plumber comes to me for a 6 wt. [?] of sheet he has it and I take some in exchange. I sometimes change 3 or 4 tons in a week—the large piece of pipe I bought [from] Mr. Buckingham. With respect to the nails [i.e., “plumbers’ pins”?] I don’t know much about [that], I am not versed in that sort of thing.

Unimpressed with this explanation, the magistrate summarily convicted Murray and sentenced him to a £5 fine, noting that he had “passed very lightly over the strong points of the case against him.”

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54. Ballantine and Clarkson to Phillipps, 6 December 1836, Thames PO Letter Book.
55. Ibid. This apparently was not Murray’s first brush with the law. A petition in the Middlesex Sessions Papers (MJ/SP) reveals that, in late December 1832, Murray—then operating as a “Dealer in Marine Stores”—had been convicted summarily by a police magistrate for having “bought a certain Marine Store to wit Old Iron and neglect[ing] to make an Entry thereof in any Book of the Time when the same was bought.” See “The Humble Petition of Thomas Murray of No. 13 High Street in the [P]arish of Saint Giles in the Fields in the County of Middlesex Dealer in Marine Stores,” April 1833, MJ/SP/1833/04/032. Furthermore, in April 1833, Murray had complained at the Great Marlborough Street Police Office that John Gook and George Lowen, the latter a parish officer, had threatened “to take a Summons out” against him for an alleged violation relating to his ironmonger’s cart, for which “the penalty would be £5.” Murray apparently paid Lowen four or five shillings to desist. See “Information of Thomas Murray before Henry Moreton Dyer, 17 April 1833, at Great Marlborough Street Police Office upon the Examination and in the presence and hear[ing] of John Gook and George Lowen then and there charged with a Misdemeanor,” 17 April 1833, MJ/SP/1833/05/029.
56. Ballantine and Clarkson to Phillipps, 6 December 1836, Thames PO Letter Book.
57. Bloxham was discharged. See Daily Police Report, 24 October 1836, HO 62/18. Reference to Murray’s fine is contained in Phillipps to Thames Police Office, 2 December 1836, Thames PO Letter Book. On the police magistrates’ assessment of Murray’s testimony, see Ballantine and Clarkson to Phillipps, 6 December 1836, Thames PO Letter Book. Although Murray intimated that the attending magistrate had “ordered him to hold his tongue and refused to hear him,” the magistrates claimed in their letter to the Home Office that Murray was permitted to “make his defence” and that it was recorded by the office’s clerk. Ibid.
Several months later, in March 1837, the Home Office received a petition from one Lewis Leo—a “Collector of Broken Glass and Old Metal” living at 29 Sandy’s Row, Spitalfields—“[p]raying [for] the return of a Cart,” which had been “forfeited” by his servant Henry Samuels “on being Convicted [summarily] of unlawful possession of Certain Metal.” Samuels had been arrested by a metropolitan police officer in December 1836 in possession of “Thirty four Pounds weight of Brass.”

When Samuels had appeared at the Queen Square Police Office, the attending police magistrate, David Gregoire, initially adjourned the case to give Samuels “an opportunity to produce evidence that the said Goods were fairly and honestly purchased by him.” Two days later, Samuels again appeared before Gregoire, this time claiming to have “produced the Person from whom he had bought the said Metal.” The magistrate examined Samuels’s witness “touching the same,” who claimed “[that] the said Henry Samuels bought the said Metal [from] her, and also stated the person of whom she bought the same.” Gregoire nonetheless convicted Samuels and ordered him to pay a 40–shilling fine or, in default of payment, to be “committed to the House of Correction for three weeks.” For good measure, Gregoire also seized the horse and cart in which the metal had been found.

Finally, in late December 1837, police officers in eastern London entered the home of John William Adams, a silk-weaver living at 31 Spital Street, Mile End New Town. Acting pursuant to a search warrant, the officers discovered there “Three Pounds weight of unwrought Silk of different colours . . . and One Hundred and forty Wooden Bobbins, being Tools and Implements with which Persons are entrusted for manufacturing Silk Materials, . . . suspected to be purloined and embezzled.” The arresting officers promptly brought Adams and the materials that they had discovered before the police magistrates in attendance at the Worship Street Police Office in Shoreditch.

After no individual came forward to claim the materials, the magistrates


60. My account of the search and Adams’s arrest is drawn from a report of the proceedings in the Middlesex Sessions Papers. See MJ/SP/1838/02/048a. Mile End New Town developed in the seventeenth century as an extension of Spitalfields, the historic silk manufacturing district in east London. In the late 1830s, the district of Mile End New Town continued to consist largely of handicraft tradesmen, artisans, and laborers—many involved in the silk industry. For information on the history and demography of Mile End New Town, see East of London Family History Society, “Mile End,” available at http://www.eolfhs.org.uk/parish/mile_end.htm.
remanded the case for a week “to give [Adams] time” to “prove” how he had become possessed of the goods. Not surprisingly, Adams then undertook concerted efforts to establish his lawful possession of the materials in question. As he later recounted, he first “applied to one of Whom he [had] bought some portion [of the silk] and [the seller] readily Came Forward.” With this witness in hand, Adams “then aplied to the Other [seller],” who stated that “the invoice [that allegedly recorded the sale] was Sufeiscent but Come he Would if Sent For.”

With his evidence assembled, Adams appeared before the police magistrates again ten days after his arrest. Noting that no person had yet claimed the property as its rightful owner, the magistrates again called upon Adams to demonstrate “how he became poss[ess]ed” of it. Although Adams diligently “put in his invoiceses [i.e., invoices] for one part and called persons to prove the Other,” the magistrates summarily convicted him after he failed to produce “persons to prove the bills [i.e., the ‘invoiceses’].” The magistrates then sentenced Adams—a first-time offender—to a £20 fine or a one-month stint in the house of correction in default of payment.

How typical were the cases of Murray, Samuels, and Adams? On the one hand, their experiences were exceptional because they were among a relatively small fraction of persons convicted summarily who petitioned the Home Office for post-conviction relief, who did so with some success, and who, in the process, created reasonably extensive written records of their proceedings. On the other hand, their experiences resembled those

61. See “To the Secretary of State For the home Departm [t]he Humble pittion [i.e., peti-

62. Ibid. (emphasis added).

63. The certificate of conviction is contained in the files of the Middlesex Sessions Papers. See “MIDDLESEX TO WIT. Be it Remembered, That on the Twenty sixth Day of Decem-
ber in the Year of our Lord One Thousand Eight Hundred and thirty seven, John William
Adams is convicted before [u]s Harrison Gordon Codd and Robert Edwards Broughton
Esquires, Two of Her Majesty’s Justices of the Peace in and for the County of Middlesex.
. . .” MJ/SP/1838/02/048a.

64. In the case of Murray, the Home Office instructed that his £5 and confiscated lead be returned to him. See Phillipps to “Magistrates, Thames Police Office,” 4 March 1837, Police Courts Entry Book, HO 60/3 (“I am . . . to request that you will restore the Lead to Mr Murray, and pay to him the sum of £5 which you are hereby authorized to charge in your Police Ac[c]ounts”). In response to an inquiry by the Home Office about Samuels, the convicting magistrate recommended that he be authorized “to deliver up the cart” but not the seized metal; based on this recommendation, the Home Office “sanctioned the return of the Cart,” but declined to “give such directions respecting the metal.” Phillipps to Leo, 8 March 1837, Police Courts Entry Book, HO 60/3. With respect to Adams, the magistrates noted that “part of the property in which [Adams had] proved an honest possession” had
of thousands of persons tried and convicted in the police offices of London for petty appropriation in the early decades of the nineteenth century.65

How did magistrates in London justify a system of summary justice that dispensed with private prosecutors and juries and that placed such extensive pressures on suspects to “account” for possession? In a letter to the Home Office in December 1836, the magistrates at the Thames Police Office defended summary proceedings as follows:

Convictions rest in such cases not solely as [the defendants] would have it appear [i.e.,] upon the testimony of Officers who receive a part of the penalties when the facts sworn to by them are undisputed[,] but principally upon the account given by the parties charged before the Magistrate of the property seized[,] who have it always in their power to account for the possession if they can do so satisfactorily.66

In the case of Thomas Murray, the conviction had been justified because he “did not dispute the fact of possession nor the suspicious marks and

been “given up to him,” and that the remaining material in the possession of the magistrates “[was], in its present state, of but trifling value”; the magistrates stated that they would “have pleasure in restoring it to Adams’ [f]amily, rather than in selling it for the public account, if [the Home Secretary] [would] be pleased to authorize it.” The Home Office consented, noting in pencil on Adams’s petition that the “Magistrates say it is a case of distress & are disposed to restore the property.” “Report upon the Petition of John W. Adams, praying that some Silk detained by the Police may be restored to him. . . .” Robert E. Broughton to Home Office, 29 March 1838, Police Courts In-Letters, HO 59/9. This is not to suggest that the proceedings were costless to the three defendants. On the toll taken on modern-day defendants tried in misdemeanor proceedings in terms of annoyance and humiliation, see Malcolm M. Feeley, The Process Is the Punishment: Handling Cases in a Lower Criminal Court (New York: Russell Sage Foundation, 1979).

65. Entries in the Daily Police Report reveal a steady stream of persons convicted summarily for possession of suspicious goods. See, for example, Case of Roger Judge, Lambeth Street Police Office (August 19, 1836) (“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”); Case of George Bailey, Thames Police Office (September 29, 1836) (“GEORGE BAILEY, with unlawfully possessing in Chandos-street, thirteen pounds weight of lead, which had been stolen.—Convicted of a misdemeanor, and fined forty shillings”); Case of John Smith, Thames Police Office (November 26, 1836) (“JOHN SMITH, on re-examination, with stealing fifty-six pounds weight of lead, the property of some person unknown, at Westminster.—Discharged from this; but convicted of a misdemeanor, and fined five pounds”); and Case of Joseph Baldwin, Thames Police Office (December 24, 1836) (“JOSEPH BALDWIN, with possessing, at Shadwell, one piece of iron, four pounds weight of copper, eight pounds of lead, four pounds of metal, twenty-five pounds of rope, and other articles, which had been stolen.—Convicted of a misdemeanor, and fined five pounds”). See Daily Police Report, HO 62/18.

66. Ballantine and Clarkson to Phillipps, 6 December 1836, Thames PO Letter Book.
appearances” on the lead, had provided “a very vague and indistinct account of the manner in which he came by [the lead] without naming the persons of whom he bought or received it,” and had failed to request an adjournment in the proceedings at the police office to permit witnesses to testify.\(^{67}\) The police magistrate Patrick Colquhoun was more pithy: Under statutes that conferred summary jurisdiction and required suspects to “account” for possession, “the Examination of the Delinquent” provided all the evidence necessary to secure conviction.\(^{68}\)

III. The “Bloodless” Code and Statutory Presumptions of Guilt

To understand the cases of Murray, Samuels, and Adams, we must first come to terms with the body of statute law that authorized magistrates to adjudicate summarily certain forms of petty theft. As Norma Landau has demonstrated, Parliament dramatically increased the number of offenses over which magistrates could exercise summary jurisdiction between the 1660s and the 1770s, from roughly 70 to over 200—a legislative output that, in its sheer magnitude, rivaled the scope of England’s more infamous “Bloody Code.”\(^{69}\) As we shall see, the legacy of several of these statutes can be seen in the prosecutions of Murray, Samuels, and Adams.

In 1756, for example, Parliament passed a measure designed to combat the theft of lead and other metals from warehouses and ships. The measure (which came to be known as “the Lead and Iron Act”) sought to counteract the “pernicious practice” of persons who stole metal “fixed to, or lying, or being 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 persons suspected of stealing metal 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.” The Lead and Iron Act thus authorized constables to apprehend “every person . . . who may reasonably be suspected of

\(^{67}\) Ibid.

\(^{68}\) Colquhoun, *Treatise (River Thames)*, 279.

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 or she “[was to] be adjudged guilty” of a misdemeanor and fined.70

Similarly, in 1762, Parliament enacted the so-called “Bumboat Act,” designed to deter the “many ill-disposed persons, using and navigating upon the river Thames certain boats commonly called bum boats, and other vessels” who, “under pretence of selling liquors, . . . slops, tobacco, brooms, fruit, greens, gingerbread, and other such-like wares and things” to “seamen and labourers,” 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 “cause to be apprehended and detained, all and every person and persons, who may reasonably be suspected of having or carrying, or in any way conveying, any ropes, cordage, tackle, apparel, furniture, stores, materials, or any part of any 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, and 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 by the magistrate of a misdemeanor and fined 40 shillings or, in default of payment, be sentenced to a one-month term of imprisonment.71

Parliament also passed several measures during the eighteenth century that authorized magistrates to adjudicate summarily cases involving the misappropriation of textile materials. In 1777, for example, Parliament passed an act designed to prevent “frauds and abuses by persons employed in the manufacture of hats, and in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, and silk manufactures.” The measure authorized magistrates to grant warrants to search dwelling houses, yards, gardens, and other places for materials suspected to have been “purloined

70. 29 Geo. II, c. 30 (1756).
71. 2 Geo. III, c. 28 (1762), preamble. For discussions of appropriation from boats, docks, and wharves on the Thames, see Peter Linebaugh, The London Hanged: Crime and Civil Society in the Eighteenth Century, 2d ed. (London: Verso, 2003), 390–96; Colquhoun, Treatise (River Thames), passim; and Knight, “Pilfering.” On the Bumboat Act and earlier efforts to regulate vessels on the Thames, see Radzinowicz, History of English Criminal Law, 2:483–85. (The spellings “bum boat” and “bumboat” appear to have been used interchangeably by contemporary writers.)
and embezzled.” Officers who discovered suspicious textile materials in these locations were instructed to bring the suspect before a pair of magistrates for questioning. If the suspect failed within a “reasonable time” to “produce the person or persons duly [e]ntitled to sell or dispose of” the materials in question, or “some one or more credible witness or witnesses to prove the sale or delivery thereof,” the magistrates could convict the suspect of a misdemeanor and sentence him or her—if a first-time offender—to a fine of up to £20 or, in default of payment, to a one-month term in the local house of correction. 72

Of course, as the scholarship of Beattie, Joanna Innes, and Paul Griffiths has shown, magistrates in London already exercised broad summary jurisdiction over petty pilferers by the seventeenth and early eighteenth centuries, routinely sentencing them to short stints in Bridewell or in local houses of correction. 73 Given this long-standing magisterial jurisdiction over “pilferers” and “idle and disorderly persons,” why did Parliament pass additional statutes during the course of the eighteenth century that conferred summary jurisdiction over specific forms of misappropriation? And, irrespective of their origins, did these newly enacted statutes alter the day-to-day experience of constables, magistrates, and persons who might come within their legislative ambit?

Because of the nature of the surviving legislative sources, the first question is difficult to answer with assurance. 74 Property owners may have


lobbied for statutes criminalizing certain forms of misappropriation even if the behavior newly “criminalized” already fell within existing magisterial authority.\(^75\) In turn, statutes such as the Lead and Iron Act, which extended summary jurisdiction to petty appropriations of metals, may have been viewed as correcting certain loopholes in the law of larceny relating to fixtures.\(^76\) As the eighteenth century progressed, magistrates also may have experienced increasing unease about lumping persons of “low-to-middling” status—persons like Murray or Adams—among the vagrants or petty “pilferers” who were the traditional targets of informal summary committals. So too, Parliamentarians, magistrates, and legal commentators may have desired to place summary proceedings on a more solid legal footing by furnishing specific statutory bases for summary convictions.\(^77\)

The state of the surviving records relating to summary proceedings also makes it difficult to assess the quantitative impact of statutes conferring summary jurisdiction over certain forms of misappropriation. Calendars of convictions in the London Metropolitan Archives for the periods 1774–


76. On this theme, see Joanna Innes, “Statute Law and Summary Justice in Early Modern England” (1986). I am grateful to the author for making this unpublished paper available to me.

86, 1787–93, and 1794 reveal the unsurprising fact that magistrates in Middlesex frequently exercised summary jurisdiction over a wide range of theft-related offenses, including the unlawful possession of tobacco, metal, hemp, and various foodstuffs. The aggregate numbers appear to have been impressive: Although prone to exaggeration, the police magistrate Patrick Colquhoun estimated in 1800 that magistrates in London had convicted 2,500 defendants under the Bumboat Act since its passage in 1762, resulting in fines exceeding £6,000.

In the early decades of the nineteenth century, Parliament both simplified and broadened the summary jurisdiction of magistrates in larceny-related cases. By the time that Murray, Samuels, and Adams were convicted in the mid-1830s, eighteenth-century statutes conferring summary jurisdiction such as the Bumboat Act and the Lead and Iron Act had been largely folded into the Larceny Act of 1827 or, in London, into the various “police acts” that defined the broad authority of London’s police magistrates. By the mid-1830s, police officers and magistrates in London interpreted the then-current version of the Police Act (the Police Act of 1833) to include three categories of offenders against whom “a charge of larceny [was] implied”: (1) persons “found conveying goods suspected to be stolen and giving no satisfactory account of them”; (2) persons “found upon search warrant in possession of property suspected to be stolen, and giving no satisfactory account”; and (3) persons “appearing to have had prior posses-

78. My analysis of the calendars for two sample years (1790 and 1792) reveals that roughly 65 percent of convictions returned by magistrates to the Middlesex Quarter Sessions involved some form of misappropriation. See Smith, “Circumventing the Jury,” 89, table 2.1. In 1790, Middlesex JPs returned 143 summary committals for illegal appropriation to the quarter sessions, a figure that likely understates their number. Ibid. For further discussion of the sources from which these data were drawn, see Norma Landau, “The Trading Justice’s Trade,” in Law, Crime and English Society, 65–66. Although stipendiary magistrates appear to have been more active and may well have been more scrupulous than the traditional unpaid JPs on the Middlesex bench, it is by no means clear that the records of convictions returned by stipendiary magistrates to the Middlesex Quarter Sessions after 1792 were complete. Concerns about the record-keeping practices of the metropolitan police offices persisted into the nineteenth century, perhaps most infamously with respect to financial accounting. See, for example, John Harriott and John Longley to [Lord Hawkesbury], 17 April 1808, Thames PO Letter Book (noting that the Senior Clerk of the Thames Police Office was “called upon to explain his Accounts which appear to be erroneous”).

79. Colquhoun, Treatise (River Thames), 47. Although Colquhoun had reason to exaggerate the effectiveness of the Bumboat Act because he hoped to see its provisions expanded to cover additional theft-related acts on and near the Thames, there is little reason to doubt the measure’s overall importance to London’s magistrates. On Colquhoun, see Sir Leon Radzinowicz, A History of English Criminal Law and its Administration from 1750, vol. 3, Cross-Currents in the Movement for the Reform of the Police (New York: Macmillan, 1957), 211–51.
sion of property suspected to be stolen, and having had reason to suspect it to have been stolen.\[^{80}\]

Metropolitan police magistrates also came to rely heavily on another statute with eighteenth-century roots: the Vagrancy Act of 1824. Under that measure, English JPs could 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 sentence the convicted offender to a three-month term in the house of correction at hard labor.\[^{81}\] As the police magistrate James Traill observed in a submission to a Parliamentary subcommittee in 1837, this broad authority over “suspected persons” and “reputed thieves” provided magistrates with “extraordinary powers” by permitting them “to infer a felonious or criminal intention from circumstances, though no act is proved.”\[^{82}\]

By the 1830s, when more complete statistical records from the metropolitan police offices become available, the extensive reach of summary proceedings in London is clear: For example, in 1836, the Thames police magistrates convicted 709 of the 903 persons charged with misdemeanors under the Police and Vagrancy Acts—a conviction rate of nearly 80 percent.\[^{83}\] By this time, convictions at the Thames Police Office under these two statutes outnumbered committals of persons to stand trial for all types of felony by more than three-to-one.\[^{84}\]

IV. The Prosecutorial Benefits of Summary Proceedings

Although historians have attempted to relate responses to petty theft to broader shifts in the organization of the workplace or the ideology of property, such explanations, to date, have not explained adequately why criminal justice administrators resorted so often to summary proceedings.\[^{85}\]

80. Letter from James Traill to House of Commons Select Committee on Metropolis Police Offices, 1 December 1837, in Report from Select Committee on Metropolis Police Offices; with the Minutes of Evidence, Appendix and Index, 1837–38 (Shannon: Irish University Press, 1970), 218, appendix, no. 14 [hereafter “Traill Report”].
81. 5 Geo. IV, c. 83, § 4 (1824).
82. Traill Report, 218.
83. “A Return of the number of Persons charged with Felony and also of the number of Persons charged with Misdemeanors under the [Vagrancy Act of 1824] and [the Police Act of 1833],” Thames PO Letter Book, PS.T/1/Letter book/3.
84. Ibid.
85. Although Linebaugh has argued that crises in the nature of capitalist production in the eighteenth century led to a dramatic shift in attitudes among the propertied classes to
One important answer can be found in the operation of the criminal law itself: Statutes that conferred summary jurisdiction upon magistrates and placed the burden on suspects to “account” for goods in their possession addressed all of the principal problems of proving larceny that we have identified previously.

Solving the Problem of Property Identification

Recall for a moment the hapless prosecutor James Richardson, who failed to convince a jury at the Old Bailey that he owned a piece of wood found in a defendant’s possession after claiming that “there [was] no such thing in London” that could be mistaken for his lowly plank.86 This inability to prove ownership no doubt proved frustrating to Richardson. But compare his predicament to that of a laborer found with wood in his possession and prosecuted under the Wood Act of 1766, a statute—like the Lead and Iron Act or the Bumboat Act—that required suspects to “account” for materials found in their possession.87 A suspect’s anxiety might have been particularly acute if the wood had indeed been stolen. But an individual brought before a magistrate might also have faced dim prospects if the wood found in his possession had been acquired legally. Even if the actual seller of the wood could, in theory, document the underlying sale, the seller might still be unwilling to undertake the trouble of supplying invoices or appearing before a magistrate to testify. Furthermore, although experienced merchants in London in the late eighteenth century documented significant commercial transactions through the use of “bills of parcels,” “receipts,” or other written memorials, it seems unlikely that the types of modest purchases, gifts, or loans employed by the lower classes to obtain their day-to-day goods would have been documented in such a scrupulous manner.88 In instances where the suspect had acquired wood or perquisites and customary entitlements, he fails to provide an adequate explanation for why criminal justice administrators opted for summary proceedings as opposed to different types of proceedings. See Linebaugh, London Hanged. Here, as always, Beattie’s insight is valuable: “[W]e need to resist taking the view that the responses inspired by the problems of urban crime were in any sense inevitable. . . . Rather, it is more useful to ask why some options were chosen among those that might have been available and not others—and to place them in as wide a social, cultural, economic, and political context as possible.” Beattie, Policing and Punishment, 4.

86. See above, note 19.
88. Some sense of the documents accompanying transactions between London-area merchants can be gleaned from Lord Mansfield’s trial notes in the case of Reynolds v. Goff
other materials based on a notion of customary entitlement, of course, it is
doubtful that any “official” documentation would have existed at all.

Solving the Problem of Defense Counsel

Resort to summary proceedings also diminished the influence of defense
counsel. At the Old Bailey, as we have seen, skilled defense counsel could
undermine claims to ownership made by victims of theft, especially in cases
where the property alleged to have been stolen was nondescript—as it often
was—and thus difficult for prosecutors to identify. Triumphs of cross-ex-
amination did not characterize proceedings in the urban police office or
the JP’s rural parlor. In such settings, the fates of defendants rose—and,
more typically, fell—on their own primitive forensic abilities.

Admittedly, in what John Langbein has aptly termed the “accused
speaks” trial, a defendant in a higher court charged with larceny who
made no effort to “explain away” the prosecution’s evidence of wrongdo-
ing traditionally faced a strong likelihood of conviction.89 Nonetheless, the
emergence of defense counsel in the 1730s, and their increased presence
and activity at the Old Bailey in the ensuing century, meant that lawyers
gradually took over from the accused the defensive functions at trial and
increasingly protected their clients from serving as testimonial resources.90
Although defense counsel technically could not comment on the evidence
or provide the defendant’s explanation of the facts until the passage of the
Prisoner’s Counsel Act of 1836, the ability to cross-examine witnesses and
to raise legal arguments to the court increasingly meant that a defendant
stood a realistic chance of being acquitted without ever opening his or her
mouth.91 In addition, although felony defendants remained “pressured” to

89. Before “the arrival of the lawyers,” as Langbein notes, “[t]he defendant’s refusal to
respond to the incriminating evidence against him would have been suicidal.” Put differently,
“[w]ithout counsel, the testimonial and defensive functions were inextricably merged, and
refusing to speak would have amounted to a forfeiture of all defense.” Langbein, “Historical
Origins,” 1048. For similar reflections on the fate of the “silent defendant,” see John Fabian
Witt, “Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine,


91. On the significance of the Prisoner’s Counsel Act, 6 & 7 Will. IV, c. 114 (1836), see
May, The Bar and the Old Bailey, 197–200; idem, “Reluctant Advocates: The Legal Profes-
sion and the Prisoner’s Counsel Act of 1836,” in Criminal Justice in the Old World and the
speak at trial “so long as the beyond-reasonable-doubt standard lacked crisp formulation,” clearer judicial statements of the burden of proof “beyond a reasonable doubt” in the later decades of the eighteenth century arguably created a more certain standard against which the prosecution’s case could be tested for purposes of a directed verdict of acquittal.92

More research needs to be done on the evolution of jury charges, the development of the concept of the prosecution’s “case,” the role of the directed verdict of acquittal, and the extent to which defense counsel truly “silenced” criminal defendants in the century or so after the first appearance of defense counsel at the Old Bailey in the 1730s. However, we cannot ignore the comment of the French observer Cottu who, in describing English trial procedure in 1820, stated famously that “the defendant acts no part” and that the accused’s “hat stuck on a pole might without inconvenience be his substitute at the trial.”93 Speaking broadly, defense counsel in trials for felonies gradually “silenced” their clients during the course of the eighteenth century. By contrast, statutes that placed an explicit burden on suspects in summary proceedings to “account for possession” forced them to speak. Whereas defense counsel at the Old Bailey frustrated prosecutions by quieting their clients, defendants in the police offices frequently convicted themselves through their own fumbling words or awkward silences.94

Solving the Problem of the Corpus Delicti

As we have seen, legal commentators from the 1670s through the early decades of the nineteenth century expressed serious concerns that defendants accused of larceny might be wrongfully convicted and punished based on “presumptive evidence” of guilt, particularly in instances where prosecutors sought to rely on defendants’ unexplained possession of goods alleged to have been stolen. To guard against this risk, commentators urged fidelity to the corpus delicti rule.

As has been suggested above, certain English judges, by the mid-nineteenth century, were reluctant to direct verdicts of acquittal in cases of

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94. On the difficulties faced by suspects obliged to defend themselves, see Beattie, Crime and the Courts, 350–51, and Langbein, Origins of Adversary Criminal Trial, 56–57.
larceny based on alleged failures to prove the *corpus delicti*. For example, in *Rex v. Burton*, decided in 1854, Mr. Justice Maule rejected the argument of defense counsel that his client could not be properly convicted for the theft of pepper found in the defendant’s pocket because it was impossible to establish that the pepper had been stolen from the prosecutor’s large warehouse. In the justice’s words, “[i]f a man go into London Docks sober . . . and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or any wine missed.” 95 Although counsel argued strenuously that “Lord Hale . . . [had] laid down” that “the ‘corpus delicti’ must be proved,” the court rejected the claim, arguing—incorrectly, it should be noted—that Hale urged the application of the rule “[o]nly as a caution in cases of murder.” 96

At first blush, the *Burton* case seems to suggest that at least some English judges rejected the notion that prosecutors in cases of petty theft should be required to prove the *corpus delicti* of larceny—at least in cases where a defendant’s guilt appeared virtually certain. With that said, the fact that defense counsel saw fit to vigorously pursue this line of argument well into the 1850s suggests that arguments based on the doctrine could still be credibly made. Such an argument would have made no headway in the grimy, busy confines of a metropolitan police office—not in the 1850s, and not a century earlier. Whereas prosecutors in cases of larceny ultimately needed to prove that goods had been stolen, suspects tried summarily needed to demonstrate that those same goods had *not*.

**Solving the Problem of the Limits on Presumptive Evidence**

As has been discussed, English judges also developed a body of rules in the nineteenth century that limited the ways in which a suspect’s unexplained possession of goods shown to have been stolen could be used by the prosecution at trial. Prosecutors in such cases faced the risk of a directed verdict of acquittal unless they could demonstrate that the goods had been held recently and exclusively by the defendant.

Although the surviving records relating to summary proceedings are spotty, it seems doubtful that magistrates in the bustling police offices considered such issues in deciding the fates of suspected thieves who appeared before them. On occasion, and increasingly in the 1830s, lawyers seeking to practice in the police offices might press defendants’ claims

96. Ibid.
or focus post-conviction scrutiny on magisterial decision making. But these challenges seldom seem to have focused on narrow legal issues and, at any rate, occurred too late in our period and too episodically to alter dramatically the nature of magisterial practice in the police offices in the period before 1850.

Solving the Problem of the Petty Jury

By permitting convictions to be based on a suspect’s mere possession of suspicious goods, statutes that required defendants to “account” for possession also “watered down” the elements of the common law of larceny and made convictions significantly easier to obtain. Most important, by focusing on the physical manifestation of the alleged offense—possession of the goods—rather than the criminal acts themselves, prosecutors relieved themselves of proving the vexing elements of “caption” and “asportation.” Tellingly, the statute that established the metropolitan police offices in 1792 eroded the *actus reus* requirements of larceny still further. So-called “Clause D” of the Middlesex Justices Act of 1792 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 [for the magistrate] 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.”

Over time, Parliament further curtailed the role of the jury by enacting measures in 1847, 1850, and 1855 that extended summary jurisdiction to magistrates over all simple larcenies under the value of 5 shillings.

97. For further discussion of the activities of lawyers in the police offices, see Smith, “Circumventing the Jury,” 214–30.

98. In this regard, Bill Stuntz’s description of the historical evolution of the substantive criminal law in America is highly suggestive. “Suppose a given criminal statute contains elements ABC; suppose further that C is hard to prove, but prosecutors believe they know when it exists. Legislatures can make it easier to convict offenders by adding new crime AB, leaving it to prosecutors to decide when C is present and when it is not. Or, legislatures can create new crime DEF, where those elements correlate with ABC but are substantially easier to prove. Prosecutors can continue to enforce the original crime, but more cheaply, by enforcing the substitutes.” William J. Stuntz, “The Pathological Politics of Criminal Law,” *Michigan Law Review* 100 (2001): 519. See also Markus Dirk Dubber, “Policing Possession: The War on Crime and the End of Criminal Law,” *Journal of Criminal Law & Criminology* 91 (2001): 829–996.

99. 32 Geo. III, c. 53 (1792).

100. The three statutes were the Juvenile Offenders Act of 1847, 10 & 11 Vict., c. 82 (1847), the Juvenile Offenders Act of 1850, 13 & 14 Vict., c. 37 (1850), and the Criminal Justice Act, 18 & 19 Vict., c. 126 (1855). In all instances, consent of the defendant to summary proceedings was required.
The profound implications of this transfer of decision-making authority from judges and juries to magistrates can only be mentioned briefly here. However, a comparative perspective on the issue is illustrative. In *State v. Hodge* (1869), the New Hampshire Supreme Court, after reviewing the law in both England and America relating to a defendant’s recent possession of stolen goods, concluded that the presumption that a defendant was guilty based on possession of suspicious goods was an issue of *fact*, which, “according to our practice, [should] be drawn by the jury, and not by the court.” ¹⁰¹ Moreover, in America, as the *Hodge* court made clear, the state ultimately needed to carry its burden of proof, even in cases in which defendants had been detected with stolen goods in their possession:

If the jury found the defendant had the property in his possession after it was stolen, that fact was evidence against him. If they found an absence of explanatory evidence on his side, under circumstances which tended to show he could furnish such evidence, that fact was additional evidence against him. But if those facts were found, there was no presumption of law, nor was the burden of proof shifted. . . . The State had the affirmative, and the burden of proof which belongs to the affirmative.¹⁰²

In England, under statutes that required suspects to “account” for possession, the state had been relieved of this considerable burden long ago.¹⁰³


One must not underestimate, however, the ability of modern judges to guide the jury by questioning witnesses or by responding to testimony with facial expressions and gestures. See Michael Pinard, “Limitations on Judicial Activism in Criminal Trials,” *Connecticut Law Review* 33 (2000): 256–65.

¹⁰² *Hodge*, 50 N.H. at 526 (internal citations omitted).

¹⁰³ This is not to say that all American defendants suspected of petty theft reaped the benefits of the American jury’s comparatively broad latitude to assess the implications of a defendant’s unexplained possession of suspicious goods. It is conceivable that American
V. The Presumption of Innocence: Then and Now

In March 1821, the three police magistrates assigned to the Thames Police Office submitted a letter to the Home Secretary, Lord Sidmouth, stressing the great importance of their summary jurisdiction over petty thefts and calling for further simplification and expansion of this authority. The magistrates observed that “offenders” had been brought before them “[eight] or [nine] times in the course of the last three years with stolen property in their possession” and that, “notwithstanding the utmost diligence,” the magistrates would have been unable “to obtain Evidence enough to convict them of a felony . . . and [the suspects] must have been discharged without punishment every time but for [the magistrates’] powers of summary conviction.” Among these “powers,” the magistrates singled out for special praise the clauses of the Thames Police Act setting forth their summary jurisdiction over “suspected Persons and reputed Thieves,” persons “opening and breaking Casks, Bags and other Packages,” and persons intentionally “letting fall” or throwing various types of goods into the Thames. According to the police magistrates, these clauses were necessary because of the challenges of detecting thieves operating on and near the Thames, the difficulty of proving the loss or identity of the types of goods typically stolen there, and the fact that mariners often refused to delay their voyages to attend trials.

For criminal justice administrators, summary proceedings provided several advantages compared to proceedings in the higher courts—including promptness, cheapness, and predictability. But their evidentiary benefits were especially striking. Writing in 1800, Patrick Colquhoun observed that a “leading object” of the measure authorizing the Thames Police Office in 1800 was to permit magistrates exercising jurisdiction over the Thames “[t]o inflict slight Penalties by summary Procedure on circumstantial Evidence, aided by the Examination of the Delinquent (as under the Bumboat Act, and stolen-metal act [i.e., the Lead and Iron Act] where, on regular Proof, it would be Felony;)—and to attach upon the Practice of Depredation, in judges, willing to defer to the jury’s interpretation of the facts, granted fewer directed verdicts of acquittal. But if the judgment of a defendant’s peers might not always turn out favorably for the accused, criminal proceedings in which juries assessed the facts relating to a defendant’s unexplained possession were, on balance, likely to be more favorable to a defendant than ones in which the suspect needed to satisfy a skeptical and “case-hardened” police magistrate.

104. William Kinnard, John Longley, and Thomas Richbell to Home Office, 5 March 1821, Thames PO Letter Book. Referring to their “imperative duty” to make “such a number of Summary Convictions,” the magistrates urged that “no difficulties nor doubts ought to be thrown in the way of [these] powers” and that “the law upon which [summary convictions were] founded should be simplified as much as possible.” Ibid.
such stages of its progress as are previous, or subsequent to the Felonious Act." For his part, James Traill conceded that his fellow police magistrates in London routinely convicted suspects in summary proceedings upon “less conclusive evidence” than was needed to secure convictions in the higher courts, a state of affairs justified by “the lesser alleged offence of which [the suspect] [was] to be summarily convicted.”

Of course, not all observers supported extending criminal jurisdiction to metropolitan magistrates and lowering the evidentiary standards required to convict persons of theft. Speaking in the House of Commons in 1792, the Whig MP William Windham stated that the clause in the Middlesex Justices Bill that permitted magistrates to convict summarily “persons of evil fame” and “reputed thieves” found to have been loitering with intent to commit a felony “reversed the usual order of things” by permitting men to be convicted “not for acts which they committed, but for those which they intended to commit.” According to Charles James Fox, the leader of the Foxite Whigs in Parliament, no criminal violation could exist “that could not be proved”:

It was on this principle, that every man in England was declared innocent, until he was pronounced by law to be guilty. Had these men committed a felony or not? If they had, bring them to a court of judicature, prove their guilt, and pronounce them guilty. But we cannot prove them guilty!—then by law, they are innocent.

As Fox observed, permitting magistrates to convict persons based on mere “suspicion” or “reputation” “reversed the fundamental principle of the criminal law of England—That innocence must be presumed where guilt cannot be proved.”

It is rare to find references to the presumption of innocence in eighteenth-century legal cases, with only one such allusion in the Old Bailey Session Papers between 1714 and 1799. Although seldom articulated,
the presumption, as May suggests, developed contemporaneously with the concept of the prosecutorial burden of production and the burden of proof “beyond reasonable doubt.” Although it is difficult to disentangle rhetoric from legal theory, Whig critics of summary proceedings in the early 1790s appear to have possessed an understanding of the presumption of innocence that included two central elements of our modern-day notion: first, that the prosecution is required to produce evidence of certain criminal acts, and, second, that prosecutions that fail to meet the requisite evidentiary burden should result in acquittals.

Statutes that permitted magistrates to convict summarily persons who failed to “account” for possession (as well as “suspected persons” and “reputed thieves”) relieved prosecutors of the burden of producing evidence with respect to a defendant’s actions, as well as proof that the goods in the defendant’s possession had indeed been stolen. Accordingly, it is difficult to take issue with the claim that such statutes essentially placed “[t]he burden of proof . . . on the accused, reversing the normal relationship between prosecutor and defendant in later-eighteenth-century English law.” What is equally striking, as we have seen in the cases of Murray, Samuels, and Adams, is that statutes that required suspects to “account” for possession not only required suspects to produce evidence supporting claims to lawful ownership but also appear to have placed the burden on them to persuade the fact-finding magistrates as well. To modern eyes, the evidentiary regimes created by these statutes came close to requiring suspects “to establish innocence,” a burden at odds with even the weakest conception of the modern-day presumption of innocence.

This is not the only aspect of summary proceedings that appears anomalous to the modern eye. There seems little doubt that a lower quantum of proof was necessary to secure convictions for larceny-related offenses in summary proceedings than in the higher courts. Indeed, it is difficult to square the modest evidentiary showing required to support convictions in summary proceedings with the notion that prosecutors in England by the late 1790s were required to establish proof “beyond a reasonable doubt.”

111. See above, note 6.
112. Styles, “Embezzlement,” 195. See also King, Crime, Justice, and Discretion, 103 (arguing that such statutes effectively reversed “the principle that the accused was innocent until proved guilty”).
113. Andrew Ashworth and Meredith Blake, “The Presumption of Innocence in English Criminal Law,” Criminal Law Review (May 1996): 310. (“An offence that requires a defendant to prove a defence is one that requires him or her [in certain circumstances] to establish innocence, and it may therefore be said to derogate from the presumption of innocence. The burden of proof does not lie on the prosecution in all respects.”)
114. See also Langbein, Origins of Adversary Criminal Trial, 266, n. 63 (noting that summary proceedings appear to have relaxed the “beyond-reasonable-doubt” standard of proof).
Although it is, of course, impossible to calibrate what amount of evidence was deemed sufficient to justify conviction to the magistrates who tried Murray, Samuels, and Adams, it was surely less than that necessary either to survive a motion for a directed verdict of acquittal at the Old Bailey or to convince a petty jury of guilt in a typical case of simple larceny. Indeed, Colquhoun essentially acknowledged as much in arguing that magistrates should be permitted “[t]o inflict slight Penalties by summary Procedure on circumstantial Evidence, aided by the Examination of the Delinquent . . . where, on regular Proof, it would be Felony.”

Conclusion

In 2001, the House of Lords considered the case of Regina v. Lambert, an appeal by a defendant convicted of “intent to supply” cocaine under the Misuse of Drugs Act 1971. The appellant, who had been detected with a bag of cocaine in his car, was convicted of drug trafficking, after he failed to carry a statutorily imposed burden of proving that he did not know that the bag in his possession contained a controlled substance. On appeal, Lambert argued unsuccessfully that the Misuse of Drugs Act, by requiring a suspect to prove “lack of knowledge,” violated article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that “[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

In a ringing dissent, Lord Steyn observed grimly that nearly 40 percent of indictable offenses in England contained some type of statutory presumption against the defendant. Reflecting on these figures, he sharply criticized Parliament for the “arbitrary and indiscriminate manner” in which it had “made inroads on the basic presumption of innocence.” Observing that “the process of enacting legal reverse burden of proof provisions continued apace,” Lord Steyn characterized “the transfer of the legal burden” to the defendant under the Misuse of Drugs Act as “a disproportionate reaction

115. Colquhoun, Treatise (River Thames), 279.
117. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(2).
118. Lord Steyn relied heavily on a recent study demonstrating that 219 of 540 indictable offenses triable in the Crown Court set forth “legal burdens or presumptions operating against the defendant.” Lambert, [2002] 2 A.C. 545, ¶32 (citing Ashworth and Blake, “Presumption of Innocence”).
to perceived difficulties facing the prosecution in drugs cases.”\textsuperscript{119} However, the Court dismissed Lambert’s appeal after interpreting the statute to impose only an “evidentiary” burden of production upon the defendant rather than a “legal” burden of persuasion.\textsuperscript{120}

As a matter of public policy, one might agree with Parliament’s judgment that persons apprehended with illegal narcotics in their possession can reasonably be expected to bear the burden of accounting for them. Alternatively, one might side with Lord Steyn and view the Misuse of Drugs Act as a legislative overreaction to the problem of assembling sufficient proof in cases involving suspected narcotics traffickers. Few, however, would quarrel with the notion that persons who possess illegal narcotics (or associate closely with persons who possess them) assume considerable legal risk. But if convictions of persons apprehended with narcotics raise serious constitutional concerns about the presumption of innocence, how are we to assess an earlier legal regime in which persons who possessed lead, silk, rope, or wood—substances, unlike illicit narcotics, which can be possessed legally—were, in effect, presumed to be guilty?\textsuperscript{121}

Writing in the 1830s, the police magistrate James Traill recognized the incongruity of trying persons in summary proceedings for offenses that were “attended with an equal degree of moral guilt, and nearly the same penal consequences to the offender” as were cases of simple larceny tried at the Old Bailey.\textsuperscript{122} Given the expansive eighteenth-century rhetoric about the right to trial by jury, this two-tiered system of criminal justice administration managed to thrive because summary proceedings—with few exceptions—involved the most modest forms of misappropriation, the lightest criminal punishments, and, in many cases (though by no means all) the least powerful set of criminal defendants.\textsuperscript{123}

Yet while summary proceedings provided several distinct and important advantages to criminal justice administrators, they did not deny persons suspected of petty theft their capacity to act. The experiences of Murray, Samuels, and Adams suggest that summary proceedings—while intended to be cheap, speedy, and certain—did not always accomplish these goals. Occasionally, a determined individual might appeal a summary conviction

\textsuperscript{119} Ibid., ¶ 32, 41.
\textsuperscript{120} In recent years, English criminal defendants have argued that other statutory presumptions violate Article 6(2) of the European Convention. See, for example, \textit{Sheldrake v. Director of Public Prosecutions}, [2003] 2 All E.R. 497 (Q.B. Div’l Ct.) and \textit{R. v. Daniel}, [2002] EWCA Crim. 959 (C.A. 2002) (available in Lexis United Kingdom database).
\textsuperscript{121} I am indebted to my colleague Richard McAdams for prompting me to think more carefully about this issue.
\textsuperscript{122} Traill Report, 218.
\textsuperscript{123} I am grateful to John Langbein for emphasizing this point to me.
to the quarter sessions, employ the writ of certiorari to bring a case before the Court of King’s Bench, or petition the Home Office for relief. In rarer cases yet, these efforts might be successful. Moreover, given the entry of defense counsel into felony proceedings in the eighteenth century and their importance in asserting the rights of criminal defendants, it should come as little surprise that, during the second quarter of the nineteenth century, a smattering of attorneys—and persons claiming to be attorneys—emerged to offer legal services to defendants tried in the police offices of London.

In the vast majority of cases, however, members of England’s laboring poor who faced the risk of summary proceedings were left to rely on their own capacities and initiative. And so they did. Writing in 1800, Patrick Colquhoun noted that individuals engaged in operating small craft on the Thames who faced the risk of prosecutions under the Bumboat Act had formed a “general Subscription Club, for the purpose of defraying all expenses arising from detections, penalties, and forfeitures” under the Act. According to Colquhoun, “the common fund” of pooled contributions “secured them against all expenses in cases of conviction.” Thus, decades after English property owners had banded together to form “societies for the prosecution of felons” to defray the costs of prosecutions in the higher courts, individuals who faced the risk of summary conviction in London’s police offices organized collectively to protect against the potential threat of summary proceedings. Concerned about the prospects of conviction under statutes that required them to “explain away” presumptive evidence of guilt, these enterprising individuals simply engaged in their own brand of “self help” and insured against the monetary consequences of conviction.
