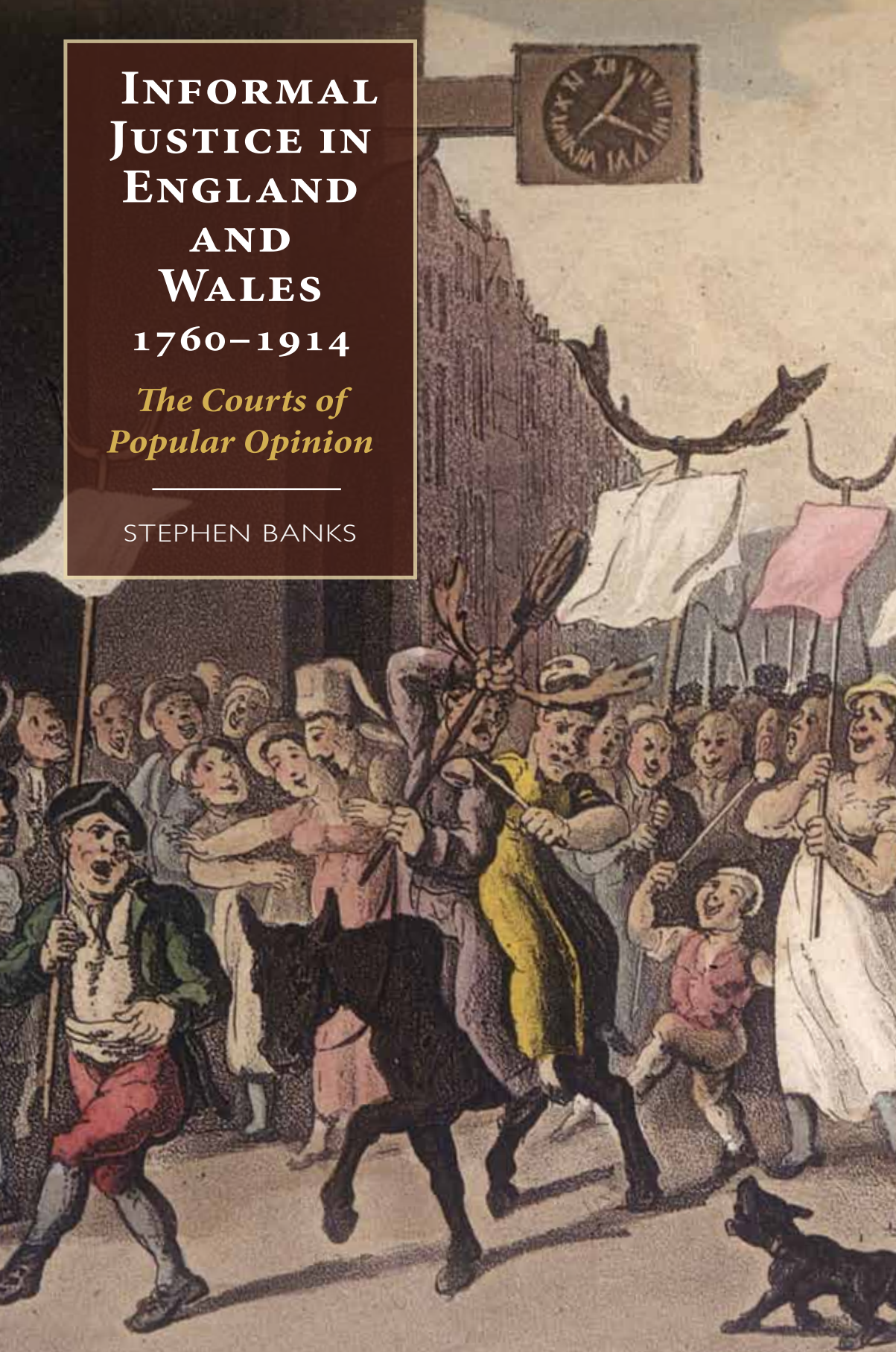
Informal Justice in England and Wales 1760–1914

The Courts of Popular Opinion

STEPHEN BANKS



INFORMAL JUSTICE IN ENGLAND AND WALES 1760–1914

INFORMAL JUSTICE IN ENGLAND AND WALES 1760–1914

The Courts of Popular Opinion

Stephen Banks

THE BOYDELL PRESS

First published 2014
The Boydell Press, Woodbridge

ISBN 978 1 84383 940 8

The Boydell Press is an imprint of Boydell & Brewer Ltd
PO Box 9, Woodbridge, Suffolk IP12 3DF, UK
and of Boydell & Brewer Inc.
668 Mount Hope Ave, Rochester, NY 14620-2731, USA
website: www.boydellandbrewer.com

A catalogue record for this book is available
from the British Library

This publication is printed on acid-free paper

Contents

Acknowledgements

In preparing this monograph I have received assistance from so many of the all-too-often unsung archivists and local historians who inhabit these isles that it would be invidious to single anyone out. Thanks to you all. Particular appreciation should be shown, however, to those in the Folklore Society who have done, and continue to do, so much to preserve the lives and learning of the ordinary people of our past – those who are too often swept aside in the grand histories of their times. I must express my gratitude to Kate McIntosh, without whose excellent suggestions and contributions this book would not have seen the light of day. Thanks also to Lawrence McNamara and Sam McIntosh for friendship, beer and a great deal of wise counsel. Finally, the biggest debts of all are owed to my parents, to my children, Oliver and Theo, and above all to my long-suffering wife Sanjeeda. I promise this thing is finally written and I will come out of the garage now.

Preface

This is a book about justice. It is not about justice as observed in the courtroom (unless it be a 'courtroom' of an unorthodox variety) but about unofficial justice as visited upon malefactors by the collective actions of private citizens. Justice is a difficult word, and I should say at the start that for my purposes the term 'unofficial justice' is taken to exclude deeds of furtive vengeance (however much deserved). I am not concerned here with those occasions upon which offenders were simply set upon in the dark and given a good beating – though it is likely that such instances occurred often enough. Rather my interest is in those occasions upon which groups acted openly, publicly and unapologetically against wrongdoers. Unapologetically because they claimed that they were doing so by right and in accordance with customary practices that supposedly legitimated group responses to moral defects. Reference will indeed be made to some actions that were both public and yet quite indiscriminate in respect of the violence visited upon the wrongdoer. However, it will soon become apparent that most public collective acts were intended primarily to shame their victims rather than to harm them, and that they were performed within an understood rubric of customary practice that served (in the main) to contain the violence inherent in group action. This study, then, is primarily focused on public shaming rituals – and these generally (though not invariably) involved a noisy perambulation through an offended community. During the course of these processions the participants tried to attract as much attention as possible by beating on pots, pans, kettles . . . anything suitable that came to hand. Hence these phenomena are broadly subsumed under the title 'rough music' – rituals that were widely distributed and known variously at the time as 'skimmingtons', 'stang ridings', 'ceffyl prens' and by many other terminologies besides.

'Rough music' has to date been much better studied in respect to its role in early modern England, in particular by those interested in gender and gender history. Since rough music was commonly employed against those exhibiting inappropriate gender behaviours, its history has often been connected with the use of the brank, the ducking stool and the like – as a tool to discipline women. Martin Ingram has observed that unofficial species of punitive procession in the early modern period were closely related to official punishments such as the judicial ridings, used (particularly in London) to punish prostitutes, scolds and other unfortunates. Such ridings were also used to punish those convicted of a wide range of economic offences.

Whilst some scholars have pursued the later history of rough music, few have gone right into the world of modernity itself. E. P. Thompson did pioneering work on the

nineteenth century whilst examining the moral authority of the crowd. His work, though, was predominately political and historical rather than legal. In my introduction there is something of an appeal, suggested in part by the work of Thompson, for a new type of legal history: one that studies *beliefs* about the content of the law as much as the content of the law itself. Legal historians and lawyers have, in the main, focused on the doctrinal development of the law, the history of its institutions or the lives of its important personages, and have seen little reason to enquire into what ordinary people knew or believed about the law and how that influenced their personal behaviours. Lawyers are much more comfortable with official documents and prefer to leave things as insubstantial as beliefs to the domain of the folklorist, the sociologist or the anthropologist. Naturally, then, what was actually written in law seems to them of more consequence that what was *believed* to be the law. Furthermore, many lawyers seem to tacitly accept that 'The Law' did and does possess some special quality and authority, merely by virtue of being written down. My own view, however, is that the very deep rules of society are predicated upon world views that are rarely fully articulated in either the statutes or the cases. Not that I want for one moment to underestimate the importance of the study of written law, but rather wish to observe in addition that many acts in society are guided by legal thinking but not by legal knowledge. Such acts are often based upon suppositions as to what the law is, or should be. Such suppositions, advanced with enough conviction, can direct political discourse, influence economic activity, guide social behaviour and so on – in political debate, for example, what is thought to be in the law is often much more important than what is actually there. Throughout this book, evidence will be adduced that groups in penalising others operated with their own particular views of the legal environment and were not usually conscious of being part of an oppositional counterculture. They did not consider themselves as being outside the law trying to change it – but rather that they were inside the law and seeking to protect it. Legal belief can, in short, drive social action just as much as legal reality can – and therefore, in my view, it has just as much a place in the history of the law as the examination of the law's formal content or the operation of its often inaccessible institutions.

Generally speaking, the groups and communities surveyed here had a very developed sense of what was and was not permissible – although they often discovered after the fact that, from the point of view of authority, they were in error. The conflict of ideas that resulted interested Thompson as evidence of a clash between orders, one in which, from his point of view, real moral authority was invested in the crowd as opposed to vested interests.

For my part, this is not a political study – and in Chapter 1 I make the necessary but rather obvious point that, in the area of my research at least, the clash was as much between the new and the old as between the powerful and the powerless. The withdrawal of the state from the arena of shaming punishments during the course of the nineteenth century served to create the impression that the punitive practices of rural

communities and labouring men and women were the product of their own unique culture, but in point of origin they in fact closely shadowed the officially licensed practices of years gone by.

Chapter 2 takes the enquiry into new territory. It argues that, with the benefit of hindsight, in the first half of the period under review the distinctions between formal and informal mechanisms of judgement and punishment can be overstated. As the operation of local and unofficial courts attest, the relationship between official and unofficial juridical systems remained – in rural communities in particular – complex, uncertain and contested. In the structure of the formal legal system, in its rhetoric and the manner of its dissemination, there was and continued to be much that gave succour to vibrant local justice traditions that blended elements of both the official and the unofficial. Communities contained within themselves their own juridical claims, which were often expressed during the conduct of festive life and the observance of calendrical customs. Communities coming together to celebrate and coming together to judge were closely connected. Rough music, then, was intimately associated with festivity both in terms of the conceptualisation of the activity and in terms of practical matters such as timing and location.

Chapter 3 considers the nuances of the rough music employed in communal punishments, the terminology associated with it and the three broad variant types augmented by certain specific regional practices. Whether the actual malefactor was dragged from his or her home and paraded, or a human substitute employed or an effigy displayed in their stead, what becomes apparent is that there were common views as to what was required to make these shaming rituals lawful. Thus, if it was performed in three parishes, or on three nights in succession, or first preceded by a march around the church – then the participants could be confident that they were acting within their 'rights'. Nonetheless, there were changes in rough music performance over time. Perhaps most importantly during the course of the nineteenth century, the beatings and duckings that characterised earlier practice became increasingly transposed into acts of purely symbolic violence.

Promiscuity, inappropriate gender behaviour or deviancy remained the avowed causes of rough music throughout the period under review. In Chapter 4, however, two caveats appear. First, in the field of marital relations punitive action against scolding wives seems to have been on the decline and, by the end of the nineteenth century, had clearly been overtaken in terms of frequency by actions taken against wife-beaters. I am sceptical, nonetheless, as to the claims of others that a consistent and coherent change in attitudes to gender relations can be discerned from this. Second, I urge some caution in respect of accepting at face value the reasons actually advanced for a performance of rough music. Whilst the avowed reason was almost certainly a contributing cause, evidence is advanced to suggest that the picture was often rather more complex. When confronted, for example, with an assertion that a skimmington had been staged because of a wife-beating, the intelligent question

to ask is often why this particular wife-beater had been selected for chastisement as opposed to any other. Although, given the state of the sources, such questions are often difficult to answer there is enough evidence to suggest that, within communities, those seen as outsiders, non-conformists, teetotallers or otherwise suspect individuals were likely to be subjected to particular moral scrutiny.

Most works on rough music have, however, been content to characterise those participating in it as simply the representatives of homogenous communities, the members of which are assumed to share a common moral platform. This is challenged in Chapters 4 and 5, perhaps most particularly in the latter chapter where I show that shaming rituals had an important role to play in trials of representation staged between opposing interest groups. The community, in short, was a contested territory over which one might fight in order to establish one's own view of normative conduct. Coach drivers parodied their rivals, gentlemen staged mock executions to take their revenge upon revenue inspectors, and criminal gangs used humiliating parades to undermine the credibility of those who might testify against them. Even middling tradesmen sponsored street theatre in order to lambast larger operators, thereby attempting to defeat commercial ventures that were threatening to themselves, for instance by characterising a trader as involved in economic embezzlement. Rituals of popular justice then could readily be made to serve small vested interests and to express views not necessarily in harmony with those of the majority community.

Festive rituals and within them juridical and punitive practices had a strong affective power in an age not yet inculcated with ideologies and alternative group behaviours. In penalising individuals' abhorrent conduct they could be highly partisan but they could also serve as tools with which to unite communities in pursuit of general good. Rough music could both create and articulate the sorts of aspirations for change that were necessarily political. Chapter 6, then, explores the folkloric elements found in several kinds of resistance to established order: in food price protests, in the Swing disturbances and, most particularly, in Wales where the Rebecca Riots were most obviously an extension of the Welsh version of rough music – the 'ceffyl pren.' The chapter offers ample explanation as to why the authorities would wish to proscribe such practices.

The writ of the authorities did not, however, run with equal effect everywhere and the subsequent study of resistive communities in Chapter 7 suggests that there were particular places in which independent justice traditions were able to endure in the face of the increasing pressure created by, amongst other things, the spread of professional policing. In brief, it was in the industrial open villages that were distinguished by the presence of persons of some education – those that supported artisanal trades and where there was to be found a supply of labour that was skilled and granted a degree of autonomy – that ordinary men and women were best able to go about their business largely untouched by the hand of authority. A plurality of income streams accompanied by the exploitation of natural resources (often

acquired by force majeure) allowed such communities considerable independence from landlords, whilst at the same time the somewhat precarious nature of their position encouraged a high degree of community cohesion and cooperation. Places such as Pockthorpe near Norwich managed themselves. The rural police were too thinly spread and their presence too transient to operate to any great effect and, as Laurie Lee memorably records in respect of a murder in his village of Slad, Gloucestershire, even in cases of the most egregious crimes it was difficult to break through the barriers erected against outsiders.

The subsistence of independent justice traditions in groups of skilled and semi-skilled labour is one justification for extending the study of rough music into the twentieth century. As this book will show, it was through the activities of quarrymen, colliers and the like that shaming rituals came to make an important contribution to nascent working-class culture and the emerging labour movement. The 'white-shirting' of blacklegs, for example, and the mockery and waving of women's apparel by women themselves, are both testimony to the continued importance of reputation in labouring communities. Even into the 1930s shaming practices that would not have been out of place in the eighteenth century can be seen to be informing school strikes and other working-class actions.

From here, Chapter 8 explores the campaigns against popular festivities, sports and shaming rituals that gathered pace in the second half of the nineteenth century. Of particular interest are the attempts to suppress the 'bonfire cultures', which with their immolation of effigies of contemporary hate figures mirrored the behaviours observed in rough music processions. I note that such practices were acceptable when subordinated to the purposes of national patriotic culture, and indeed perhaps as much effort was expended in taming and subverting anarchic popular celebrations to the cause of respectable patriotism as was expended in trying to completely suppress those that did not conform. Bonfire culture served as a catalyst for other types of collective action, as is observed through the operations of the 'Skeleton Army' at Worthing. Ultimately, though, as at Lewes, it could only endure by collaborating with the authorities. In doing so, its anti-authoritarian impulses were tamed and safely channelled into denunciations of national patriotic enemies such as the Pope, the Kaiser and so on.

Ultimately, I shall not agree with the assessment of others, however, that the authorities were just as active and successful in suppressing rough music proper in the rural environment. Examples illustrate that the intermittent and unpredictable nature of some of its forms meant that it was much harder to suppress than regular seasonal activities – however large they might be. Furthermore, there is much to suggest that the authorities felt themselves obliged to tolerate such activity as long as it was confined within certain bounds. The evidence will show that in a few locations rough music was still being performed and still having an operative effect upon its victims into the 1950s. Nonetheless, it was in terminal decline, the explanation for

which lies not in the operations of the police or magistrates but rather in the dwindling rural consciousness. As Snell has shown, a world conceptualised through the medium of the parish began to pass away with the advent of the railway, the bicycle and the increased labour mobility that they brought. The parish as a juridical unit disappeared and with it rough music. Even in places where practices such as rough music endured, their affective force was undermined by the spread of education, increased autonomy, and social and geographical mobility.

In the closing pages I offer an instance where a rural community, still clinging to the assumptions of years gone by, attempted to shame an incumbent cleric and his wife but utterly misfired. The affair illustrates that in the absence of actual physical assault, rough music substantially depended on shared cultural understandings between the parties. It was the material, emotional, spiritual and psychological dependence of the victim on his or her community that gave any disapproval such potency. Where the victims were socially, educationally and culturally apart, as in the case of the clerical couple, the message of the music was indecipherable, inexplicable and even comic. However, for most of the period under review in this book, rough music and other justice rituals powerfully expressed collective disapprobation. The desire to preserve reputation, understood through traditional norms, was a significant determinant of conduct during the formation of working-class culture. Furthermore, when we consider how behaviour in rural environments and labouring neighbourhoods was managed into the twentieth century, too much can be credited to the thinly spread forces of authority. Much must be attributed to the power of shame, the virtues of self-governance and the operations of the courts of popular opinion.

Introduction: Inventing Law and Doing Justice

Many years ago, I found myself on a school trip to the now long-departed but not much lamented Soviet Union. Eager to further the cause of a history project I took advantage of some permitted shopping time in the state-owned GUM department store to purchase, for a remarkably small sum, an English translation of the 1936 Soviet constitution. For those unfamiliar with it, this was an astonishingly benevolent document guaranteeing universal suffrage, secret ballot and so forth. Even as a schoolboy, a moment's reflection that this was a constitution written by a committee headed by Joseph Stalin was enough to convince me that, sometimes, very little of the way that a society actually works can be captured by the study of its written laws or of the principles that purport to govern it. This was not a profound insight, but somehow in the world there still exists a very real belief in the innate power of words written down and, in particular, in the intangible power and authority expressed by written law. Perhaps this is an echo of our past.

The very first written laws were inscribed on stele, topped by the images of the gods. In truth we do not know if any of the early Sumerian and Akkadian law codes were ever actually enforced, but the message of the iconography was pretty clear – law had been given by the gods to the kings and was a sign of divine authority and therefore upheld by more than mere temporal sanction. Furthermore, to write something down was to bring it from one world into another. Whether it be the words inscribed upon stele, pierced into the clay of the omen texts, or much later scrawled upon the parchment of medieval prayers, curses and spells, for four millennia humanity has been seized by the sense that to write something down is in some measure to actualise it, to give it a potency both in this world and that of the gods.

To say that in the past the making of law was akin to a religious experience is not to deny ancient cultures their complexity. Cynicism about both the law and the gods is much documented, certainly within the classical tradition, where there was no shortage of spiritual and legal pragmatists. Even today though, in modern Western culture we still have not entirely shed a long-standing reverential mode of thinking about law. Law can still put on a show such that it can still inspire affective states akin

to those aroused by religious devotion. Through its iconography, its architecture and its rhetoric, the law is still in the business of proclaiming that it is not merely about rules and about power but about something deeper and perhaps finer. Law maintains, at least in part, its power to inspire: it can still create and condition world views that, to cynics such as myself, can sometimes seem rather gauche.

I worked for a number of years in merchant shipping and became, so I thought, well acquainted with the many problems of this troubled and ineffectively regulated industry. I can still remember being portentously assured by a somewhat pompous trainee lawyer of my acquaintance that certain industry practices that were ubiquitous, and which I had myself often witnessed, could not possibly occur because they would be 'Against the Law!'. This statement was advanced with all the solemnity of a declaration of faith, as though it was invoking some mysterious potency, powerful in the realm of the real yet rooted in some authority much more intangible.

This book is a study concerned with law and justice viewed both pragmatically and reverentially. It is about what people in the eighteenth and nineteenth centuries believed and felt about law and justice, and about how they tried to go about actualising their beliefs outside the formal legal framework laid down by the superior courts. Although lawyers and courts will appear throughout this work, I predominantly consider the activities of people for whom the law formed part of their world view but was not consciously part of their daily business. I will be much more concerned with myths, fictions, understandings and misapprehensions, the power and perception of 'the law' in daily life rather than with law as a discrete doctrinal product. In particular, I look at transgressive behaviour and the ways in which groups visited their own forms of justice upon offenders. I will not be much concerned with justice as either an abstract philosophical concept or as an officially sanctioned outcome at the end of a judicial process. When I use the term 'justice' it will mainly be in order to capture the frame of mind of those delivering it rather than as a personal value judgement about their ethics in doing so. Along the way we will meet with community punishments, which may well arouse our approbation, such as the rough justice sometimes meted out to those who sought to profiteer by hoarding food in times of failed harvests. On the other hand, we will also encounter the collective bullying of eccentrics or unfortunates, which will likely seem utterly abhorrent.

What the variety of phenomena under consideration here will have in common is that their instigators appeal to claims of right or moral probity. Very often what will be observed is a struggle between contending views as to the content, spirit and disposition of the law as each party attempts to justify their actions by reference to an allegedly authentic tradition that contradicts the claims of their opponents.

Much of this book will be about those who, in a broad sense, 'lost': those who argued for local communal rights and powers, fixed prices, local tribunals and layered property rights in the context of an increasingly free market laissez-faire society. It is about the claims of those who were predominantly below the threshold at which

erudite letters were created, memoirs composed and so on. It will consider the precarious relationship of communal legal visions as against the letters of the statutes and the operation of the courts. The relationships between law as expressed in ratio or written in statute, law as practised and law as an imagined social product will be shown to have been complex and interdependent.

This study is particularly concerned with excavating the world of legal fictions, of ideas about the content of the law. Before delving into my period proper, however, it might be appropriate to make some further general observations about the power of legal fictions to shape and constrain law and to make their own contributions to the broad species of legal knowledge.

Law's Fictive Body

In Britain the grand principles of the law are often invoked by means of aphorisms, observations that are really triggers used in order to ignite collective memories, aspirations or beliefs. My father, who comes from a very respectable working-class family in the Midlands, has often declared that 'An Englishman's home is his castle', although on what authority this is said he does not know. It is declared as a self-evident statement of what is, or, at the very least, ought to be. For men such as my father, individual laws may be subject to scorn and may be broken, yet the law as a whole remains a profound matter.

And this is not just true for an older generation. I have observed that my own young children and their friends use simple legal terminology and invoke the authority of the law in serious tones as a declaration of faith in a system of governance that cannot be disputed – an end point beyond which one cannot go. My eleven-year old, as solemnly as any judge, recently informed his eight-year-old brother that it was 'illegal' and indeed 'against the law' for someone still at primary school to have their own email account. Instrumentally, this in part accomplished his purpose of dissuading his sibling from seeking to share his iPad, but I am also fairly confident that he indeed believes this to be so, and that both children can envisage some unspecified dread and mysterious consequence that may well follow from ignoring such a prohibition.

Day-to-day, of course, our contact with the law is very likely to be rather more mundane and utilitarian: there is nothing very reverential about being on the end of a parking ticket! While lawyers spend their time dissecting and analysing legal rules, we all know and observe that there are flaws in the system: we know that there are partisan or avaricious judges, we regard with cynicism the passage of hurried and politically inspired statutes. Yet still the law can compel our allegiance. On this, as other things, the human mind is able to adhere to contradictory ideas or display seemingly contrasting affective moods according to time, place and circumstance.

It is possible to be an entirely hard-headed, realistic lawyer and yet in another mood feel a genuine emotional connection to the mythologised authority of the

common law. There is always the danger of contradiction however. Reverence is generally inspired by mystery and nothing endangers mystery so much as knowledge.

As we shall see, there is nevertheless much value in propagating mystery, particularly when it serves to aggrandise the propagator. Fictitious views of the origin and authenticity of law are necessarily created by powerful interests as part of the project of legitimisation, but they also generate themselves – seemingly spontaneously – out of the soup of untested assertions, apocryphal stories, historical detritus, wishful thinking, misunderstood judgements, and sometimes genuine understanding that passes for social knowledge. Within the common law world, at least, one often observes attempts to substantiate broad views of the law by reference to particular points in real legal time. Unfortunately, such attempts are very often misplaced. It never ceases to surprise what some Americans suppose to be within their founding constitution or what conversely some British law students believe to be enshrined within Magna Carta!

Legal beliefs are not much studied; lawyers are not much interested in 'beliefs', they are much more comfortable with discussing the ratio of a case or the sections of an act or, more abstractly, the validity of Harteian rules of recognition. Legal anthropologists are a very rare breed indeed. Yet the fictitious statements commonly made about the law are far from unimportant. On the contrary, they are a key element in law's quasi-mythological construction as part of a collective habitus or world view. The statement 'An Englishman's home is his castle' comes suffused with a powerful attachment to notions of individual liberty. The least interesting thing to say about it is that, as a purported statement of some fundamental truth about the sanctity of one's home, the statement is so qualified in law as to have hardly any meaning at all. It nevertheless remains as a kind of rhetorical rallying point and an estimation of the general disposition of the law and its relationship to the individual. In the mind of the utterer, it stands as a foundational premise to which exceptions may be permitted but against which they must be judged.

Rational analysis of the actual content of the law makes little difference once an idea of the law – with all its affective power – informs core normative values. As an analogy, many things may in the future shake the British people's general adherence to the monarchy, but an intellectual exposition of the intrigues and accidents of the historical process is unlikely to prove itself one of them. Intellectually, I know that although I admire the Queen, she has no more 'right' to sit on the throne than my milkman, yet I sing 'God Save the Queen' as lustily as anyone and the 'Last Night of the Proms' stirs something very deep in me that I would not readily surrender.

It is sometimes necessary to remind ourselves that most people do in fact obey most of the laws most of the time – and this is not because of the content of the law books. Fear of being punished plays its part, and the rationality of a prohibition may make it more or less likely to be respected. For many people, however, it is still the case that the law represents a kind of *grundnorm*, it tells what 'ought' to be and invites

an obedience that is primarily a habitual rather than an intellectual matter. The fact that we sometimes speed on the roads, or park in prohibited places, does not make this observation invalid. As a strategy for living it is necessary to have a world view, and there is in most (though clearly not all) of the population a sense of a kind of deep law that helps to tell us who we are and where we are placed in the scheme of things. Of course, not everyone will internalise the law in the same way; there may be general variations as between different persons, places and communities.

Consider for a moment the broad concept of Britishness. Although space prohibits the unpacking of all its baggage here, a vision of a particular kind of legal community is clearly an important item in the national kitbag. Yet that vision is not necessarily coterminous with the day-to-day operation of the legal system. This goes on its own way, for good or ill. Few follow its progress, unless they are very immediately involved, and interest groups frequently despair at their lack of success in interesting the public in legal issues. Civil liberties may be infringed, political arrangements changed, age-old institutions abolished or remodelled and still the public dog sleeps. Until that is, for no clear reason, it wakes. Exactly when it will do so is hard to predict, for it is not the most significant noises that make the dog stir. Very likely it will be a minor case, or a footnote in a government's legislative programme that is of no great social or economic import, that suddenly stirs the public mood. Core normative values are allegedly now under threat; letters are written to newspapers by people who do not normally write letters to newspapers, and the rhetoric of liberty or Britishness is brought down from the attic and dusted off. Law-abiding people with a thousand more pressing concerns of their own begin to demand the right to eat beef on the bone and wonder whether or not to start hunting foxes. In time the furore dies away but not before it has been made apparent that, in the minds of those who must be persuaded to obey it, the law is still an ideological construct, a statement of world belief as well as a pattern of rules. Simple power can sustain the law, but if the law wants or needs to rely on a degree of consent it has to create a world view or accommodate itself to one it finds already in existence.

I am concerned here with visions of the law as espoused by the people of the eighteenth and nineteenth centuries, visions that led on to consequent conduct. It is important from the first to give notice to the rather obvious point that alternate visions of the law were rather easier to sustain in a world where authority was less centralised and where local identity was much more important than today – although in the period under question this statement becomes progressively less true over time. The relationship between the central spine of law-making bodies and the regions of the kingdom was less direct, less certain in its transmission of legal information and more obviously obstructed by local jurisdictions, administrative problems and independent inclinations. Even more then than in the present day, there existed potential tensions between the legal expectations of communities and the law as practised amongst the common law judges. This tension between local interpretations of the

law, and the law itself, will be very relevant to this study of the punishment of supposed wrongdoers by those whom, for the moment, I must beg to be allowed to call simply 'ordinary people'.

Communities had their own views of what constituted an offence and their own views of appropriate sanctions. Of course these were not always set in contradiction to a criminal justice system trying to lay down normative values. For the title of this book I chose the term 'informal justice' because my study will describe modes of doing justice that lay on both sides of the sometimes rather indeterminate legal divide. Sometimes communities responded to perceived offences in ways that were lawful and sometimes in ways that were unlawful (though this was not always apparent until decided by the courts after the fact). Both species of response, however, were often conceptually related and blended together into the local justice tradition.

At the start of the period in question there were many parts of the country where local tradition was still being upheld by formal institutions operating largely outside the ambit of the common law courts. Court-leets, swainmotes, verderers' courts, stannary courts and the like were staffed by those who were not legal professionals, and in them judgement was generally delivered upon the defendant by his or her peers. Local or occupational custom served as a powerful guiding principle and the proceedings were somewhat irregular by the standards of the common law lawyers. Still, the higher courts accepted the right of these courts to do justice within certain bounds.

In 1760 these courts were still penalising low-end misdemeanours, supervising weights and measures, upholding customary rights and work practices, arbitrating disputes, regulating markets and so on: matters not much accounted by history but undoubtedly important in the lives of the people who fell under their jurisdiction. However, most of these courts were already in decline, and by the end of the period those that remained were, by and large, shadows of their former selves, mere vestigial curiosities.

Existing alongside these courts, however, were traditions of juridical performance and systems of social sanction that were driven by common views of law, justice and right that were often founded upon legal fictions. Thus, one observes mock courts that had no legitimate authority yet acted as though they did; one sees shaming punishments, strict in their adherence to rules that allegedly made them lawful but that clearly ran contrary to established criminal case law; one observes labour agreements that were unenforceable yet imposed elaborate disciplinary frameworks upon collective labour; and also taxing customs (accompanied by penalties for avoidance) firmly anchored in specific time, place and tradition, that from the point of view of the common lawyer were little better than extortion.

There are many more examples that this book will explore, but it must be admitted that observing these informal social rules, fictions, self-constituted institutions, prohibitions and accompanying sanctions is much easier than assessing their true significance. It will be one of the contentions of this book that the extent to which

the physical, juridical and psychological environments of the period were populated by legal fictions and self-constituted juridical mechanisms has been much underestimated. By fictions I mean suppositions as to the content of community or individual rights or powers that lawyers and courts would subsequently find to be erroneous. To those espousing them at the time, however, these were either genuine privileges, rights or powers – as real and material as any other species of legal rights – or they were legitimate manifestations of what the law ought to be, or what the true unrecognised law allegedly actually was.

In short, communities laid claims to powers that were in conflict with the views and traditions of the common law courts. Their claims were various but they substantially revolved around the right to exercise customary rights and sanction those who breached them, or to uphold understood principles of morality and chastise those who refused to conform to them. These were claims that contained, but went beyond, mere self-interest and they acknowledged not only legitimating but also limiting principles.

In such circumstances the actors were rarely disordered howling mobs, they rarely acted indiscriminately. Although facets of criminality will from time to time be observed among them, more often the parties involved had very clear ideas of what constituted a legitimate or illegitimate response to transgression. Similarly, many were not acting in their own immediate interests but in a spirit of solidarity, genuine indignation or altruism in performing acts that corresponded to their own legal construction of the world.

But were these acts really of any importance?

The contexts in which popular judgements were given and sanctions applied have often led to the significance of these acts being underestimated or trivialised. Informal justice was often delivered to very specific groups, often within festive time or festive space. For example, it was at the harvest supper that the conduct of delinquent harvesters was judged, during the Plough Monday celebrations that revenge was exacted upon village skinflints, and at the bonfire on 5 November that the conduct of contemporary malefactors was excoriated.

Outside observers – socially, geographically and psychologically distanced – have readily reduced this aspect of popular culture to the quaint and quixotic. Yet it was during celebrations that the community could be most readily gathered and constituted, and the power of shame in particular most easily harnessed as an instrument of social discipline. Lest 'festive' be thought to connote 'trivial' it is salutary to remember that Barry Faulk remarked that: 'To write a history of capital punishment in England is to write a history of festive life.'[1] Within their festive space, the

1 Barry Faulk, 'The Public Execution; Urban Rhetoric and Victorian Crowds', *Executions and the British Experience from the 17th to the 20th Century*, ed. William B. Thesig (Jefferson, N. Carolina: McFarland, 1990), pp. 77–91 at p. 77.

community paraded, performed and punished but remained for the most part within the constraints imposed by the limits of the festive calendar and festive tradition.

It is necessary to recover the humanity of those on the receiving end of festive judgement in order to comprehend what lay behind the whimsical descriptions of indulgent folklorists. True, a ducking can be a matter of a good-natured dunking in a river on a bucolic summer's day, accompanied by the feigned indignation that is expected as part of the play. Yet it can also be a matter of being stripped naked in front of the community and held down in a freezing torrent, possibly until one expires.

Receiving a fine is a trivial matter as long as one can afford to pay. If, in a rather atomised society, the power of social sanction escapes us, still it can be observed in the fate of those physically unharmed yet socially shamed who lost their homes and their situations and fled their communities.

In few of these cases, however, did the crowd seem to believe that it had exceeded its authority. Indeed when told that their activities had been unlawful they often reacted with genuine surprise, not knowing that they had strayed beyond the permissible. Sometimes, of course, they simply did not believe those who chastised them. It is not at all surprising that misapprehensions as to the contents of their powers and rights should be so frequently found within communities when the common law was imperfectly applied, and when it contained within itself a rhetoric that alleged that the common law was precisely founded upon customary practice.

Law in the Community

The first census in 1801 calculated that there were some 8.8 million people living in England and Wales; a modern estimation is that in England about two-thirds of this population was living in rural areas and only one-third in urban areas, defined as settlements of more than 2,500 people.[2] Not until 1851 did the numbers of town or city-dwellers match those in the villages and hamlets. It follows, then, that for many of these people the assize and the quarter sessions were but occasional events in a county town, which was itself a good long walk away. The local manorial court might be much more familiar. Predominantly, though, justice was delivered day-to-day by the justice of the peace (JP). He was guided by his clerk and by Burn's *Justice of the Peace,* a book that was to become the bible of magistrates. It was the lay-magistrate, then, who formed the interface between customary practice and common and statute law.

The JP was the local fount of the common law, though in some areas of law his reach might be constrained by the existence of other jurisdictions. He might be

2 P. Langford, *A Polite and Commercial People: England, 1727–1783* (Oxford: OUP, 1989), p. 418.

either zealous or lazy, ignorant or shrewd, but his was the task of reconciling local custom and the common law as expressed in his law books. How then might he react to the application of communal justice upon, for example, a village malefactor – an adulterer, a notorious gossip, a dishonest trader or other such? Much of this book concerns itself with the phenomenon of 'rough music', the practice of staging ritual shaming processions that were variously known as skimmingtons, stang ridings, ceffyl prens and the like. A JP's law books might tell him that in *Mason v Jennings* 1680,[3] it had been decided that to ride skimmington against someone was to defame them – although in that case the plaintiff had recovered nothing by his action. Yet this was a very old case and the very dearth of such cases in his law books might tell him that such activities were rarely proceeded against. How was he to act in the face of the unanimous assertion of the community that such activities were lawful provided they were carried on in three different places for three successive nights?

Claims of customary rights could be persuasive when the landscape was littered with different jurisdictions, ancient but sometimes almost moribund courts, manorial customs, feudal relics and special privileges allegedly based upon ancient charter. True, by the middle of the nineteenth century much of this had been swept away and magistrates were less permissive, with a clearer sense of their personal obligations and of what was lawful. By then, of course, magistrates could increasingly count on the assistance of sporadically zealous professional police forces. However, the impact of the arrival of the professional policeman should not be overstated – certainly not in the early years. Writing of the London police courts operating in the second half of the nineteenth century, Jennifer Davis noted that:

> The business of the courts demonstrates, in particular, that historians have underestimated the extent to which informal sanctions against wrongdoers applied within the community survived alongside official law enforcement as applied by the police and the courts at least until the end of the nineteenth century; while historians have similarly overestimated the extent to which the nineteenth century state was either able or willing to intervene in the everyday affairs of its subjects.[4]

Magistrates and clergymen remained limited in the forces at their disposal and limited too in respect of their knowledge. It seems very likely that they simply did not know whether the claims of right that informed many folkloric and punitive customs were valid or not. The general impression derived from the evidence from much of the period is that very few of the performers of skimmington rides, stangings, effigy burnings and other informal punishments were ever proceeded against, and where they

3 *Mason v Jennings* (1680) T Raym 401, 83 ER 209.

4 Jennifer Davis, 'A Poor Man's System of Justice: The London Police Courts in the Second Half of the Nineteenth Century', *Historical Journal* 27:2 (1984), pp. 309–35 at p. 314.

were convicted (typically of breaches of the peace) the penalties were often light. This is certainly true when compared to the harsh terms of imprisonment being imposed at the time for minor property offences. A sense of uncertainty regarding the law surely played its part in this.

One wonders of course whether the JP really cared about such things if there was no obvious challenge to his authority in evidence, or if there was no perceived threat to the social order as a whole. Where did his sympathies lie? The condescension displayed by contemporary newspaper editors catering for their somewhat exclusive audience, or by early folklorists collecting after the fact, should not dispose us to assume that the infliction of informal or extra-legal punishment was the sole prerogative of the lumpen labourer or ill-educated rustic. Whether it be a matter of the burial of an effigy of an officer by his disgruntled compatriots, the financing of political bonfires by well-heeled politicians or simply the participation of the middling sort in the rough music inaugurated by their less well-heeled neighbours, more classes were drawn into the system of shaming and symbolic sanctions than some of the commentaries would allow.

When it came to the harassment of a radical, the shaming of some alleged sexual deviant or simply the chastisement of a submissive husband, the magistrate did not always hasten to enforce the letter of the law. Indeed, when it came to measures against 'engrossers' and 'regraters' and the attempt to enforce price controls, many magistrates seem to have actively assisted in, as well as approved of, popular action. Whilst I shall argue that it was far from true that rough music rituals always reflected social conservatism, many did have that aspect and, as we shall see, such occurrences were much less likely to be punished, or punished severely, than those other acts of popular justice that could be viewed as attempts to disrupt the existing hierarchy of wealth and power.

A certain pragmatism was necessarily imposed upon legal officers by the limits of their coercive resources. Prior to the advent of professional policing a magistrate substantially depended upon lay-officers drawn from the community and presumably animated by community sentiments. He might have recourse to the goodwill of the respectable community as expressed through the *posse comitatus* or, as a last resort, call in military forces. Unfortunately, such forces were rather blunt in their application and on occasion represented a remedy that was worse than the disease. The inhabitants of Wantage and Abingdon complained in 1795 about the soldiers billeted upon them that 'such a sett of Villains never entered this Town before.'[5] In 1800 the inhabitants of Sunderland petitioned with the rector for the removal of troops since, 'Their principle aim is robbery.'[6]

5 Petition to Sir G. Young and C. Dundas, 6 April 1795 PRO WO 40/17.
6 Ibid.

Homely justice dispensed by cheery sympathetic JPs is not a picture one generally recognises when observing the aftermath of public disorder or the treatment of the itinerant poor! Nevertheless, however grudging, a degree of tolerance of local traditions, practices and beliefs was generally a politic course to pursue and this, to a degree, conditioned responses to the phenomena that will be under consideration here. In the eighteenth century, the cases that came before a magistrate depended substantially upon private complaints made in person (and intimidation was far from unknown) or upon the efforts of the local worthies, particularly the constables. A constable was, of course, a local man – a townsman or a villager steeped in its traditions and then raised up to oversee the community. Who living in a community in eighteenth-century England would believe that the annual perambulation to gather firewood and open paths, the riding of the stang to chasten the adulterer, the ploughing up of the gardens of the wealthy who were too miserly to provide the customary dole, were unlawful when, as so often the evidence suggests, the magistrate had winked at them and the constable had participated.

It was more than the fact of their continuing occurrence that argued for the legitimacy of such practices. The close association of such activity with the church calendar and with parish activities (such as beating the bounds) argued for their propriety as did their wide dispersal throughout the kingdom. Where this was insufficient, participants often anchored their claims in their own specific points of legal time, acknowledging that as a general practice a certain activity might not be permissible but in their own particular locality a particular grant or legal event did give it license. We might illustrate the point with a case of 'plough bullocking'. This was a somewhat rough-and-ready practice whereby the better houses within a rural community were visited on Plough Monday by gangs of men seeking as of right a customary dole of beer, food and/or coin. If the expected largesse failed to materialise the occupant would be abused and his property might be vandalised, but more specifically he was liable to have his garden or nearby crops grubbed up with the plough brought by the gang for that very purpose. A plough bullock in the 1880s, however, when asked if he was not afraid of being taken up by the police for such acts replied, 'They can stand by it and no law in the world can touch 'em, 'cause it's an old charter.'[7]

We may doubt that any royal charter ever legitimised this particular way of extorting money, and doubt that the speaker could give any further details of the charter in whose authority he claimed to be cloaked, but claims of ancient grants and charters were validated in other contexts sufficiently often to suggest to lay people that such claims had real legal foundation. As E. P. Thompson observed, during the dispute

7 R. Chambers, ed., *The Book of Days: A Miscellany of Popular Antiquities* (London, 1888), vol. 1., p. 95, cited in B. Bushaway, *By Rite, Custom, Ceremony and Community in England, 1700–1880*, 2nd edn (London: Breviary Stuff Publications, 2011), p. 5.