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*Law and Public Policy: Taming the Unruly Horse?*

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**VIOLENCE, LOCAL MAGISTRATES AND THE INFORMAL LAW 1700-1833:  
MAGISTRATES AND MEDIATION IN KENT.**

DR. S.K.SULLIVAN\*

When eighteenth-century prosecutors brought indictments for assault, riot, or other non-felonious offences against the person, their goal was not punishment of the defendant, but instead the extraction of payment, or less frequently, apology from the defendant.<sup>1</sup>

The motives of eighteenth century criminal prosecutors has been the focus of some recent attention.<sup>2</sup> The purpose of the most recent enquiries has been rather less grand and less ambitious than those of previous endeavours.<sup>3</sup> One of the major current concerns appears to be to establish whether prosecutors perceived the prosecution of petty crimes to be truly criminal in nature (i.e. seeking the punishment of the offender), or whether prosecutions were undertaken on the basis of seeking restitution (i.e. an attempt to receive a form of compensation).<sup>4</sup> In essence the purpose of the present enquiries is to establish the perception of petty crime by the eighteenth-century offender, the victim, and the justice of the peace.

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<sup>1</sup> Norma Landau, "Indictment for Fun and Profit: A Prosecutor's Reward at Eighteenth-Century Quarter Sessions" (1999) 3 *Law and History Review* 507.

<sup>2</sup> Ibid 507-536; and less recently by Peter King "Punishing Assault: The Transformation of Attitudes in the English Courts" (1996) 27 *Journal of Interdisciplinary History* 43, 43-74; Peter King, *Crime, Justice, and Discretion in England 1740-1820* (2000); Peter King, *Crime and Law in England 1750-1840*, (2007); Drew Grey, "The Regulation of Violence in the Metropolis; the prosecution of Assault in the Summary Courts, c1780-1820" (2007) 32 *The London Journal* 75, 75-87.

<sup>3</sup> See especially Douglas Hay "Property, Authority and the Criminal Law" Douglas Hay et al (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth-century England* (1975) 17, 17-65 for his portrayal of the "bloody code" as a class conspiracy, and the response by Peter Langbein, "Albion's Fatal Flaws" (1983) 98 *Past & Present* 96, 96-120; Peter King, "Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800" (1983) 27 *Historical Journal* 25, 25-58.

<sup>4</sup> Landau, above n1, 507-536.

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It is the aim of this piece to suggest that notable authorities such as Landau, and King have been looking in the wrong place for the most illustrative evidence of the motives and perceptions of the relevant actors. If Landau is correct in her assertion that the eighteenth-century prosecutor of petty crime was motivated by restitution, and that a compromise of such prosecutions was common, then it is submitted that the quarter sessions is not the best source of evidence of such motives. If the motive of the prosecutor was restitution and not retribution then such a motive will be more clearly shown by consulting documents which were created closer to the action(s) which constituted the crime, than by the formal court records. It is the contention of this piece that whilst the justice of peace notebook may produce a smaller quantity of evidence than the quarter sessions records, the evidence which is produced will be of greater qualitative value.<sup>5</sup>

The local community in the two centuries prior to the creation of modern police forces maintained order not through the downward pressure of a centralised criminal justice system<sup>6</sup> but through a range of both informal mechanisms (informal mediation<sup>7</sup>, and rebukes and warnings by constables<sup>8</sup>) and formal mechanisms (poor law<sup>9</sup> and the church courts<sup>10</sup>) to create a negative notion of order. The decline of the church courts in the

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<sup>5</sup> For further details on these subjects see the concluding section.

<sup>6</sup> James.A. Sharpe, *Crime in Early Modern England 1550-1750* (2<sup>nd</sup> edition 1999) 92.

<sup>7</sup> Douglas Hay, "The Criminal Prosecution in England" (1984) 47 *M.L.R.* 8, 8, and in particular his assertion that a Quaker was able to boast that he had settled more than 600 disputes in his own parish in a period in excess of 40 years, and that as a result there had been no formal litigation during that period. Also, Sharpe, above n6, 47; N. Landau, *The Justices of the Peace 1679-1760*, (1984), 196.

<sup>8</sup> Vic Gatrell, Bruce Lenman, and Geoffrey Parker (eds), *Crime and the law: The Social History of Crime in Western Europe since 1500*, (1980) 109.

<sup>9</sup> Roger Wells, "The Development of the English Rural Proletariat and Social Process 1700-1850" (1978) 6 *Journal of Peasant Studies* 117, 117; Edward P. Thompson, *Customs in Common* (1991) 102.; Gatrell, Lenman, and Parker above n8, 100; Sharpe above n6, 74.

<sup>10</sup> Sharpe, above n6, 78-86; J. Bullard, *Constitution and Canons Ecclesiastical 1604: Latin and English* (1934), and in particular 114, and 329; James Sharpe "Crime and Delinquency in an Essex Parish 1600-1640" in James Cockburn (ed), *Crime in England 1550-1800* (1977) 90, 90-109; J. Potter, *Ecclesiastical Courts in the Diocese of Canterbury 1603-65*, (MPhil, Royal Holloway College, 1972); R. Mortimer *Western Canon Law*, (1953) 68-69; Geoffrey Rudolph Elton "Crime and the Historian" James Cockburn (ed), *Crime in England 1550-1800* (1977) 3,3; Paul Hair, *Before the Bawdy Court* (1972) 256.

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eighteenth century<sup>11</sup> meant that a significant source of local ordering was removed, and that the justice of the peace was in fact, if not in law, destined to play a larger role in the correction of the minor offender. This paper is devoted to an examination of one informal albeit significant aspect of the role of the justice of the peace in maintaining order in the local community in the county of Kent in the eighteenth century, and in the first thirty-three years of the nineteenth century. This paper will focus solely upon the use of the office of the justice in the eighteenth and nineteenth centuries to informally resolve criminal complaints,<sup>12</sup> and in particular crimes of violence against the person as evidenced by the surviving justice of the peace notebooks in Kent.<sup>13</sup>

The term "making-up" is used to denote the practice whereby a criminal complaint placed before a justice of the peace did not lead to a formal prosecution, but instead the office of

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<sup>11</sup> For a broad view see William Cornish & Geoffrey de Clark, *Law and Society in England 1750-1950* (1989) 28-33; Hair, above n10, 21-24. For arguments that this area requires further investigation see Sharpe, above n6; and also Robert Shoemaker, *Prosecution and Punishment: Petty Crime and the Law in London and Rural Middlesex 1660-1725* (1991), 20-2. On the survival of the jurisdiction of the church courts at law if not in practice, see Garth More, *English Canon Law* (1967) 26-127 and for a fuller opinion supporting the survival of the ecclesiastical jurisdiction to discipline the laity see Mortimer, above n10, 70. For a comprehensive listing and treatment see Halsbury's "Laws of England" 4th Edition, Volume 14, paragraph 1264, at page 695. For the judicial position see *Redfern v Redfern* [1891] P139, CA, as per Lord Lindley L.J. at 145, and Bowen L.J. at 147. *Elliot v Albert* [1934] KB 650, as per Scrutton LJ at 660, and Maugham LJ at 666. *Manchester Corp'n v Manchester Palace of Varieties Ltd* [1955] 1 All ER 387, as per Lord Goddard at 393. Cf P. Hair *Before the Bawdy Court* pp21-24. For an opinion supporting this statement on the legal termination of the jurisdiction of the ecclesiastical courts after the "Ecclesiastical Courts Act" 1850, 18 and 19 Vict. Chapter 41 (which removed all jurisdiction over defamation), and the "Ecclesiastical Jurisdiction Act 1860" (which removed the power to discipline the laity for brawling on church grounds) see John Baker, *An Introduction to English legal History* (4<sup>th</sup> Edition 2002), 152.

<sup>12</sup> For details of William Hunt (Wiltshire Justice of the Peace in the 1740's) and Samuel Whitbread (Bedfordshire Justice 1810-20) using a mixture of threats and letters to resolve disputes arising from criminal informations, see Clive Emsley, *Crime and Society in England 1750-1900* (3rd edition 2005) 184-185; David Taylor, *Crime, Policing, and Punishment in England 1750-1914* (1998) 111-112.

<sup>13</sup> In Chronological order they are as follows : William Brockman, 1689-1701, & 1713-24, Beachborough, TR 1564/1, henceforth W. Brockman. Paul D'Aranda 1707-9, Shoreham, U442/045, henceforth D'Aranda. William Emmett 1711-1737, Bromley, U310/014, Bromley Records Office, henceforth Emmett. James Brockman 1725-67, Beachborough, TR1564/1, henceforth J. Brockman. Wyndham Knatchbull, 1734-47, Mersham, U951/04, henceforth W. Knatchbull. Edward Filmer, notebook and papers, 1740-54, Sutton Place, U120/09 (notebook) and U120/011 (papers), henceforth Filmer. Ralph Brockman, 1770-81, Beachborough, TR 1564/1, henceforth R. Brockman. G. Norman, 1792-1802, Bromley, U310/014, Bromley Records Office, henceforth Norman. A. Bradley, 1817-19, Sittingbourne, U2802/01, henceforth Bradley. Edward Knatchbull, 1819-22, and 1830-35, Mersham, U951/05-06, henceforth E. Knatchbull. D. James, 1820-26, U1482/01, henceforth James. Montagu Pennington 1809-33, Walmer, U2639/01. All of the above are stored at the Centre for Kentish Studies except where stated.

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the justice was used as the focal point for an informal settlement of the complaint. This process will now be explored in terms of the impetus for such an informal resolution, the tools used by Kentish justices in the pursuit of such a settlement, the nature of the offence which formed the subject of the complaint, the factors which determined the exercise of this discretion, and the nature of the restitution involved in such a settlement. Finally, I will offer some conclusions on the role and the nature of "making-up", and its broader significance to the question of the motives of eighteenth and early nineteenth-century prosecutors of petty crime.

### **I PROSECUTORIAL DISCRETION**

In the eighteenth century the justice of the peace was perceived to possess a mediatory function as well as holding an office for the enforcement of the common law. This is evidenced in legal theory,<sup>14</sup> in the practical guidance offered by justice of the peace guidebooks,<sup>15</sup> and in the relaxation of the procedure for the use of a recognizance concordantur.<sup>16</sup>

From a legal perspective the discretion to informally settle criminal complaints after they had been placed before a justice of the peace, lay solely with the justice. It was for the justice to decide whether to decide the matter formally if he were competent to do so, to refer the matter to the petty sessions, or to bind the parties to appear at the quarter sessions or the assizes.

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<sup>14</sup> The most important function of the justice was to "heal petty disputes" as per William Blackstone, *Commentaries on the Laws of England*, (1771), Volume 1,8; and also "where the injury is but small, the magistrate to whom the complaint is made, cannot better exercise his humanity, and I may add, his wisdom, then by persuading the parties to peace and reconciliation" stated by Sir John Hawkins, Chairman of the Middlesex quarter sessions in 1780, cited in Taylor above n12,111.

<sup>15</sup> As per Thomas Gisborne "An Enquiry into the Duties of the Men in the Higher and Middle Classes of Society" cited in Landau, above n7,174.

<sup>16</sup> Landau, above n7,182, discovered that even after the parties to a criminal complaint had been bound to the quarter sessions, Kentish Justices would release the parties from the obligation prior to the sessions and would mark the recognizance as "concordantur" or "the parties were agreed." An examination of seven years of recognizances in the period 1707-1723 disclosed that on average 25% of all cases which were referred to the county quarter sessions were "made-up" before the case reached that court. See also Shoemaker, above n11,102-3.

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In pursuit of an informal resolution the justice could ask the parties to settle the issue between themselves,<sup>17</sup> or recommend that they resolve the matter,<sup>18</sup> or to instruct the parties to informally resolve the issue.<sup>19</sup> In the pursuit of an informal settlement of a criminal complaint the justice of the peace utilised the basic tools available to him. The first was the issue of a warrant which provided the justice with a minimum level of legal compulsion.

For those persons of note who were not immediately willing to "make-up" the offence, the Kentish justice resorted to the use of a threatening letter. Thus on the 30<sup>th</sup> January 1743 3 Edward Filmer received a complaint from Mary Hunt that her master, the Reverend Clendon of Sutton Valence, had repeatedly attempted to seduce her, and that on one such occasion Clendon had offered Hunt half a guinea in return for sexual favours. It was alleged by Hunt that this behaviour had culminated in an attempted rape.<sup>20</sup> In response to this Filmer wrote to Clendon, and urged him to close "this woman's mouth" by settling the complaint informally, and that if the latter failed to do so then Filmer would have no alternative but to refer the case to the quarter sessions.<sup>21</sup> A month later (3<sup>rd</sup> March 1743 ) Hunt informed Filmer that Clendon had used a third party to make an offer of three guineas to "make-up" this issue, and that she had accepted this offer.<sup>22</sup> It was also possible for the justice of the peace to use a combination of a warrant and a threatening letter to ensure that a complaint was informally resolved.<sup>23</sup>

From a legal perspective the control and the possession of the discretion to deal with a criminal complaint in a formal or informal manner resided with the justice of the peace,

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<sup>17</sup> D'Aranda 19<sup>th</sup> June 1708.

<sup>18</sup> R. Brockman 13<sup>th</sup> January 1722.

<sup>19</sup> Pennington 14<sup>th</sup> June 1814.

<sup>20</sup> Filmer, notebook 30<sup>th</sup> January 1743.

<sup>21</sup> Filmer, papers 31<sup>st</sup> January 1743.

<sup>22</sup> Ibid 3<sup>rd</sup> March 1743.

<sup>23</sup> Pennington 6<sup>th</sup> May 1813.

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however, from a descriptive rather than a prescriptive perspective the control of this discretion resided with the parties to the complaint.

The referral of a complaint to the quarter sessions or the assizes, by a justice of the peace, when the parties did not wish the complaint to proceed to one of those courts would have been futile. The parties to the complaint could have sought a release from their respective recognizances, or alternatively a compromise could have been reached at the petty sessions, quarter sessions or the assizes.<sup>24</sup> This meant that despite the legal powers of the Justice, he was not able to enforce a formal or an informal settlement of a criminal complaint if one of the parties to the complaint did not favour such a conclusion.<sup>25</sup>

Similarly, the justice of the peace was unable to ensure that a criminal complaint was dealt with formally if the parties to the complaint wished to resolve the issue informally. In December 1819 James Woods was involved in the destruction of the windows and the door of the home of Mr. Jell of Kingsdown. Upon being summoned by warrant, Woods proceeded to act in an insolent manner towards Pennington. Despite the desire of the latter to punish Woods, the parties resolved the complaint informally.<sup>26</sup> Within four months Sophia Dixon made a complaint of attempted rape against James Woods. On this occasion Pennington was determined to pursue a formal conclusion to the complaint. However, Pennington was left powerless when Dixon and Woods decided to resolve the issue, and Pennington was reduced to an impotent entry in his notebook that Woods was a "bad impudent lad."<sup>27</sup>

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<sup>24</sup> Blackstone considered that it was common practice for the prosecutor and the accused to agree at the Quarter sessions, and arrange for the court to inflict a token penalty. William Blackstone, Commentaries on the Laws of England, (1771) Volume 4,356-7.

<sup>25</sup> Pennington 12<sup>th</sup> August 1825.

<sup>26</sup> Ibid 11<sup>th</sup> December 1819.

<sup>27</sup> Ibid 6<sup>th</sup> March 1820.

## II THE NATURE OF THE OFFENCES

The offences are predominantly, but not exclusively, from within that range of offences which may be described as "minor crime." Second, the vast majority of these offences are what may be described as "minor" offences against the person. Third, there are only seven property offences amongst the examples of "making-up." When this is compared against the fact that 81% of all cases at the assizes or the quarter sessions in the eighteenth century were offences against property,<sup>28</sup> then it is reasonable to assume that the justice of the peace, and the informal practices which attached to that office, did not act as a substantial filter to prevent property offences from entering the formal legal order.<sup>29</sup>

It is necessary to add a few comments in relation to the offences of rape and attempted rape. It is beyond doubt that these offences would fall within the category of "serious crime" but despite that fact there are numerous examples of these offences being informally resolved in this way. It is submitted that this was a result of the problematic nature of prosecuting rape, rather than an appreciation that rape and attempted rape were a suitable subject for such an informal practice.<sup>30</sup> The deterrents which hindered the prosecution of these offences included<sup>31</sup> doubts in relation to the character of the victim<sup>32</sup> and the problematic nature of the evidence of children.<sup>33</sup>

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<sup>28</sup> See James Beattie, *Crime and the Courts in England 1660-1800* (1986) 411.

<sup>29</sup> An examination of newspaper apologies to "make-up" through the *Kentish Gazette* disclosed that of those offences which were informally resolved in this manner in the period 1772-1807, 26 % of them were of a proprietary nature. Whilst this is still a much lower number of property offences than were in evidence within the formal legal order, it does demonstrate that when property offences were resolved this occurred without judicial blessing. S.K.Sullivan, *A Just Method of Justice: Informal Ordering in Kent 1700-1883* (PhD, University of Kent at Canterbury, 2006), 173-294; Sharpe, above n6,47.

<sup>30</sup> On this point see Shoemaker, above n11,23-24, and 89-90. Contra Anna Clarke, *Women's Silence and Men's Violence, Sexual Assault in England 1770-1845* (1987).

<sup>31</sup> Beattie, above n29, 126-129.

<sup>32</sup> Pennington 21<sup>st</sup> December 1812.

<sup>33</sup> *Ibid* 9<sup>th</sup> January 1810. . See also Beattie, above n29,129-132.

### III THE EXERCISE OF DISCRETION

The notebooks provide some insight as to the factors which influenced the decision by the justice and the parties to allow an informal resolution of a complaint. The factor most likely to secure an informal settlement was the intoxication of the accused. Thus in February 1811, Pennington allowed Richard Rolfe of Whitfield to "make-up" a complaint of an assault on his part because it was considered to be a mere drunken affray.<sup>34</sup> The factor which was the second most effective in enabling an accused to avoid a formal prosecution was the plea of reciprocity. In October 1734 Henry Gold responded to a complaint of an assault by asserting that the complainant had assaulted him previously. In response to this Wyndham Knatchbull rebuked Gold, and informed him that it would have been more advisable to seek a legal remedy than to resort to personal vengeance. However, Knatchbull still permitted the complaint to be made up.<sup>35</sup> Similarly, in 1812 when William Bushel of Walmer complained to Pennington that he had been assaulted by William Hoile, the presiding justice decided that there was fault on both sides and the issue was resolved.<sup>36</sup> A similar factor which influenced the decision to allow a complaint to be "made-up" was the previous character of the complainant. In May 1809 Bret Mercer complained of an assault by Henry Williams.<sup>37</sup> The decision by Pennington to allow this matter to be informally resolved was influenced by the fact that Mercer had previously been charged with the offence of bestiality with a mare.<sup>38</sup>

The two most surprising aspects of the exercise of this discretion are the limited impact of the previous good character of the accused, and indeed the lack of a restriction placed upon the exercise of this discretion by the previous criminal misconduct of the accused. In the consideration of clemency within the formal legal order the good character of the

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<sup>34</sup> Pennington 26<sup>th</sup> February 1811.

<sup>35</sup> W. Knatchbull 6<sup>th</sup> August 1737.

<sup>36</sup> Pennington 6<sup>th</sup> June 1812.

<sup>37</sup> Ibid 17<sup>th</sup> May 1809.

<sup>38</sup> Kentish Gazette 4<sup>th</sup> August 1801 Issue 3457, P4Cd.

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accused was the most influential factor and the lack of previous convictions was the third most successful factor in obtaining a pardon.<sup>39</sup>

Thus in June 1811 Pennington allowed Elizabeth Holden to "make-up" her assault upon Catherine Berry.<sup>40</sup> On the very next day Elizabeth Holden and her husband Thomas were accused of another assault by Elizabeth Mills, and despite this rapid repetition, Pennington once more allowed Holden to obtain an informal settlement.<sup>41</sup> The case of Thomas Goodwin provides an example of the lack of impact of the previous misconduct by the accused in relation to a rather more serious offence. On the 2<sup>nd</sup> May 1810 Goodwin attempted to rape Ann Grant of Walmer.<sup>42</sup> This was his second attempt to forcibly compromise the virtue of this girl of thirteen years of age. On the second occasion his conduct was witnessed by, and attested to by his three acquaintances—Richard Day, William Tarton, and Stephen Watson. Upon the issue of a warrant by Pennington, Goodwin absconded, and he did not surrender himself until 23<sup>rd</sup> May 1812. However, despite the gravity of the offence, and his prolonged absence, Goodwin was permitted to avoid criminal prosecution by the payment of two guineas to the mother of the young girl.<sup>43</sup>

It is possible to illustrate this further by referring back to the conduct of James Woods and James Erridge. It will be recalled that in December 1819 both Erridge and Woods were the subject of a complaint of criminal damage made by Mr. Jell.<sup>44</sup> This was made up in the presence of Pennington, but within three months Pennington had summoned

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<sup>39</sup> Peter King "Decision-Makers and Decision-Making in the English Criminal Law 1750-1800" (1984) 27 *Historical Journal* 25, 25-58.

<sup>40</sup> Pennington 11<sup>th</sup> June 1811.

<sup>41</sup> *Ibid* 12<sup>th</sup> June 1811.

<sup>42</sup> *Ibid* 2<sup>nd</sup> May 1810.

<sup>43</sup> For the sake of completeness it may be noted that on the 4<sup>th</sup> October 1815 Goodwin attempted to rape a young girl of eight years of age named Sarah Clark. On this occasion he also absconded, but Pennington was able to gain some satisfaction by noting in his diary that Goodwin was subsequently convicted of theft on the Isle of Thanet, and as a result was transported for seven years. See also *Kentish Gazette* 2<sup>nd</sup> January 1816, 4961, P4Cd

<sup>44</sup> Pennington 11<sup>th</sup> December 1819.

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Woods again, and this time as a result of a complaint of attempted rape.<sup>45</sup> This complaint was informally settled, and in August 1825 both Woods and Erridge were allowed to "make-up" an assault upon George Gillom.<sup>46</sup> Thus between them Elizabeth Holden, Thomas Goodwin, James Woods, and James Erridge had been the subject of criminal complaints which included three attempted rapes, four assaults, and four cases of criminal damage, and on each occasion they were able to avoid formal prosecution.

#### **IV THE NATURE OF THE RESTITUTION**

The actual nature and size of the restitution involved in the "making-up" may be divided into two parts. First, there was the pecuniary compensation for the loss suffered by the victim as a result of the conduct of the accused. Thus when Thomas and John Bayley assaulted John Muddle in 1812, they were required to compensate Muddle for his loss of earnings, and the cost of his treatment by a surgeon.<sup>47</sup>

The second part of the restitution was the money offered to "make-up" for the offence committed. Thus the primary determinant of the size of the restitution was the seriousness of the offence. Hence a serious assault upon John Coveney in 1781 cost his assailants two guineas,<sup>48</sup> and Thomas and Elizabeth Holden were required to pay two pounds for a serious assault upon Elizabeth Mills.<sup>49</sup> In contrast a trifling assault upon Marian Ladd by William Goldwin was settled for a trifle.<sup>50</sup>

The conduct or the character of a victim of an attempted rape had a large impact upon the size of the compensation that the victim received. For example, in 1812 Judith Spears received a mere seven shillings and six pence because her character was not free from

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<sup>45</sup> Ibid 6<sup>th</sup> March 1820.

<sup>46</sup> Ibid 12<sup>th</sup> August 1825.

<sup>47</sup> Ibid 29<sup>th</sup> September 1812.

<sup>48</sup> R. Brockman 14<sup>th</sup> May 1781.

<sup>49</sup> Pennington 12<sup>th</sup> June 1811.

<sup>50</sup> Ibid 21<sup>st</sup> May 1812.

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suspicion.<sup>51</sup> In 1813 Chambers was only required to pay a token sum because his victim was overly nervous, and because she did not seem to offer resistance.<sup>52</sup> It is also clear that the character of the accused, and the desire to protect it by an informal settlement of a potentially embarrassing complaint, did inflate the sum paid. Thus the Reverend Clendon was obliged to pay a full three guineas to avoid a prosecution for an attempted rape.<sup>53</sup>

The ability of the accused to pay had an impact upon the financial settlement. It is a common sense position to state that it would be futile to ask for a sum which was greater than the ability of the accused to pay. Finally, it should be noted that the level of compensation was ultimately a question to be decided by the justice of the peace, rather than the parties to the complaint. Thus in 1810 Thomas Castle received two pounds from James Cook for the assault committed by the latter, but Pennington upon deciding the matter considered that this sum was too large, ordered Castle to return fifteen shillings to Cook.<sup>54</sup>

Apart from the determination of the size of the pecuniary restitution there are three more aspects of the forfeit suffered by the accused in return for the non-prosecution, which are of interest. First, there were those forfeits which mimicked the pecuniary penalties contained within the formal criminal law. Thus in September 1814 in response to a complaint of riotous conduct, and criminal damage which was made by James Deane of Whitfield, John Rickman, Thomas Bailey, and George Holding each agreed to pay £1 1 shilling to the Kent and Canterbury Hospital.<sup>55</sup> Second, there were detriments suffered by the accused which were completely novel, and which depended upon the individual facts of the case, and as such had no counterpart within the formal legal order. An excellent example of this is provided by an assault committed by Elizabeth Marsh upon

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<sup>51</sup> Ibid 21<sup>st</sup> December 1812.

<sup>52</sup> Ibid 6<sup>th</sup> March 1813.

<sup>53</sup> Filmer, papers, 3<sup>rd</sup> February 1743.

<sup>54</sup> Pennington 15<sup>th</sup> October 1810.

<sup>55</sup> Ibid 28<sup>th</sup> September 1814.

her neighbour, John Shoulden of Lawrence.<sup>56</sup> The former was only permitted to "make-up" this offence upon the agreement that she would leave her home in Lawrence, and move to one of her other houses in Foulmead. Third, there was the remedy of placing an advert in the Kentish Gazette as a public apology.<sup>57</sup>

## V CONCLUSIONS AND THE “CRIMINALIZATION” OF PETTY CRIME

The process of "making-up" should not be seen as sharply divided from a formal prosecution in the period under review, and whilst the process was legally within the control and the discretion of the justice of the peace, the factual control of this process was in the hands of the parties to the complaint. The exercise of the discretion in relation to the decision to prosecute or to "make-up" may be described as a substantive decision making process. Thus a broader range of factors were taken into account when the prosecutorial discretion was exercised, and hence factors which were ignored or deemed worthy of little consideration within the formal legal order, such as reciprocity and drunkenness, had a large influence upon the decision to forgo a formal prosecution. Similarly, the nature and the size of the restitution involved in "making-up" were finely tuned to the factual circumstances of each individual case. It would be all too easy to portray "making-up" as a means by which an enlightened and benevolent justice exercised the discretionary practices which attached to the office to heal the wounds of the parties involved in a complaint to ensure future good relations and harmony. However, the process of "making-up" was often less than consensual. Indeed the justice of the peace often used threats and intimidation to enforce an informal settlement even when it was not truly desired. Thus in many cases there was no true reconciliation but merely an avoidance of a formal prosecution without a resolution of the problems which

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<sup>56</sup> Ibid 7<sup>th</sup> December 1810.

<sup>57</sup> This was used in three cases Pennington 12<sup>th</sup> October 1810 , 14<sup>th</sup> April 1813 , and 23<sup>rd</sup> June 1813 . For a substantial treatment of newspaper apologies see Sullivan, above n29, 173-294; Donna Andrews, "The Press and Public Apologies in Eighteenth-Century London" in Norma Landau (ed), *Law, Crime and Society, 1660-1830*, (2002) 202, 208-230.

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gave rise to the complaint. Similarly, the use of "making-up" was undoubtedly a device used by the notable and the powerful to "hush up" their sins and criminal misconduct with the offer of a payment, which the victim, of a socially and a financially inferior status, undoubtedly found difficult if not impossible to resist.

There have been recent enquiries seeking to establish the perceptions of petty crime by prosecutors, offenders, and justices, and Landau, has recently demonstrated that criminal prosecutions at the Middlesex quarter sessions relating to petty crimes were very similar to civil actions both in terms of motive and procedure.<sup>58</sup>

However, if Landau<sup>59</sup> and King<sup>60</sup> are correct that the overwhelming majority of criminal complaints were resolved informally, then it inevitable that many such complaints would have been settled before reaching the quarter sessions, or indeed without the use of a recognisance. As a result it is likely that the evidence gleaned from a study of the quarter sessions will be of limited use because much of the evidence of the perceptions and motives of the relevant actors would have been filtered out at an earlier stage in the dispute.

Thus there will simply be no evidence of many criminal complaints. As a result it is suggested that the evidence obtained from a study of formal court records would provide a rather inaccurate view of the popular attitudes towards petty crime. The evidence obtained will only provide a glimpse of events from the stage of the recognisance through to the verdict at the quarter sessions. If we are to obtain an accurate examination of popular perceptions then we need to look at sources of evidence from a stage of the criminal prosecution prior to the issuing of a recognisance.

At that stage of the criminal complaint we have the justice of the peace notebooks which

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<sup>58</sup> Landau, above n1, 533-536.

<sup>59</sup> Landau, above n1, 520-525.

<sup>60</sup> King, above n2.

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can provide some evidence of the events between the criminal complaint and the recognisance. Thus we are able to obtain evidence of attitudes towards prosecutions which are closer to the event(s) which constitute the crime, of which the quarter sessions records can tell us very little.

It is appropriate to conclude by stating that in the pursuit of assessing the changing attitudes of prosecutors, offenders, and justices toward petty crime at the end of the eighteenth-century, it would be more productive to pursue the diverse (and quantitatively small) forms of evidence which provide glimpses of those practices which the larger quantitative records of the quarter sessions cannot provide. It is at this point that the historian of crime encounters the major obstacle of the lack of sources. However, with care, determination and no little amount of imagination, the historian of crime can uncover illustrative examples which even sources such as justice of the peace notebooks cannot uncover.

It has been argued that that the making of a criminal complaint in Kent in the period under review could often be motivated by a desire for compensation, and can be seen as a form of negotiation. Due to the nature of the exercise and the limitations of the historical sources it will be very rare that we can catch a glimpse of the negotiations prior to intervention of a justice of a peace. However, when such a glimpse is afforded it illustrates most clearly the popular attitude towards petty crime.

Just such a glimpse is provided by the grievance of Elizabeth Atkins, a widow, of Staple in 1826. On Saturday 23<sup>rd</sup> August 1826 Atkins was forcibly removed from the "Anchor" public house in Wingham by several men of whom she knew the identity of two of them. She was then taken to the penthouse of Mr. Hemp, and, Atkins was forced across a stye and publicly exposed with the intention of shaming her. From here Atkins was dragged into a meadow, doused in water, and the men threatened to stamp on her and "force out the old bitch's guts." Rather than initiate a criminal complaint the instinct of Atkins was to negotiate a settlement. During the course of the next two days both Atkins, and

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Richard Joiner, a labourer of Staple, attempted to negotiate the best deal possible. On Monday the 25<sup>th</sup> August 1826, Atkins informed Henry Winter, George Minter, John Page, John Wellard, Thomas Brook, and James Sweetlove that she would not make up the offence for less than ten pounds. In response Henry Minter offered, and Atkins accepted ten shillings from him. However, the other men refused to pay, and later that day Atkins and Joiner offered to make up the offence for ten shillings from each of the six men. This too was met with a refusal, and after a complaint to a justice of the peace, Henry Minter was bound to take his trial at the East Kent quarter sessions.<sup>61</sup>

This single example neatly illustrates the previous analysis. Upon the commission of this petty offence against the person, it was the immediate reaction of the victim to seek compensation and not retribution. It was only after the failure of repeated negotiations that a criminal complaint was made. A sustained study of those sources of evidence closer, to the events which constitute the crime, than the records of the quarter sessions, illustrate that the “criminalization” of petty crime in Kent had not fully arrived during the first thirty years of the nineteenth-century, and perhaps only arrived with the introduction of modern policing.

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<sup>61</sup> Wingham Petty sessions Minute Book, PS/W4, The Centre for Kentish Studies, Maidstone.