The Future of Lay Participation in the Criminal Justice System in England and Wales: A Critical Assessment.

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Dedication

For Marcus and Oscar

Never give up and always believe it is possible

ACKNOWLEDGEMENTS

To my Supervisor, Dr Matthew Millings, Thank you for having faith in me and always finding the time to support encourage and discuss my ideas with me.

Dad, Thank you for always pushing me to keeping going and never give up and to believe that anything is possible with hard work.

To all my friends but especially Sofia, Alice, Fleur, Rossella and Rachel – Thank you for the long phone calls, the memes and the wine and for keeping me sane on what has been a rollercoaster of a journey to submission.

To my gorgeous boys Marcus and Oscar - I love you both so much. Mummy started this just before you were both born. I hope I have shown you the importance of never giving up, the benefit of having an amazing support system and that no matter what other people may say anything is possible if you believe.

To my amazing Husband Jay – I could not have done this without you - Thank you for always being there no matter what, for your unwavering support and wisdom and for your faith and belief in me at all times. I love you.

To everyone else I cannot name individually who has helped me on this journey – Thank you.

Abstract

This Thesis discusses whether the future of lay participation has a future in the criminal justice system in England and Wales, paying particular attention to the modalities of trial by jury, magistrates' courts and community justice centres. Whilst many of the criticisms of the involvement of lay persons in the justice system might be merited, such criticisms ignore the legitimacy provided by their involvement, which remains a crucial aspect of public trust and an avenue for citizens to actively engage in political society while exercising official state power. The work of Mirjan Damaska will be used to provide a framework to analyse the impact and importance of trial by jury and lay magistrates from a theoretical foundational perspective. The thesis also engages in a comparative analysis of community justice centre initiatives.

The original contribution of knowledge is to explain the history of these foundational mechanisms and contextualise them in relation to the current crisis point in the justice system. The thesis analyses in particular the perceived benefits and forms of lay participation in court-based provision. It will further discuss how governmental efficiency drives are undermining the very foundations the criminal justice system was built upon.

The thesis finds that in the post-Covid era – which is characterised by spiralling court waiting times and economic instability – the time has come to pause and reflect on what principles we, as a society, wish to use as the foundation for future progress in the criminal justice sphere. The thesis critically evaluates whether cost-effectiveness ought to be the yardstick by which the value of the criminal justice system is assessed. It also asks whether, in light of the analysis, it is time to recognise the importance of the citizen's voice and ensure that lay participation in criminal justice proceedings is preserved.

Declaration

I confirm that no portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

List of Cases

Bushell Case 1670 124 ER

Chaaban 2003 EWCA Crim 1012

Ex p Brownlow [1980] QB 530

Green vs United States 356 U.S. 165 (1958

J, S, M v R 2010 EWCA Crim 1755

Lanz v Austria App No 24430/94 ECtHR Judgement, 31 January 2002 [52]

R v Essa [2009]

R v Hoare and Pierce [2004] EWCA Crim 784

R v Howell [2003] EWCA Crim 1,

R v Kyham 2008 EWCA Crim 1612

R v Mirza; R v Connor and Rollock 004 UKHL 2 2004 AC 1118

(R v H, R v C, R v B[1]) 2009 EWCA Crim 1035

R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51

Ramanauskas v Lithuania App No 74420/01 ECtHR Judgement 5 February 2008.

Roe v Wade 410 U.S. 113 (1973

Sander v UK Case no.34129/96 European Court of Human Rights

Ward v James 1966 1 QB 273

List of Statutes

Access to Justice Act 1999

Civil Procedure Rules 2020

Contempt of Court Act 1981

Coroners and Justice Act 2009

Courts Act 2003

Criminal Justice and Public Order Act 1994

Criminal Justice Act 2003

Criminal Justice and Courts Act 2015

Juries Act 1974

Official Secrets Act 1911

Police, Crime and Sentencing and Courts Bill 2021

The Future of Lay Participation in the Criminal Justice System in England and Wales: A Critical Assessment.

Introduction

1.1 Themes of the Thesis

This thesis is an examination of the future of lay participation in the criminal justice system. It makes a contribution to the extant literature on the future of such lay participation through an analysis of the evolving roles of lay professionals in the criminal justice system, and the impact of efficiency and monetary constraints on the future of their participation at a time when the criminal justice system is arguably at a moment of crisis. In this context, the thesis attempts to answer the following key questions:

1) Why the criminal justice system is at a perceived crisis point concerning the future of lay participation;
2) Why trial by jury and lay magistrates perform important functions in our adversarial criminal justice system; and
3) Whether alternative modalities – in particular community justice centres – could provide viable supplemental models if the use of trial by jury and the lay magistracy continues to decline.

This introductory chapter shall attempt to provide an outline of the issues and brief summaries of the questions posed above.

1.1.1 Background to the Study

The thesis is primarily concerned with three models of lay participation in the justice system and what they have to offer to the promotion of legitimate criminal justice procedures in modern states. Those models are: the jury; the lay magistrate; and the community justice centre. It will explore the fundamental importance of lay participation as a vehicle which embodies

principles important to the character of democracy, including the promotion of civic engagement and civic liberties and the bestowment of legitimacy upon the system in the eyes of the citizenry.

The topic of lay participation in the criminal justice system has been the source of much recent debate in both the academic community and the popular press. Much of this debate has centred around whether lay participation in the form of trial by jury and lay magistrates should still occupy such a prominent place in the criminal justice system. This, along with other issues pertaining to the structure and funding of the criminal justice system, arguably indicates that the justice system is at a crossroads.

For example, calls to reform what is regarded as an inefficient and expensive criminal justice system have been legion, with trial by jury and lay magistrates potentially facing a particularly bleak future. In June 2015 Michael Gove described the criminal justice system as "creaking and outdated"[1] and went as far as to call for an overhaul of the current system, including measures to eliminate waste and inefficient and associated human costs. These comments followed the publication of the Leveson Report in 2015[2], which set out plans to streamline the justice system in England and Wales. Lord Leveson, an experienced lawyer and judge, himself stated that in the context of the prevailing political and funding climate, the criminal justice system had to accept it would have diminished resources for years to come and thus needed to improve its performance.[3]

This thesis will take the position that, contrary to the view that considerations of efficiency and cost-effectiveness must dominate the future direction of public-policy making, lay participation in the legal system (but also in other areas of public life)[4] embodies principles which are much more important to the fundamental character of democracy. Jury service, magistracy membership and other mechanisms which seek to involve local communities in the legal system, act as vehicles for the promotion of civic engagement and promotion of liberties. By

[1] Gove M as cited in https://www.theguardian.com/politics/2015/jun/22/justice-system-failing-badly-michael-gove - last accessed 9/1/22

[2] Rt Hon Sir B Leveson Review of Efficiency in Criminal Proceedings Report, January 2015, Judiciary of England and Wales https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf last accessed 10/01/22

[3] Ibid

[4] There are of course other elements of lay participation in the criminal justice system such as special constables, who support the police service, but such considerations are outside of the focus of this thesis.

ensuring that 'the people', as a block of citizens, are granted a role in deciding cases and dispensing justice, the legal system is bestowed with a level of legitimacy that systems with limited-to-no public participation cannot enjoy. In the case of the jury, this was noted in the famous dictate of Justice Black:

> *"The jury injects a democratic element into the law. This element is vital to the effective administration of criminal justice, not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application ... Martyrdom does not come easily to a man who has been found guilty as charged by twelve of his neighbours and fellow citizens*."[5]

The rationale(s) for adopting this position are plural. First, lay participation in the justice system plays a significant role in respect of erecting checks and balances on state power and coercion. Although institutions capable of maintaining social order are required for states to function, the powers of such institutions must not be unfettered. In this way, the inclusion of lay persons in processes which are instigated and prosecuted by the state, acts as a bulwark against potential tyranny and the capricious exercise of centralised power.

Second, serving on juries and being eligible for roles in the magistracy, inter alia, promotes civic engagement. As noted in Aristotelian ethics – upon stands much of Western democratic principles[6] – civic virtue is a necessary precondition of successful societies. Civic duty, or virtue, close linked to the principle of citizenship, represents a dedication of citizens to the common welfare of all. Aristotle distinguished citizens as those with the right to participate in deliberative or judicial office:

> *"[O]ur definition of a citizen admits of correction. For under the other forms of constitution a member of the assembly and of a jury-court is not 'an official' without restriction, but an official defined according to his office; either all of them or some among them are assigned deliberative and judicial duties either in all matters or in certain matters. What constitutes a citizen is therefore clear from these considerations: we now declare that one who has the right to participate in deliberative or judicial*

[5] Green vs United States 356 U.S. 165 (1958) at 215-16.
[6] Hornbeck. D, Seeking Civic Virtue, Journal of Thought Vol. 51, No. 3-4 (Fall/Winter 2017) 52-68.

office is a citizen of the state in which he has that right, and a state is a collection of such persons sufficiently numerous, speaking broadly, to secure independence of life."[7]

For a protracted period, then, lay involvement in the justice system has been regarded philosophically as a foundational marker of a mature and participatory political system. In systems in which trial is regarded as a contest between the state and the individual, the participation of citizens in criminal justice institutions grants the system higher levels of legitimacy and public acceptance than the counterfactual. Through lay participation in the criminal justice system lay citizens are granted "more relevant opportunities to influence collective decisions that have immediate impacts on their lives."[8]

To summarise, although ancient, these sentiments in the modern context are encapsulated neatly by Gastil et al, who note that:

"*The legitimacy of a democratic system hinges in part on the confidence citizens have in the judgemental competence of their duly elected or appointed judges, as well as other public officials. Scepticism and vigilance against governmental corruption certainly have important roles, and blind trust in government would not serve democracy well. Conversely, deep doubts about the viability of democracy limit the effectiveness of democratic institutions. What a stable democracy requires is 'warranted trust,' that is, a confidence in state institutions and actors that comes from direct knowledge of its effectiveness and just operation. By providing a direct experience of deliberation within these, the justice system itself can promote a sense of legitimacy of juries, judges and perhaps indirectly even more distant state entities."*[9]

As mentioned above, an appreciation of the philosophical and practical dimensions of managerialism, and its impact as a lens to view the delivery of services by government agencies, is key to understanding some of the changes that have occurred in the criminal justice system. The origins of managerialism stem from the notion that government agencies delivering public services, including the criminal justice sector, should function along business

[7] Aristotle, *Politics*, Book 3, section 1275b.
[8] Cohen, J and Rogers J (1995) Associations and Democracy London Verso
[9] Gastil. J, Pierre Deess. E, Weiser P.J. and Simmons. C, The Jury and Democracy, how jury deliberation promotes civic engagement and political participation, Oxford University Press 2010 P 19-20

principles and increase their efficiency in financial terms. Since the 1970s courts in England and Wales have been facing two distinct pressures; rising work pressure from an increasing case load and ever-tightening resources due to budget cuts and economic instability. This has resulted – as is the case with other government departments - on a laser focus on the operational efficiency of the criminal justice system.

Managerialism therefore raises a tension between those who see the approach taken as infringing on the fair trial rights protected by both traditional models in their own ways: "The combination of rising workload pressures and tightening resourcing represented a formidable double challenge for the courts which required considerable adjustment, adaption and initiative by way of response."[10] Lay participation is often regarded as inefficient because it entails significant costs which are not inherent in other forms of procedural justice. However as this thesis will demonstrate, the participation of lay persons in the justice system is an indication of a well-developed and legitimate civic culture which cannot be captured on a cost-benefit basis alone.

Lay participation is important in the building of public confidence in the justice system because it provides an opportunity for jurors to be educated in the roles and responsibilities associated with democratic citizenship. The jury and lay magistrates provide a vehicle by which citizens can gain confidence in the system; this does not mean that citizens do not believe that jurors/ lay magistrates cannot make mistakes but they are a reasonable vehicle through which to resolve criminal and civil cases because of the legitimacy that lay involvement bestows. The vehicle also provides an opportunity for citizens to gain a better understanding of the operationalising of the criminal justice system and the competence of those who serve it – from police officers to judges.[11] This thesis will therefore argue that the system should therefore place the lay user at the heart of the system with processes shaped around their needs to ensure they can actively participate in the system. This thesis will explore the history and benefits of the current use of lay participation through the vehicles of lay magistrates and jurors. It will further discuss the benefits that adopting a community justice model might provide when operated in conjunction with existing justice system mechanisms and processes, including trial

[10] Gastill J, Pierre E, Deess, P, Weiser J, Simmons C, The Jury and Democracy: How jury deliberation promotes civil engagement and political participation, Oxford University Press 2010
[11] Gastill J, Pierre E, Deess, P, Weiser J, Simmons C, The Jury and Democracy: How jury deliberation promotes civil engagement and political participation, Oxford University Press 2010 P 17-23

by jury and the magistracy.

1.1.2 Study Objectives

This study aims to analyse recent impacts on lay participation in the form of trial by jury and lay magistrates. This examination will therefore examine whether these changes are undermining the adversarial foundations upon which the criminal justice system in England and Wales was founded. By examining the challenges these institutions face, and by addressing the important role such lay institutions play in modern society in promoting community involvement in the justice system – and the associated public confidence in the system this engenders – the thesis adds to the considerable literature on this issue. It shall critically evaluate whether or not lay involvement, primarily in the form of trial by jury and the lay magistracy, has a future in the English and Welsh criminal justice system.

The thesis will discuss the competing theories of adversarialism and managerialism, arguably the two most significant models for the procedural aspects of justice in the modern context. It will proceed to analyse further models of lay participation; specifically, by undertaking a review of community justice initiatives, exemplified by the North Liverpool Community Justice Centre, which aimed to bring the dispensation of justice to the local community. In doing so, it will provide a unique insight into the importance of the dominant theoretical underpinnings of the criminal justice system and the future of lay involvement in it. This is particularly salient given the increasing prominence of financial constraints as a driver of criminal justice reform, rather than perceptions of fairness and the general population as stakeholders.

Throughout the thesis key concepts and terms are discussed, however it is important in this introduction to define the following key terms:

Community: "Community Justice" as an overarching concept refers to all forms of crime prevention and justice activities that explicitly include the community in their processes and set the enhancement of community quality of life as a goal. For the purposes of this thesis community will be defined according to McCold and Wachtel as a feeling of "connectedness

to individuals and a group."[12]

Justice : for the purposes of this thesis justice will be seen as being characterised by fair, accessible and efficient legal processes through which individual rights are protected and which reflects the country's reputation for upholding and promoting the rule of law[13].

Localism: this will be defined in relation to its link with community rather than based on geographical location as will be discussed further in Chapter five.

1.2 Structure

The first substantive chapter of the thesis, Chapter One, sets the scene for the remainder of the analysis. It discusses why lay involvement in the criminal justice system is at a crossroads. The Chapter begins with a brief analysis of the theory of adversarialism as well as discussion of the rise of managerialism and the impact this has had on the justice system, especially in respect of the drive for financial efficiency as a paramount concern. Indeed, the Covid-19 pandemic crisis and the unprecedented widespread closure of the court system, focused attention on potential efficiency-saving fiscal measures available to the state. Managerialist approaches to delivering public services focus on generating efficiency and cost-saving and incentivise speed and flexibility in process. The criminal justice system has witnessed numerous reforms over the years from a managerialist perspective focused on increasing its efficiency and perceived effectiveness. The consequences of managerialism on the criminal justice system will be considered in this Chapter, before an analysis of recent justice department spending settlements – in the context of deep governmental budget cuts since 2010 – is undertaken. These budget cuts have the potential to significantly weaken existing modalities of justice in England and Wales, particularly those reliant on the participation of lay persons.

Chapter Two introduces the work of Damaska, whose seminal treatise focuses enquiry on two different faces of adjudication.[14] The first is one in which the process is designed to resolve

[12] McCold P, Wachtel B; Community is not a place: A new look at Community Justice Initiatives, paper at the International Conference on Justice without Violence: Views from Peace making Criminology and restorative justice, Albany New York June 5-7 1997

[13] LSE School of Law Conference 2020 Reinventing the Law https://www.lse.ac.uk/law/events/lay-participation-in-criminal-trials/lay-participation-in-criminal-proceedings-seminar-1 last accessed 14/2/2022

[14] J. D. Jackson, Paradoxes of lay and professional decision making in common law criminal systems, Revue internationale de droit pénal 2001/1-2 (Vol. 72), pages 579-594.

conflict; the second is one which enforces state policy. Depending on the view taken as to the purpose of courts and their legal subsidiaries, this will have profound implications for the choice of procedural form. The 'conflict solving' approach prefers a "contest morphology", whereas the policy implementing form prefers "the morphology of inquest."[15] The Chapter explores why Damaska's framework was selected as the theoretical tool to evaluate the importance of lay participation in the criminal justice system, as opposed to competing theorists' work in the area. This Chapter will develop the ideas previously discussed surrounding lay participation and the public trust that it engenders in the system and why it such a fundamental feature of the criminal justice system ought to be preserved.

Lay juror participation in trials – in contrast to the employment of career judges – are evidence of these vestiges, whereby lay persons with no prior specialist knowledge of law or the rules of evidence are accorded high levels of influence in criminal trials. On this basis, Damaska argues that juries and other lay participation mechanisms are fundamental elements of adversarial legal systems, increasing participation between the parties to a legal dispute and reducing the influence of legal professionals over the criminal justice system. As Damaska argues, the dichotomy between the differing approaches taken to judicial processes rests on the fact that "each model is premised on a very different view of the nature of justice."[16]

Chapter Three focuses the enquiry on the archetypal form of lay participation in the criminal justice system: trial by jury. Arguably, it is this institutional feature of Anglo-American legal systems which simultaneously best represents the notion of citizen participation in the legal sphere whilst remaining the form of participation in law which is under most threat of marginalisation. Damaska regards trial by jury as an example of a process under which the image of the decision maker as an independent arbitrator between government and individual gains credibility, primarily because the fact-finders concerned are lay jurors rather than career civil servants.

The chapter provides a historical overview of the evolution of the jury mechanism, although the principal purpose of the discussions in the chapter is to place the role of the modern jury in criminal cases in its historical and institutional contexts. It discusses whether such participation

[15] M Damaska (1986), The Faces of Justice and State Authority, New Haven: Yale, 88.
[16] M Damaska, Structures of Authority and Comparative Criminal Procedure (1975) Yale Law Journal Vol. 84: 480, 482.

can – or indeed, should – retain its status and role in the criminal justice system of England and Wales. The chapter proceeds to a discussion of the key challenges which face trial by jury and the impact these could have on the future of lay involvement via the vehicle of jury trial. As the contemporary legal system continues to struggle to deal with caseloads and the lack of resources available to administrators, a move away from adversarial modes towards more managerialist approaches constitutes a major driver of the criticisms the system faces. In turn, this forms the basis for the perceived threat to the future of lay involvement through jury trial and the employment of other modes of adjudication. The chapter evaluates criticisms of the 'trial by jury' mechanism and contrasts the jury mechanism with other forms of adjudication. The chapter also discusses efforts by successive administrations to reduce the use of jury trial and the defunding and reorganisation of the courts system.

In the context of Chapter three it is important to note that a distinction has to be drawn between the importance of orality in the trial process and the need to protect vulnerable witnesses. The ability of vulnerable witness to provided pre-recorded testimony is a necessary exception to the concept of the trial being an arena for the judge and jury to question and examine the evidence presented to them. This thesis draws a distinction between measures taken to support witnesses as above and measures which have the potential to undermine the foundations of trial by jury. In particular, the vulnerable witness exceptions need to be distinguished from the threat posed by remote juries which may erode the nature of an adversarial trial by making it harder for the jury to actively feel like participants in the trial process.[17] This exception is a fundamental threat to the important of orality in the trial and to the public sense of justice being seen to be delivered in the traditional way; as discussed by the Bar Council and Law Society, for the public and participants in the trial, it is essential that they believe they were subject to a fair hearing if they are to feel able to respect the results of a criminal process.[18]

Chapter Four broadens the enquiry to the role of the lay magistracy in dispensing justice. The increasing pressure on the court system to exhibit greater efficiency and operational flexibility has resulted in the marginalisation of some aspects of magistrates' work. Chapter Four charts the history of the magistrates' office to centre the discussion on the traditions and structures

[17] Lord Chief Justice BBC Radio 4, Law in Action (16 June 2020) "Reinventing the Law" https://www.bbc.co.uk/programmes/m000k2m4 accessed July 29th 2022
[18] The Bar Council and Law Society, Police, Crime, Sentencing and Courts Bill, Committee Stage, Briefing for MPs – Part 12, Clause 168: Remote Justice

upon which lay participation in judging cases is founded. It proceeds to discuss recent reforms to the magistracy; in particular those in the twenty-first century which have sought to professionalise the office and reduce the reliance placed on lay persons acting as judges. This movement was initiated largely under the successive Blair governments of the 2000s but has continued under more recent administrations. Discussion will then move to focus on the ways in which traditional methods of dealing with offending have been circumvented by the introduction of new forms of summary justice, including out-of-court disposals.

Against this backdrop this chapter will consider the threats posed to the role of lay magistrates, in particular from the increased use of district judges in their place, as well as from out of court disposal orders. The impact of budget cuts to the magistrates' system, which have resulted both in a reduction in the number of lay magistrates operating and in widespread court closures will also be addressed. The chapter will conclude by applying Damaska's theories concerning justice and state control balanced against the concept of injustice and participative democracy. The Chapter will critically consider some of the prevailing weaknesses of the magistracy system; in particular, the insistence that localism must trump efficiency. If it is the case that the citizenry – as represented by democratically elected legislators – is concerned more with efficiency than maintaining traditional modalities of justice, this would mark a shift to managerialist/ hierarchical approaches in approaches to delivering justice. In light of this the Chapter will also consider to what extent the general public is aware of these changes in focus and direction and what implications this has for their remoteness from the administration and dispensation of justice.

Chapter Five introduces a further justice model: community justice initiatives. The chapter considers whether, should popular involvement in the criminal justice system through juries and lay magistrates be reduced significantly, there are alternative or supplemental structures which could offer a viable method of ensuring the criminal justice system remains linked to the communities it serves. It will address whether encouraging community involvement in the criminal justice system through community courts could offer this connection.

The Chapter will critically discuss the concept of Community justice and the impact placing improving the quality of community life as a key objective has on both the community and criminal justice system. Under the umbrella of community justice come initiatives such as

community crime prevention[19] , community policing, [20] community courts[21] and restorative justice sanctioning systems[22] as well as community prosecution[23] and defence.[24] The common factor is their core philosophy. They all have as their aim community level outcomes which focus on short- and long-term problem solving, restoring victims and communities, as well as strengthening normative standards and reintegrating offenders back into the community. Chapter Five critically examines how these initiatives work in practice by comparing Red Hook and the North Liverpool Community Justice Centre and, in the light of this evidence, their viability as an alternative to lay involvement in the decision-making stage of the process in England and Wales. The Chapter will further address the impact and prominence given to managerialist efficiency concerns and how these brought an early demise to the NLCJC pilot whilst in stark contrast the Red Hook Centre in the US has continued to flourish.

This thesis does not argue that lay participation is not without fault. Instead, this thesis summaries its findings by suggesting that lay participation performs an essential role in promoting civic engagement and protecting democracy in the systems in which it functions. It argues that if lay participation is lost due to the increasing managerialist focus on efficiency more than just lay participation in the courtroom will be lost. The criminal justice system and the state will become more removed from its citizens. The current models of lay participation in England and Wales enable citizens to hold the state to account through participation in judicial processes or more simply to engage citizens in political society and how the state exercises its power. Lay participation therefore provides a platform to educate citizens on the roles and responsibilities of democratic citizenship a role it has fulfilled since its earliest inception.

[19] Karp D. R and Clear T.R, Community Justice: A conceptual Framework, Boundary Changes in Criminal Justice Organizations P324-330
[20] Goldstein H 1990, Problem oriented policing. New York: McGraw- Hill P1-5
[21] Rottman, D. B, 1996. Community Courts: Prospects and limits. National Institute of Justice Journal 231 P46-51
[22] Bazemore, G 1998.The "community" in community justice: Issues, themes and questions for the new neighbourhood sanctioning models. In community justice: An emerging field edited by D. R Karp, Lanham, Maryland: Rowman & Littlefield
[23] Boland B. 1998 Community prosecution: Portland's experience. In community justice: An emerging field edited by David R Karp, Lanham, Maryland: Rowman & Littlefield
[24] Stone C, Community Defence and the Challenge of Community Justice National Institute of Justice 231 August 1996 Pages: 41-45 6

1.3 Methodology

The thesis is analytical and interdisciplinary; it provides a critical analysis of existing lay participation in the criminal justice system and the justifications that have been proposed for this participation. It critically evaluates the theoretical explanations for the participation of lay involvement in the system as well as an alternative to the traditional methods of trial by jury and lay magistrates. It also engages in a case study of a specific mechanism of criminal justice namely community justice centres.

This thesis is therefore an amalgam of doctrinal and non-doctrinal research. Whilst doctrinal legal research may be narrow, as noted:

> *All [non-doctrinal] legal research can be generally grouped within three categories: problem, policy and law reform-based research … They can be considered together because of the often occurring link between them. In fact, all four categories of research, doctrinal, problem, policy and law reform, could be part of a large-scale research project. A researcher, for example, could begin by determining the existing law in a particular area (doctrinal). This may then be followed by a consideration of the problems currently affecting the law and the policy underpinning the existing law, highlighting, for example, the flaws in such policy. This in turn may lead the researcher to propose changes to the law (law reform).*[25]

This Thesis reflects the great tradition of legal scholarship. It uses observations in concert with analysis of subsisting theoretical and empirical work to provide analysis. The use of a case study methodology was chosen as

> *"Although case studies indeed can be used for exploratory purposes, the approach also may be used for either descriptive or explanatory purposes as well-i.e., to describe a situation (e.g., a case history), or to test explanations for why specific events have occurred. In the explanatory function, the case study can therefore be used to make causal inferences."*[26]

This approach illuminates the debate on the viability of Community Justice Systems as an alternative to traditional lay participation models. Most of the sources used in this study were freely available through journal subscription, books and online databases. A broad spectrum of

[25] Dobinson I and Johns F, 'Qualitative Legal Research' in Michael McConville and Wing Chong Hui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) P19-20.

[26] Yin, R.K The Case Study as a Serious Research Strategy, The Case Study Institute, Inc.—Washington, D.C.

legal and non-legal literature, recent Empirical studies such as those conducted on the North Liverpool Community Justice Centre and Red Hook Community Justice Centre have been analysed and relevant quotes obtained. Relevant statutory law and case law have been carefully examined.

Chapter 1 Lay Involvement in the Court System at a Crossroads

This Chapter will explore the proposition that the criminal justice system in England and Wales is at a crossroads. The Covid 19 pandemic crisis and the unprecedented widespread closure of the court system, in tandem with the backlog of court cases, has once again focused attention on potential timesaving and cost-saving measures available to the authorities. The rapid move to different forms of legal hearing traditionally involving lay persons – in particular trial by jury and lay magistrates in criminal cases – raise questions as to whether such procedures ought to continue to feature in their current format (if at all). The criminal justice system has witnessed numerous reforms over the years from a managerialist perspective focused on increasing its efficiency and perceived effectiveness. This thesis argues that the Covid-19 pandemic provides a natural inflection point for consideration as to whether an opportunity exists to consider these reforms and the values that should underpin the criminal justice system at a time when 'community'[27] and the values of community are firmly on the public's agenda.

Traditionally as will be discussed in Chapter 3 and 4 lay participation has played a key role in the dispensation of justice with lay magistrates representing their community and peers in the magistrates courts in the same way that juries represent their community and peers in the Crown Court.[28] However with the increasing pressure on governments to produce more streamlined and efficient public services in the wake of the economic shutdown, thoughts of policymakers have turned to designing a criminal justice system that is cost effective and more efficient in its workings.

[27] Community as discussed in Chapter 5 in relation to community justice traditionally was linked to a geographical location but we will draw on the following definition of community -Community can be alternatively defined as a feeling of "connectedness to individuals and a group" McCold P, Wachtel B ; Community is not a place: A new look at Community Justice Initiatives, paper at the International Conference on Justice without Violence: Views from Peace-making Criminology and restorative justice Albany new York June 5-7 1997 ; Restorative and Community Justice in the United States Leena Kurki Crime and Justice, Vol. 27 (2000), pp. 235-303

[28] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012 p 17

In light of these considerations, this Chapter considers the historical basis for criminal trials in England and Wales, and the evolution of these fora in recent times. Following chapters will argue that lay participation is central to the public's confidence and perception of the legitimacy of the system; this chapter therefore sets the scene for such discussions by placing the notion of adversarialism in its proper context. Recent changes to the criminal justice system appear to have been designed to restrict the role of lay persons, whether these changes were motivated by a desire to facilitate administration of justice or because of the view that inexpert lay persons enjoy excessive power. Yet, in a culture where institutions can and do change, the persistence of lay involvement in the criminal justice system reflects not the endurance of a sanctified relic but arguably the adaptability of decision-making mechanisms which provide society with substantial and unique benefits.

The Chapter will first discuss adversarialism as a trial mechanism, and contrast it with the other major trial modality, namely the inquisitorial model. The discussion will then proceed to the evolution of managerialism; a phenomenon not confined to the legal system but adopted across public service provision in the UK since the 1990s. This approach to administering public services focuses on generating efficiency and cost-saving where possible and incentivises speed and flexibility in process. The consequences of managerialism on the criminal justice system will be considered, before an analysis of recent justice department spending settlements – in the context of deep governmental budget cuts since 2010 – is undertaken. The chapter ends with a consideration of the effects of the Covid-19 pandemic on the court system and questions the principles which should inform future iterations of the justice system in England and Wales.

1.1 Adversarialism in the Court

As discussed briefly in the Introduction, adversarial proceedings typically involve a dispute between two opposing – but in the eyes of the law, equal – sides with a neutral adjudicator deciding the case. The adversarial procedure is a procedural model, not a 'system', and so traditionally adversarial countries such as England Wales may depart from adversarialism in some instances.[29]

[29] Hodgson J.S, The Future of Adversarial Criminal Justice in 21st Century Britain, 35 N.C. J. INT'L L. 319 (2009).

Adversarial processes are characterised by features such as responsibility for investigating, selection and presentation of evidence and other aspects of legal hearings lying with the parties to the case ie. the accuser and accused. Importantly, the proceedings are normally conducted in public. The adversarial system is characterised by part control of the investigation and evidence presentation and argument, with a passive decision maker who observes and makes a decision on the evidence she/he has heard.[30] The role of 'accuser' is assumed in most modern adversarial systems by the state, in place of the 'real' or 'true' accuser (so, in England and Wales, for example, all prosecutions are brought on 'behalf of the Crown'). Although guilty pleas are very common (and constitute the norm), the default model for deciding criminal cases remains a full trial. Indeed, as noted by Hodgson:

> *"it might still be considered a broadly adversarial procedure, given the police monopoly on carrying out the investigation that will form the prosecution's case; the rights of the accused to conduct her own investigation; the relatively partisan role of the prosecutor (rather than the more neutral 'ministry of justice' function); the place of the trial, with live oral evidence as the ultimate forum for case disposal (and admissibility at trial continuing as the governing feature of what will be accepted as evidence); and the fact that avoidance of trial is only with the consent of the accused (albeit that consent may be obtained with the aid of powerful incentives)."*[31]

Adversarialists argue the system is fair to parties involved because those parties are allowed to control their case by selecting evidence they wish to present, and the issues associated with the actual battleground: the trial itself. Indeed, at the level at which juries are engaged, law creation is a question of application and interpretation (individualisation) rather than the validity of the general legal rules, with the key opposing parties at this level being legal professionals.

The adversarialist system is, at its core, a commitment to the fundamental importance of protecting parties by allowing them rather than the state to direct proceedings.[32] Yet, although the state directs proceedings, those proceedings involve a contest between the individual and

[30] Langbein, J, The origins of Adversary criminal trial, From Altercation to Adversary trial, Oxford scholarship online, 2005 P10-40
[31] Hodgson J., The future of Adversarial Criminal Justice in 21st Century Britain, North Carolina Journal of international law, Winter 2010, Volume 35 Number 2 p320-321
[32] Langbein, J, The origins of Adversary criminal trial, From Altercation to Adversary trial, Oxford scholarship online, 2005. P13-53

the state. Individuals in these systems are presumed to be innocent unless the prosecuting authority can establish their guilt to a neutral arbiter. Because the prosecuting authority is regarded as having superior resources – in terms of power and expertise – the contest is unequal; hence, the burden of proof is high, and the criminal process is subject to a number of checks and balances and procedural rules. Moreover, since those who deliver verdicts at trial are often lay persons, evidential rules must be extant to prevent them from acquiring information, which is not relevant to the case at hand, especially where that evidence is prejudicial to the defendant.

In contrast, inquisitorial procedures rely much more on pre-trial processes, as responsibility for investigations – in contrast to the position with the adversarial model – lies with a neutral party (most often a judge).[33] The same individual remains responsible for the investigation and prosecution at trial of the accused person; generally, the process is held in secret and through submission of written statements rather than oral testimony.[34] These models place emphasis on the deduction of facts through agents of the state alone, with fairness dependent upon a hierarchical system designed to ensure supervision and review at every stage/level of the hierarchy.[35]

According to Hodgson, few jurisdictions employ either pure adversarial or inquisitorial systems. Pre-trial procedures in adversarial systems are now much more central to the legal process and the written submissions of each party – far from being simply tested at trial – have assumed much greater importance and enjoy much deeper levels of scrutiny from the judge concerned.[36] Judges take more proactive roles at trial; rather than acting as 'neutral adjudicators', they call and interrogate evidence, influence the choice of witnesses and in relevant cases may direct the jury heavily. In contrast, the inquisitorial model has also evolved, allowing for some trial procedures to take root, as well as for the introduction of plea bargaining.[37]

[33] Hodgson J, Constructing the Pre-Trial Role of the Defence in French Criminal Procedure: An Adversarial Outsider in an Inquisitorial Process, 6 INT'L J. Evidence & Proof 1, 2 (2002).
[34] Hodgson J, Constructing the Pre-Trial Role of the Defence in French Criminal Procedure: An Adversarial Outsider in an Inquisitorial Process, 6 INT'L J. Evidence & Proof 1, 2 (2002).
[35] Damaska. MR, The faces of justice and state authority (New Haven: Yale University Press 1986)
[36] Hodgson J, The Future of Adversarial Criminal Justice in 21st Century Britain, 35 N.C. J. INT'L L. 319 (2009).
[37] Hodgson J, French Criminal Justice: A comparative account of the investigation and prosecution of crime in France (2005) Bloomsbury P21, 111-12, 243

Accordingly, in practice, critics of adversarialism consider it an 'empty label', difficult to operationalise and too abstract in its vision of procedures of law in practice.[38] This argument is based on the notion that the perceived dichotomy between adversarial and inquisitorial procedures is false,[39] primarily because no individual jurisdiction precisely reflects all the features associated with one particular.[40] To its proponents, the "adversar[ial] system is the best system for protecting individual dignity and autonomy."[41] If one adopts this line of argument all systems are in fact hybrids incorporating different elements from a wide-ranging menu of procedures.

The inquisitorial/adversarial dichotomy seems to reflect some deeply rooted views about the proper function of criminal proceedings in terms of the relative importance of ascertaining the truth as opposed to using party control over process as a protection against state power.
Such views are redolent of Herbert Packer's canonical analysis of the modalities of criminal prosecution. His distinction between the 'Crime Control Model' and the 'Due Process Model' was an attempt to provide a theoretical framework through which to analyse the political and social factors which determine the optimal mode of criminal trial and inquiry. This framework provides a paradigmatic analogy between adversarial and inquisitorial justice systems. The Crime Control Model is based upon the axiom that "repression of criminal conduct is by far the most important function to be performed by the criminal process."[42] This follows from the view that it is criminal conduct, which is most damaging to societal wellbeing, not simply because crime damages individuals, but also because a lack of public order will undermine faith in the legal system and general disregard for rules will ensue. In consequence, the Crime Control Model requires that the criminal justice system be set up so primary attention is paid to the efficiency with which the criminal process operates to:

> *"[S]creen suspects, determine guilt, and secure appropriate dispositions of persons*

[38] Damaska. MR, The faces of justice and state authority (New Haven: Yale University Press 1986) and in a different context N Lacey, The Prisoner's Dilemma: Political economy and punishment in Contemporary Democracies Hamlyn Lectures Cambridge: Cambridge University Press 2007
[39] Damaska MR, The faces of justice and state authority (New Haven: Yale University Press 1986) and in a different context N Lacey The Prisoner's Dilemma: Political economy and punishment in Contemporary Democracies Hamlyn Lectures Cambridge: Cambridge University Press 2007
[40] E.g, M Cappeletti and BG Garth Civil Procedure: XVI international Encyclopaedia of Comparative Law (Tubingen: JCB Mohr, 1996 pp31-31; a rather different objection in Summers
[41] Sward EE, Values, Ideology and the evolution of the adversary system 1989 64 Indiana law Journal 301 at 302
[42] Packer H, Two Models of the Criminal Process (1964) 113 U. Penn. L. Rev. 1.

> *convicted of crime. ... By "efficiency" we mean the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses become known.'"*[43]

On this basis, the optimal way for the primary objective to be achieved is to ensure that there are: (i) high rates of apprehension of suspects; (ii) high conviction rates; and (iii) minimal resources expended, thus guaranteeing speed of process.[44] Speed, in this context, requires that rituals of tradition and avenues for appeal and other obstacles to the successful resolution of a case are minimised. This also implies that law enforcement authorities – especially the police – who are not subject to checks and balances that might affect speed and efficiency, are to be granted powers to establish facts through informal processes such as interrogation, rather than being subject to evidence being tested in a formal court. It follows from this that uniform and administrative burden-reducing extra-judicial mechanisms should be favoured. As Packer notes: "The model that will operate successfully on these presuppositions must be an administrative, *almost a managerial*, model."[45]

Importantly, the Crime Control Model rests on the principle that there ought to be no presumption of innocence with regard to citizens; indeed, it operates best under a presumption of guilt. By applying administrative expertise in the early stages of an investigation, the "probably innocent" may be screened out, whereas the "probably guilty" may be dealt with quickly and at minimal cost. No such formal presumption of guilt exists; instead, it exemplifies an expression of confidence that the fact-finding processes are reliable.

In contrast to the Crime Control Model, the Due Process Model does not place heavy reliance on the ability of prosecutorial or investigative officers, rejecting the notion that such officer can be relied upon to satisfactorily collect and represent relevant evidence to the court. Instead, the Due Process Model relies upon formal and non-adjudicative fact-finding processes which stress the potential for error. Because errors occur – both in the recollection of events and in the gathering of evidence – asserted facts must be tested in a "formal, *adjudicative, adversary factfinding* processes in which the factual case against the accused is
publicly heard by an impartial tribunal and is evaluated only after the accused has had a full

[43] Packer H, Two Models of the Criminal Process (1964) 113 U. Penn. L. Rev. 1.
[44] Packer H, Two Models of the Criminal Process (1964) 113 U. Penn. L. Rev. 1.
[45] Packer H, Two Models of the Criminal Process (1964) 113 U. Penn. L. Rev. 1.

opportunity to discredit the case against him."[46] The Due Process Model considers that the imposition of criminal sanctions by the state is so serious that fairness of process trumps efficiency. Indeed, precisely because the criminal justice system is predicated on the coercive – and in some cases capricious – power of the state, safeguards and controls must be embedded which prevent it from abusing its own powers. The net effect of this is a guaranteed loss of efficiency. The question for those who oversee any criminal justice system is therefore which they value more: reliability, or efficiency.

Notwithstanding this, the distinction does offer a conceptual tool for analysis and description.[47] Indeed, there would instead appear to be a dichotomy reflecting some deeply rooted views about the proper function of criminal proceedings in terms of the relative importance of ascertaining 'the truth' as opposed to using party control over process as a protection against state power which will be the subject of further discussion and exploration in this thesis.[48]

1.2 The Rise of Managerialism

This Chapter will now explore what we mean by the concept of managerialism in the criminal justice sector and the implications this has for lay participation in it.

From the mid-1980s initiatives in criminal justice shifted from a focus on purpose to a focus on process. The key themes associated with managerialism under Thatcher can be placed under three headings; "Productivity, Cost efficiency and Consumerism."[49] The productivity theme saw a focus on how efficiently cases were processed in the system with a focus on "the economists' or management accountants versions of optimal performance rather than whether confidence in the rule of law was produced."[50] The impact of this on lay involvement can be demonstrated by the increased use of stipendiary magistrates over lay magistrates and the increased use of plea bargaining and out of court disposals, as will be discussed in Chapter 4.

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[46] Packer H, Two Models of the Criminal Process (1964) 113 U. Penn. L. Rev. 1.
[47] Chase O "American exceptionalism and comparative procedure (2002) 50 American Journal of Comparative Law 277; S Field Fair trials and procedural tradition in Europe 2009 20 OJLS 365; P Roberts Faces of Justice adrift? Damaska's comparative method and the future of common law evidence in Jackson, Langer and Tiller (eds) above n1 p 295; Cappeletti and Garth above n 19 Summers
[48] McEwan J From Adversarialism to managerialism: criminal justice in transition Legal Studies Vol.31 No. 4 December 2011 pp519-546
[49] Raine J W and Wilson M J, Beyond Managerialism in Criminal Justice, The Howard Journal Vol 36 No 1 Feb 97 pp 83.
[50] Raine J W and Wilson M J, Beyond Managerialism in Criminal Justice, The Howard Journal Vol 36 No 1 Feb 97 pp 83

The shift in public services management was focused on elements of a public sector managerialist agenda.[51] Raine and Wilson argued in 1997 that "the cumulative effect of the pursuit of managerialist goals has perhaps had greater impact on the criminal justice system than the policy agenda."[52] The origins of managerialism in the context of public services stem from the idea that the public sector should function along business principles and increase its efficiency and effectiveness:

> *"Broadly defined, managerialism encompasses a pragmatic technologically supported and quantification oriented political construction[53] "that has subjected the police, courts, probation and prisons to a regime of efficiency and value for money, performance targets and auditing, quality of service and consumer responsiveness."[54]*

It is important at this stage to stress that the criminal justice system in England and Wales during the New Labour era was not the only public sector area to be influences by managerialist tendencies as:

> *"to differing degrees, the organisational culture and ways of working of the criminal justice agencies, like all other public sector organisations have been transformed in recent years by the wave of managerialism in part promoted and imposed by 'new right' politicians as they have sought to inject private sector principles and practices into the public sector but which have also come to be seen as having a status and significance above party politics ; as a global phenomena of our time."[55]*

Indeed, the birth of New Public Management Theory[56] saw issues of efficiency and parsimony in resource usage akin to the private sector being discussed with the idea of competition being

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[51] Lacey N 1994 'Government as manager, citizen as consumer: the case of the Criminal Justice Act 1991, Modern Law Review p75, p534-54

[52] Raine J W and Wilson M J Beyond Managerialism in Criminal Justice, The Howard Journal Vol 36 No 1 p82

[53] Cheliotis L K, Penal Managerialism from within: Implications for theory and research, International Journal of Law and Psychiatry 29 (2006) p397

[54] Loader and Sparks Public Criminology? Routledge 2002 p88

[55] Raine J W and Wilson M J, Beyond Managerialism in Criminal Justice, The Howard Journal Vol 36 No 1 Feb 97 p 81

[56] Raine J W and Wilson MJ, Managing Criminal Justice Harvester, Wheatshelf 1993 and Shifting power dependencies in criminal justice: the dual state of centre and locality in England and Wales, J W Raine Criminal law review 2014 and the key focus on this theory being on public accountability and organisational best practice. The new public management in the 1980s: Variations on a theme C Hood accounting organisations and society vol 20 No U3 pp93-109, 1995 Ekvic Science ltd, A public management for all seasons? C Hood Public administration vol 69 issue 1 p 3-19 March 1991, C Hood, A public Management for all Seasons? Public Administration Vol.69 Spring 1991 3-19

actively promoted.[57] The New Public Management Model was conceptually developed as a method for interpreting movement in organisations and policy across jurisdictions. The model was first seen under Thatcher in the UK in 1979 where we saw increasing market orientation and devolution and concepts such as shorted chains of responsibility and performance targets and sanctions. The Thatcher government appears to have seen criminal justice institutions as "spendthrift, idiosyncratic and unaccountable."[58] The model is characterised by organisational accountability as opposed to command regimes resulting in the primary focus being on improvement to efficiency and performance leading to an increased managerialist focus.

Table 2: Doctrine of New Public Management (Hood, 1994)

Sl. No.	Doctrine	Meaning	Justification
1	**Hands-on professional management of public organization.**	Visible managers at the top of the organization, free to manage by use of discretionary power.	Accountability requires clear assignment of responsibility, not diffusion of power.
2	**Explicit standards and measures of performance.**	Goals and targets defined and measurable as indicators of success.	Accountability means clearly stated aims; efficiency requires a 'hard look' at objectives.
3	**Greater emphasis on output controls.**	Resource allocation and rewards are linked to performance.	Need to stress results rather than procedures.
4	**Shift to disaggregation of units in the public sector.**	Disaggregate public sector into corporatized units of activity, organised by products, with devolved budgets. Units dealing at arm's length with each other.	Make units manageable; split provision and production, use contracts or franchises inside as well as outside the public sector.
5	**Shift to greater competition in the public sector.**	Move to term contracts and public tendering procedures; introduction of market disciplines in public sector.	Rivalry via competition as the key to lower costs and better standards.
6	**Stress on private-sector styles of management practice.**	Move away from traditional public service ethics to more flexible pay, hiring, rules, etc.	Need to apply 'proven' private sector management tools in the public sector.
7	**Stress on greater discipline and economy in public sector resource use.**	Cutting direct costs, raising labour discipline, limiting compliance costs to business.	Need to check resource demands of the public sector, and do more with less.

[57] Raine J W and Wilson M J, Managing Criminal Justice, Harvester Wheatsheaf 1993 and Shifting power dependencies in criminal justice: the dual state of central and locality in England and Wales, J W Raine, Criminal Law Review 2014

[58] Raine J W and Wilson M J, Beyond Managerialism in Criminal Justice, The Howard Journal Vol 36 No 1 Feb 97 p 82

The justice system is, of course, not a business and tensions arise over the goals of efficiency or the goal of achieving and being seen to achieve a fair trial. The increased focus on managerialism did of course come at a cost with more traditional themes of the criminal justice system such as "protection of human rights, reduction of crime and delinquency and promotion of due process,"[59] marginalised and neglected.[60] This model is problematic in the public and voluntary sector where there are fewer opportunities for individuals to assert themselves[61] thus when applied to the criminal justice system we see a relatively weak configuration of localities with the centre imposing financial controls upon the perceived unpredictability of local governance thus resulting in a clear centralisation of resources.[62] This model therefore brings to bear an increasing pressure to simplify and streamline and to marginalise business that is costly to engage with resulting in attempts to be creative and responsive to change as we see attempted with Community Courts in Chapter 5 being evaluated and codified and fully costed and failing in the name of efficiency savings.[63]

1.3 The threat to justice posed by Managerialism

Managerialism has been a unifying strategy for the whole of the criminal justice system and a clear trend in the English and Welsh system since the mid-1990s[64]; it was also a major policy theme under New Labour from 1997-2010.[65]

Following the release of the Birmingham Six in 1993, the then-government announced the creation of the Royal Commission on Criminal Justice (RCCJ). Amongst its principal objectives, the RCCJ was asked to: "examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the

[59] Raine J W and Willson M J 1995 "New public management and criminal justice: how well does the coat fit?" Public Money and Management No 1 47-54.
[60] Raine J W and Wilson M J, Beyond Managerialism in Criminal Justice, The Howard Journal Vol 36 No 1 Feb 97 pp 81
[61] Garside R 2004 Crime, persistent offenders and the justice gap, Discussion paper 1 p7-9 accessed last 16/2/22 https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/crime,%20persistent%20offenders.publication.pdf
[62] Ryan M 2003 Penal Policy ad political culture in England and Wales Winchester: Waterside press
[63] Pollitt 1993 Managerialism and the public services Blackwell second edition.
[64]. Bottoms, A. E. (1995) 'The Philosophy and Politics of Punishment and Sentencing' in Clarkson, C. and Morgan, R. (eds.) The Politics of Sentencing Reform. Oxford: Clarendon Press, Gelsthorpe, L. (2002, forthcoming) `Critical Decisions and Processes in the Criminal Courts', in E. McLaughlin and J. Muncie (eds) Controlling Crime, 2nd edn. London: Sage/Open University
[65] New Labour- New Penology? Punitive Rhetoric and the Limits of Managerialism in Criminal Justice Policy, I Brownlee, Journal of Law and Society, Vol 25, Number 3, September 1998 pp 313-35.

acquittal of those who are innocent, having regard to the efficient use of resources…"[66]

According to Hodgson, "it is significant that the Commission was asked to consider the conviction of the guilty as well as, and indeed before, the acquittal of the innocent."[67] This, according to her, evinces the notion that "the RCCJ redefined miscarriage of justice to include wrongful acquittals, and efficiency (rather than justice) became a clear system goal."[68]

This view contains further support in the RCCJ's recommendation that defendants be encouraged to plead guilty at the earliest possible opportunity, partly to avoid the cost and expense of trials. In return, defendants could expect to receive a discount on their sentence. Naturally, this acted as a deterrent for defendants to request a trial and reduced the incentive to engage in adversarial proceedings.[69] Such plea bargaining has historic roots in the English and Welsh legal systems, but the resulting legislation from the RCCJ placed it on a statutory footing. Later UK administrations have increased the incentives for early plea-bargaining (and therefore commensurately reduced those for facing trial).[70] Guidelines from 2017 from the Sentencing Council in England and Wales provide strong inducements to plead guilty as early as possible in a criminal legal proceeding.[71] Whilst the rules prior to 2017 allowed for a maximum one-third reduction in the relevant sentence to those who plead guilty at the 'first reasonable opportunity', this maximum benefit is now only available to those who plead guilty at their very first court hearing, with the available reduction subject to a sliding scale of leniency thereafter.[72] Following the 2017 revision to sentencing guidelines, for offenders who plead guilty after the first stage the maximum reduction is decreased from one-quarter to a maximum of one-tenth on the first day of trial having regard to the time when the guilty plea is first indicated to the court relative to the progress of the case and the trial date. The reduction is normally decreased further, even to zero, if the guilty plea is entered during the course of the trial.[73]

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[66] Royal Commission on Criminal Justice, Report, 1993, Cm. 2263, at P1
[67] Hodgson J, The future of Adversarial Criminal Justice in 21st Century Britain, North Carolina Journal of International law and Commercial Regulation Vol 35 Number 2, Winter 2010 Art 3. p.327.
[68] Hodgson J, The future of Adversarial Criminal Justice in 21st Century Britain, North Carolina Journal of International law and Commercial Regulation Vol 35 Number 2, Winter 2010 Art 3. p.327
[69] Royal Commission on Criminal Justice, Report, 1993, Cm. 2263, at P110-14.
[70] See Criminal Justice Act 2003 c.44 s.144; sese also Coroners and Justice Act 2009 c.25 s.120.
[71] Sentencing Council, Sentencing Council proposes stricter rules for sentencing offenders who plead guilty, 11 February 2016.
[72] Early guilty pleas: Justice for whom? UK Human Rights Blog, 15 February 2016, at https://ukhumanrightsblog.com/2016/02/15/early-guilty-pleas-justice-for-whom/
[73] UK Sentencing Council, Reduction in Sentence for a Guilty plea: Definitive Guideline, 1st June 2017.

Yet, empirical research suggests that such mechanisms induce defence lawyers to press for defendants to plead guilty, even where this goes against a defendant's wishes.[74] Moreover, prosecutors benefit from such arrangements because they may obtain a guilty plea in spite of having a weak case.[75] As noted by Hodgson the RCCJ recommendations represented a significant shift away from adversarial values:[76]

> *"Rather than resting the burden of proof squarely on the prosecution, the accused is co-opted into participating in the construction of the case against her and promoting the wider system goal of efficiency-in some instances, with the penalty of adverse inference for non-compliance."*[77]

These reforms built upon the managerialist revolution in the criminal justice system introduced under New Labour in the 2000s. As discussed above, as a part of public service provision, the legal system was subject to increasing pressure to deliver greater value for money. However, reforms focused on speed and efficiency may achieve them at the expense of fairness and securing justice for all interested parties. Those dangers are amplified when they are combined with a push to increase the absolute number of criminal convictions, as was the case under the Narrowing the Justice Gap strategy[78], launched by the government in 2002. This strategy included setting a target of increasing the number of offences brought to justice to 1.25 million by 2007/8. Alarmingly, the Home Office reported in 2008 that between 2002 and 2007, recorded crime had fallen by 16 percent, yet the number of criminal offences prosecuted successfully rose to 1.45 million by 2007, even as the number of arrests barely moved.[79] The

[74] McConville M, Hodgson J, Bridges L & Pavlovic A, Standing Accused 189-98 (1994).
[75] Zander M & Henderson P, Crown Court Study 116 (Royal Comm'n on Criminal Justice, Research Study No. 19, 1993). Their study found that of 483 trials in which defendants changed their pleas to guilty prior to trial, prosecutors believed the defendant had a "Good" chance and a "Fairly good" chance of acquittal in 8% and 18% of the cases, respectively.
[76] Hodgson J, The future of Adversarial Criminal Justice in 21st Century Britain, North Carolina Journal of International law and Commercial Regulation Vol 35 Number 2, Winter 2010 Art 3. p.327
[77] Indeed, per Hodgson, notable criminal lawyer Michael Zander, a RCCJ member dissented on this recommendation, arguing that: "The most important objection to defence disclosure is that it is contrary to principle for the defendant to be made to respond to the prosecution's case until it has been presented at the trial. The defendant should be required to respond to the case the prosecution makes, not to the case it says it is going to make. They are often significantly different. The fundamental issue at stake is that the burden of proof lies throughout on the prosecution . . . [I]t is wrong to require the defendant to be helpful by giving advance notice of his defence and to penalise him by adverse comment if he fails to do so." See RCCJ Report at p.221.
[78] Narrowing the Justice Gap. Guidance on tackling Persistent Offending. 2002. Home Office Communication Directorate.
[79] Home Office Departmental Report 2008 (CM 7396, Home Office, May 2008)

available conclusions from this data are either that the prosecuting authorities became incredibly adept over a very short space of time, or that it became much easier to obtain a criminal conviction. As will be discussed in Chapter 4 of the thesis, much of the increase in criminal offence rates may be attributable to the introduction of so-called Out of Court Disposals (OOCDs) which, whilst improving the speed of the criminal justice process, further removed the adversarial contest from the justice system.

Along these lines, McEwan[80] in 2011 argued that the criminal justice system in England and Wales was undergoing a process of transition, arguing that there was a move away from the traditional adversarial criminal justice system to a new system across Europe increasingly dominated by managerialist concerns. A move away from the traditional adversarialist approach would not seem surprising as England and Wales had, until Brexit, been developing ever closer links with Europe who are of course associated with the inquisitorial approach to criminal justice.

Such moves have been reinforced by further reforms to procedural aspects of criminal inquiries by successive administrations from the 1990s onwards. One of the major restrictions placed on the adversarial balancing mechanism was the abolition in the Criminal Justice and Public Order Act 1994[81], of the right to silence of suspects and accused, and subsequently by the Criminal Procedure and Investigations Act 1996[82], which required the accused to disclose their defence to the prosecution prior to trial. As noted by Cape: "[This] has been enthusiastically enforced by certain members of the judiciary who have embraced the managerialist agenda and effectively equated silence at the police station with guilt."[83]

Not only was the right to silence effectively abolished in the 1990s, but the New Labour administration also placed increased pressure on the adversarial system by requiring suspects to disclose their defence to law enforcement authorities and the prosecution prior to trial. The Criminal Procedure Rules[84] effectively codified the common law position – that there is an obligation for a defence to give advance notice to the prosecution of weaknesses in the

[80] McEwan J, From Adversarialism to managerialism: criminal justice in transition Legal Studies Vol.31 No. 4 December 2011 pp519-546
[81] Crime Justice and Public Order 1994 c.33.
[82] Criminal Procedure and Investigations Act 1996 c.25.
[83] Cape E, Adversarialism 'lite': developments in criminal procedure and evidence under New Labour, Centre for Crime and Justice Studies, no. 79 (March 2010) 25-27. For example, see R v Howell [2003] EWCA Crim 1, R v Hoare and Pierce [2004] EWCA Crim 784, and R v Essa [2009] EWCA Crim 43.
[84] Civil Procedure Rules 2020 No. 759 (L. 19) available at: https://www.legislation.gov.uk/uksi/2020/759/contents/made (see in particular, Rule 1 and Rule 3.3).

prosecution case - expounded in R v Gleeson, in which Lord Justice Auld, quoting from a passage in the Report of the Criminal Courts Review (October 2001) stated:

> *"A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles."*[85]

These procedural reforms have been buttressed by the introduction of a power for the prosecution to introduce evidence of a defendant's previous misdemeanours, where it is deemed relevant.[86] Prior to this reform, magistrates and juries were not permitted during a trial to be made aware of an accused's past history of conviction or other misconduct.

Whilst in some circumstances, it is no doubt arguable that each of the reforms just discussed might improve the functionality of the criminal justice system, the point of interest is that instead of a shift towards an inquisitorial approach the move has been towards a managerialist approach; something Cape labels 'adversarialism-lite.'[87] He goes on to argue that:

> *"Even before the prosecution is obliged to inform them of the evidence against [suspects] they must disclose their defence or risk their silence being used as evidence of guilt. They must assist the prosecution by pointing out errors and weaknesses in the case against them, and frequently their previous misconduct – widely defined – may be used against them even though its relevance is tenuous."*[88]

Accordingly, the last twenty years arguably mark the most significant divergence from Herbert Packers' Crime Control and Due Process Models in recent times.[89] McEwan suggests "since the nature of legal processes has been said to be linked to the political structures and

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[85] 2003 EWCA Crim 3357.

[86] Criminal Justice Act 2003 c.44 Part 11. Section 98 of the Act holds that a defendant's 'Bad character' may be introduced at trial, subject to some limitations, where they are
"Evidence of, or of a disposition towards, misconduct on his part, other than evidence which— (a) has to do with the alleged facts of the offence with which the defendant is charged, or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence."

[87] Cape. E, Adversarialism 'lite': developments in criminal procedure and evidence under New Labour, Centre for Crime and Justice Studies, no. 79 March 2010 25-27.

[88] Cape, Adversarialism 'lite': developments in criminal procedure and evidence under New Labour, Centre for Crime and Justice Studies, no. 79 March 2010 p.27.

[89] Packer H, Two Models of the Criminal Process, University of Pennsylvania Law review, Vol 113, November 1964 No1 p 2

philosophies of the states in which they operate"[90], these developments suggest that there are many societies currently in a state of significant political transition.[91]

Across Europe all signatories must comply with Art 6 and the Right to a Fair Trial as McEwan states "it may not be sacrificed in the name of expediency; derogations must be justified by weighty considerations."[92] Loss of control over the conduct of the case does not in itself violate the Article 6 right to an adversarial trial. However, replacement of an adversarial system with a managerial one that lacks the protection for such rights employed by inquisitorial systems does threaten fundamental due process values.[93] There has been a lack of discussion and thought as to the effects of the evolution of a managerialist system in the UK, partly because it has evolved through combined effects of a number of independent ad hoc measures changing pre-trial and trial processes. As McEwan, argues this devolution minus a normative underpinning to the development poses three issues. Firstly, adversarialism is more than an empty label: at its core it is a commitment to the fundamental importance of protecting parties by allowing them rather than the state to direct proceedings Indeed at the level at which juries are engaged, law creation is a question of application and interpretation (Individualisation) than of the actual validity of the general legal rules, with the key opposition at this level being legal professionals. Secondly managerialism is indifferent to the fair trial rights protected by both traditional models in their own ways and thirdly the pursuit of managerialism goals affects the ability of both sides in a criminal case to direct the outcome[94].

The last ten years has seen growing concern at the length of complex trials, volume of cracked trials and delays engulfing the system and become a focus for judicial concern:

> *"The defendant is entitled to a fair trial... It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much*

[90] Damaska MR The faces of justice and state authority (New Haven: Yale University Press 1986) and in a different context N Lacey The Prisoner's Dilemna: Political economy and punishment in Contemporary Democracies Hamlyn Lectures Cambridge: Cambridge University Press 2007

[91] McEwan J, From Adversarialism to managerialism: criminal justice in transition Legal Studies Vol.31 No. 4 December 2011 p520

[92] Lanz v Austria App No 24430/94 ECtHR Judgement, 31 January 2002 [52]; ccf Ramanauskas v Lithuania App No 74420/01 ECtHR Judgement 5 February 2008.

[93] Crosby K, 'Controlling Devlin's jury: what the jury thinks and what the jury sees online' Criminal Law review 2012

[94] McEwan J From Adversarialism to managerialism: criminal justice in transition Legal Studies Vol.31 No. 4 December 2011 pp519-546

time as they like... Resources are limited.... It follows that the sensible use of time requires judicial management and control."[95]

Judicial powers have increased and developed with emphasis on early settlement.[96] Although there are indications that judicial neutrality should be maintained judges are required to proactively manage criminal cases before and during trial and to ensure the trial is conducted in an efficient manner. It is worth noting at this point that judges and justices' clerks have a duty to manage litigation, enforce the CRimPR[97] and ensure that case management directions can be complied with[98]. These powers give judges the power to require written submissions rather than oral argument as well as powers to manage PCMHs. These powers have brought about the new label of the interventionist judge. Research by Bankowski indicates that hints from the judge are likely to be a powerful influence on jury verdicts[99] and judges have considerable latitude to let the jury know their view of the evidence in the summing up. This wide scope for English judges to comment on evidence and witnesses during the summing up contrasts with the restricted scope allowed to judges in the United States where interpreting the evidence is the sole responsibility of the jury.

The aphorism "justice delayed is justice denied" is frequently offered to explain the advantages of this approach to the defence and indeed many defendants will benefit from costs and timescales being kept within reasonable limits. Although not an essential characteristic of adversarialism the jury trial is the natural corollary of the distrust of officialdom that inspires it. Both jury trial and party autonomy are manifestations of the same principle, namely that the individual defendant must be protected against the power of the prosecuting state.

It is arguable that with it becoming increasingly difficult in recent years to control the evidence the jury sees; the courts have had to develop strategies for more closely regulating juror's thoughts and this in itself implies a move from adversarialism to managerialism. This argument can be supported to a point by Crosby. Crosby in 2012[100] discussed recent developments on judicial directions and juror's use of the internet. Crosby analyses these developments through

[95] Jisl (2004) EWCA Crim 696; 2004 All ER (D) 31 (April) 114 at [114] per Judge LJ' cf Chaaban 2003 EWCA Crim 1012; 2003 All ER D 355
[96] H Genn Judging Civil Justice Hamlyn Lectures 2008 Cambridge Cambridge university press 2010
[97] CrimPR r 3.2(1)
[98] R v Kyham 2008 EWCA Crim 1612 at 152 per Judge LJ
[99] Bankowski Z, The jury and Reality in The Jury under Attack P 8-26
[100] Crosby K, Controlling Devlin's jury what the jury thinks, and what the jury sees online, Criminal Law Review 2012.

the lens of Devlin's theory of jury trial and questions whether the possibility of jury nullification might be undermined by a denial of the jury's power to respond to the case as opposed to professionals who were administering a trial.

A key element of this discussion of the role for managerialism in the future is the notion that the jury is generally under the control of the judge. The judge gets to control the jury through judicial directions, however just as an MP can revolt against the whips in parliament jurors can be affected by "matters of conscience."[101] as seen in January 2022 with the jury clearing the BLM protesters over the toppling of the Edward Colston Statute[102]. Arguably the conceptual basis for today's current debate was first conceived by Devlin in 1966 with his phrase "each jury is a little parliament" in which arguable he was emphasising the tension between systematic control and occasional revolt which he felt typified each institution's relationship with its masters. Individuals will always see facts differently and this will only be heightened by those trained to frame reality into predefined legal categories and to whom the law can mean everything as opposed to those who have a less legalistic view of the world and to whom the law only means something. Devlin had argued the balancing act between these competing perspectives was achieved through the judge's role in the formation of the jury's verdict. Devlin felt that "the Control of the Jury[103]" was limited by two directions from the judge. Firstly, the judge could control what evidence the jury sees and secondly, could control how the jury thinks about the case during its deliberations. Devlin therefore felt:

> *"The object of the process is to produce a directed verdict if "direction" be given its double meaning of guidance as well as of commandment. The jury is not allowed to search for a verdict outside the circumference delineated by the judge; and within the circumference its search is directed by the judge in that he marks out the paths that can be taken through the facts, leaving to the jury the final choice of route and destination."*[104]

However, since Devlin wrote these comments back in 1966 the legal system has undergone significant change and there is now a clear gap in the literature concerning the current shift from adversarialism to managerialism and the effect this might have on lay participation in the

[101] Devlin, Trial by Jury Stevens & Sons: London, 1966 Pp162 and 163
[102] https://www.theguardian.com/uk-news/2022/jan/05/four-cleared-of-toppling-edward-colston-statute last accessed 1/7/2021
[103] Devlin, Trial by Jury Stevens & Sons: London 1966 p61-125
[104] Devlin, Trial by Jury Stevens & Sons London1966 pp120 and 121

English and Welsh justice systems. Could the attack on magistrates as well as on trial by jury been seen as a general attack on the role of lay individuals in the criminal justice system? In an adversarial based model, the role of lay individuals was central to the historical underpinnings of the system. However, in a managerialist based system with the concerns focusing on efficiency and other considerations, the continued participation of dispensable lay individuals in the legal system would appear counter intuitive. The key question would appear to be whether lay participation will survive in a managerialist criminal justice system.

1.4 The impact of Financial Efficiency concerns on the Criminal Justice System

The managerialist approach to criminal justice – with its emphasis on efficiency and streamlined processes – has found succour over the last fifteen years thanks to the financial calamities which have beset the United Kingdom as a whole. The UK's fiscal position was comparatively parlous prior to the Covid-19 pandemic. Geopolitical events and financial crises – most notably Brexit and the preceding global financial crisis (GFC) of 2008-09 – led to severe financial consequences for the economy. The recession which followed the financial crisis was the deepest in the UK since the Second World War and the GFC cost the UK economy as much as £7.4 trillion in lost output.[105] Brexit is estimated to have knocked at least one percentage point of economic growth per year since 2017.[106]

The twin costs of bailing out banks and lower tax receipts from a damaged economy led to the Coalition government elected in 2010 embarking upon a period of severe cuts to spending on public services (often dubbed 'austerity'). This austerity programme was driven by the (misguided) notions that Britain faced a solvency crisis[107] and that, following the huge injections of public money in 2008-09 to support the financial system, it could 'not afford' to continue to fund services in the way it had done prior to the GFC. The supposed budgetary

[105] Haldane A, 'The $100 billion question' Comments at the Institute of Regulation & Risk, Hong Kong, 30 March 2010.
[106] "By 2020, GDP would be over 3% smaller than otherwise (with continued EU membership)." Kierzenkowski, R., et al. (2016), "The Economic Consequences of Brexit: A Taxing Decision", OECD Economic Policy Papers, No. 16, OECD Publishing, Paris, https://doi.org/10.1787/5jm0lsvdkf6k-en.
[107] Whilst intuitively plausible, it is, in fact, incorrect to suggest that currency-issuing governments face solvency constraints, because they may create money from nothing. No less an authority than Alan Greenspan has said: "… government cannot become insolvent with respect to obligations in its own currency. A fiat money system, like the ones we have today, can produce such claims without limit." See Federal Reserve Board, Remarks by Chairman Alan Greenspan at the Catholic University, Leuven, 14th January 1997 (https://www.federalreserve.gov/boarddocs/speeches/1997/19970114.htm. For further discussion, see Andrew Johnston, Jay Cullen and Trevor Pugh, 'The Law and Regulation of Banks and Money' in A. Johnston and L. Talbot (eds) Great Debates in Commercial and Corporate Law (MacMillan: London 2020) 207-226.

sustainability crisis, it was argued, could not be solved without cutting government expenditure.[108] Indeed, such was the commitment to 'budget responsibility' under the Conservative government elected in 2015, that it enshrined fiscal rules in a 'Charter for Budget Responsibility'; that administration's overall objective for fiscal policy – its policy for managing the public finances – was to return the public finances to balance by the middle of the 2020s. This would require the Government to spend no more than its tax income. This was to be achieved by a 'fiscal mandate', a target for government borrowing, to have been less than 2% of GDP by 2020/21.[109]

Naturally, the government's response to the Covid-19 pandemic rendered these targets obsolete. However, in the interim period between 2010 and 2020, swingeing budget cuts to public services did occur.[110] The courts and legal services were not immune from these policies of budget repair, leading to significant defunding from 2010 onwards. On the basis of these cuts, the Institute for Government claimed that this "process … has prompted widespread concerns about the quality of justice now being dispensed across the UK."[111] Moreover, the complexity of the cases heard in criminal courts increased over this period, requiring courts to make further savings to meet demand, even as staff numbers have dropped.

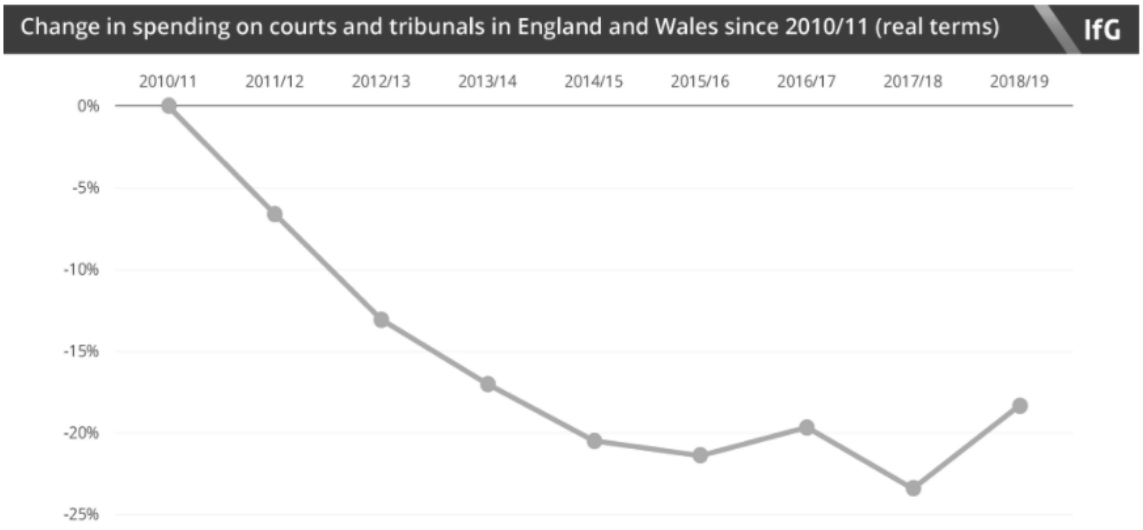
[108] 'Protecting the taxpayer's purse, protecting the public services—these are our two great tasks, and their demands have to be reconciled. How very pleasant it would be, how very popular it would be, to say "spend more on this, expand more on that." We all have our favourite causes—I know I do. But someone has to add up the figures. Every business has to do it, every housewife has to do it, every Government should do it, and this one will.' Margaret Thatcher, Speech to Conservative Party Conference, 14th October 1983.

[109] For discussion, see Keep M and Ward M, 'Balanced budget rule', House of Commons Library Debate Pack Number CDP-2019-0007, 18 January 2019, at https://researchbriefings.files.parliament.uk/documents/CDP-2019-0007/CDP-2019-0007.pdf

[110] In 2016, the National Audit Office concluded that: "Reducing inefficiency in the justice system is essential if the increasing demand and reducing funding are not to lead to slower, less accessible justice. Although the bodies involved have improved the management of cases, around two-thirds of criminal trials still do not proceed as planned on the day they are originally scheduled. Delays and aborted hearings create extra work, waste scarce resources and undermine confidence in the system. Notwithstanding the challenges of improving the efficiency of a system designed to maintain independence of the constituent parts, there are many areas where improvements must be made. Large parts of the system are paper-based, and parties are not always doing what they are supposed to do in a timely manner. The system is not currently delivering value for money." See National Audit Office, Efficiency in the criminal justice system, Report by the Comptroller and Auditor General, HC 852 Session 2015-16 1 March 2016, at 17.

[111] Institute for Government, Performance Tracker: Criminal Courts, (2019) https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts

1.4.1 Spending



112

In 2019, the final full year not impacted by the Covid-19 pandemic in the UK, Her Majesty's Courts and Tribunals Service (HMCTS) spending, at £2.0 billion per year, was 18.4 percent lower in real terms[113] than it had been in 2010/11, the first full year of the Coalition Government. This year did not in fact mark the lowest comparative spending period in the post-GFC era; that was 2017/18, when real terms spending on HMCTS had dropped by approximately 23 percent in relation to its 2010/11 level.[114]

In fact, government funding of HMCTS fell by much more than the 18.4 percent headline figure: it was 32 percent lower in real terms than in 2010/11. HMCTS responded to the budget cuts during this period by increasing court fees for users of non-criminal court services. The net result of this is that government funding of HMCTS spending has dropped from almost 80 percent to just 65 percent over this period. Importantly, courts are restricted in the fee increases they will be permitted to impose in future, following a 2017 Supreme Court decision which

[112] Source: Institute for Government analysis of total operating expenditure from HMCT Service Annual Reports and Accounts, from https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts
[113] This is the ratio after inflation is taken into account and is therefore more accurate a comparator than nominal spending.
[114] Institute for Government, Performance Tracker: Criminal Courts, (2019) https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts

ruled that fees in employment tribunals were excessive.[115] On this basis the Ministry of Justice has now committed to reviewing and capping court fees.[116]

1.4.2 Case numbers

The number of cases reaching criminal courts fell substantially between 2010/11 and 2018/19, which perhaps prima facie might indicate that reducing funding for those courts was required. However, the complexity of the cases reaching criminal court has increased, meaning that demand has fallen less rapidly than the HMCTS budget. As noted by the Institute for Government, there are three levels of offences under English and Welsh law:

(i) Summary offences: the least serious, designating any offence which carries a sentence of less than 6 months imprisonment, and which are heard almost exclusively in the magistrates' court;
(ii) Either-way: offences which may be heard in either the magistrates' or Crown court (depending upon the preference of the magistrate or defendant); and
(iii) Indictable: offences which are so serious that they must always be heard in the Crown court.[117]

Although the number of cases which the magistrates' court dealt with between 2012/13 and 2018/19 fell by 6.6 percent, the number of either-way or indictable offences fell by 18.6 percent and 27.2 percent respectively. These declines were partly influenced by the Leveson reforms of 2016,[118] which were designed to reduce the case-burden on Crown courts. Accordingly, the number of cases referred to the Crown court by magistrates' courts fell by 32.4 percent between 2010/11 and 2018/19.[119]

And yet, case complexity dealt with in the Crown court has increased significantly since 2010, placing greater demand on legal personnel, even in the face of substantial budget cuts. Trials for serios offences such as sexual or drugs-related crimes take up a growing portion of Crown court cases. Such cases are much more difficult to try; trials for 'either way' cases in the Crown

[115] R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51.
[116] HM Courts and Tribunals Service, Annual Report and Accounts 2018–19, HM Courts and Tribunals Service, 2019.
[117] Institute for Government, Performance Tracker: Criminal Courts, (2019) https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts
[118] Discussed in detail in Chapter 3.
[119] Ministry of Justice, 'Criminal court statistics: January to March 2019', Table C1.

court now last for an average of 3.9 hours, in comparison with 3.1 hours in 2010. Moreover, a greater share of indictable offences comprise the Crown court caseload, the average for which is 9 hours.[120] This led the Lord Chief Justice to conclude in 2017 that "the reduction in the number of cases is counterbalanced by the increase in complexity and length."[121]

In aggregate, the changes to the criminal justice system led the Institute for Government to conclude in 2020 that:

> *"Overall, increases in complexity mean that demand has fallen by less than caseloads alone imply. Even with a sharp fall in caseloads over the past few years, and the decline in the number of complex sexual offences that the courts have received since 2016/17, demand has still fallen by less since 2010 than real-terms spending on the courts and tribunals system."*[122]

1.5 The Covid 19 pandemic

On the 23rd March 2020 the Covid-19 pandemic caused the temporary suspension of jury trials in England and Wales. Given the social distancing requirements imposed by the health authorities, in April 2020, there were just 350 in-person hearings per day in the English and Welsh court system, in comparison to thousands during normal times.[123] In the Crown court, the number of cases processed averaged just 58 percent of pre-pandemic levels between April and August. The magistrates' court rate was even lower, at 41 percent.[124] Perhaps most problematically, jury trials were stopped entirely.

On 11 May 2020, it was announced that jury trials would resume 'under special arrangements' in the week of the 18th May 2020. The trials, starting at the Central Criminal Court in London and Cardiff Crown Court, would use multiple courtrooms for the jury, reporters and

[120] Ministry of Justice, 'Criminal court statistics: January to March 2019', Table C7.
[121] Judiciary of England and Wales, The Lord Chief Justice's Report 2017, Judiciary of England and Wales, 2017, p. 17, retrieved 12 October 2021, www.judiciary.uk/wp-content/uploads/2017/09/lcj-report-2017-final.pdf
[122] Institute for Government, Performance Tracker: Criminal Courts, (2019) https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts
[123] HM Courts and Tribunals Service, 'Courts and tribunals data on audio and video technology during coronavirus outbreak', HM Courts and Tribunals Service, 30 April 2020, retrieved 15 October 2021, www.gov.uk/guidance/courts-and-tribunals-data-on-audio-and-video-technology-use-during-coronavirus-outbreak
[124] HM Courts and Tribunals Service, 'HMCTS weekly management information during coronavirus – March to August 2020', 10 September 2020, retrieved 15 October 2020, www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-august-2020

participants in the trial. The courtrooms would be linked by closed circuit TV. On 1 July 2020, the Justice Secretary confirmed that a total of 26 courts had resumed jury trials since June 2020.[125] A further 16 court resumed jury trial from 6 July 2020 all under special arrangements to ensure the safety of those involved.[126] As of 26th January 2021, there were over 290 Covid-safe jury trial courtrooms.[127] As of January2021, there were 54,000 cases awaiting a jury trial and rising.[128] Given the scale of the problem, the government considered the "radical" move of reducing the size of juries from the standard 12 to 7(6).[129]

Lord Chancellor, Robert Buckland QC, in his evidence to the justice select committee on 23 June 2020 stated that the severity of the backlog of cases required a dramatic upscale of current efforts and confirmed the government's consideration of plans to legislate for, among other options, smaller jury sizes (7). The increased capacity expected to be derived from a reduction in jury numbers is estimated to be in the region of 5-10 percent. The other option proposed was to permit trials without juries, specifically for 'either-way' offences. He also suggested that trials involving a judge and two magistrates would potentially only apply to cases where the maximum sentence available is two years' imprisonment[130].With the increased scrutiny on trial by jury many advocates of its importance have voiced their concerns about any temporary changes being anything but that indeed, there has been fierce resistance to any erosion to the protection offered by the jury of twelve. The Criminal Bar Association ("CBA") released the results of an internal ballot on 29 June 2020 which showed that 93 percent of members who voted were against erosion of jury trials in the Crown Court. This number is striking as those surveyed will be suffering the financial fallout caused from the suspension of trials. The Bar Council and Law Society of England and Wales also raised concerns in its statement on the impact of the pandemic on the criminal justice system described jury trials as being at the "heart of the criminal justice system" and "vital to the rule of law."[131]

[125] https://www.gov.uk/government/news/coronavirus-recovery-in-her-majesty-s-court-and-tribunal-service Last accessed 28/1/2022
[126] https://www.judiciary.uk/announcements/update-16-more-courts-to-resume-jury-trials/ last accessed 13/2/22
[127] https://hansard.parliament.uk/Lords/2021-01-26/debates/F8599FD2-323E-4668-813C-5BFB6E0CA49E/SeriousCriminalCasesBacklog last accessed 17/2/22
[128] 1.01pm Lord Falconer of Thornton https://hansard.parliament.uk/Lords/2021-01-26/debates/F8599FD2-323E-4668-813C-5BFB6E0CA49E/SeriousCriminalCasesBacklog last accessed 1/3/2022
[129] Jane Croft, 'Radical measures needed to restart jury trials' Financial Times, 30 April 2020, https://www.ft.com/content/d003486a-786d-4090-bbbb-f276212cd72a last accessed 1/2/2021
[130] https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/519/51908.htm last accessed 1/12/21
[131] https://www.barcouncil.org.uk/resource/joint-statement-by-the-bar-council-and-the-law-society-on-jury-trials-court-capacity-and-dealing-with-the-backlog.html

Whilst the court system has now returned to some form of normality, the Covid-19 pandemic has reset state finances across the world. This is true in the UK where, in spite of promises to end the austerity programme[132], the fiscal costs of combatting the economic slump – in combination with political pressure to prioritise health and social care funding in future – weigh heavily on future public spending commitments. As noted by the Institute for Fiscal Studies, the budget for justice services was cut significantly in the 2010s and, in spite of the uplift provided in 2018-19, the day-to-day budget for the Ministry of Justice and Law Officer's Departments will be 21 percent lower in 2021-22 than it was in 2009-10.[133]

1.6 The Police, Crime, Sentencing and Courts Bill

Such reforms are encapsulated by a new proposed Police, Crime, Sentencing and Courts Bill[134], which, at the time of writing, had enjoyed its third reading in the House of Commons.[135] If

[132] Dearbail J, 'Chancellor Sajid Javid declares end of austerity', BBC, 4 September 2019, https://www.bbc.co.uk/news/business-49577250 last accessed 1/11/21
[133] Zaranko B, Spending Review 2021: plans, promises and predicaments, Institute for Fiscal Studies, 12 October 2021, at https://ifs.org.uk/publications/15694 last accessed 2/2/2022

[134] Police, Crime and Sentencing and Courts Bill: Third Reading UK Parliament 7 July 2021
[135] "Police, Crime, Sentencing and Courts Bill: Third Reading". UK Parliament. Retrieved 7 July 2021.

passed, the Bill would "overhaul" police, criminal justice, and sentencing legislation. The powers and procedures described above in relation to courts' operations were exercised under temporary emergency provisions in the Coronavirus Act 2020, which enabled participants in criminal hearings (witnesses, defendants, lawyers etc) to attend remotely by live audio or video link. According to the government, if the new Bill is adopted:

> *"This means the courts will be able to operate more efficiently in the future, with greater flexibility to make full use of improvements in technology in court processes and respond to unusual or changing circumstances like the pandemic. The courts will be more accessible and delays to justice will be minimised."*[136]

The Bill also contains enabling provisions which would allow criminal courts to make use of new technology as it develops. This would make it possible in the future for a jury, sitting collectively, to participate in a trial by live video link, where the court considered this appropriate.

This is arguably yet another example of knee jerk reactions to not only covid circumstances but financial pressures on the court system, discussed below. The Law Society have spoken of their concerns over the increased use of remote hearings and the use of remote juries and the potential impact this will have on access to justice.[137] It concludes that:

> *"The Law Society is opposed to provisions within the Bill for juries to view trials via video link, question the need for the reform and how it would be implemented. We would support the removal of this aspect from the Bill…The impact on access to justice is also unclear and unproven, with limited evidence of the effects this change may bring. How jurors interpret body language and facial expressions can be key in a trial and it is unclear what impact hearing a trial remotely would have in this area."*[138]

The Law Society was also highly concerned about the impact such changes might have on vulnerable groups, with research demonstrating that 16% of solicitors felt that vulnerable

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[136] Police, Crime, Sentencing and Courts Bill 2021: audio and video live links factsheet, Updated 7 July 2021, https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-audio-and-video-live-links-factsheet

[137] https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/new-bill-must-not-undermine-access-to-justice last accessed 17th September 2021

[138] The Law Society, Parliamentary Briefing: Police, Crime, Sentencing and Courts Bill, House of Commons remaining stages, 5 July 2021, https://www.lawsociety.org.uk/en/topics/criminal-justice/parliamentary-briefing-police-crime-sentencing-and-courts-bill last accessed 1/9/21

clients were able to participate effectively in hearings, and only 45% were confident that non-vulnerable clients could participate effectively.[139] Other research demonstrates that defendants in criminal cases are more likely to be jailed in video hearings, and that suspects whose cases were dealt with remotely were less likely to have representation.[140]

The Bar Council was similarly scathing in its assessment of the plan to remove juries from being physically present at trials, commenting that:

> *"The Bar Council does not support legislation allowing for remote juries. The Bar Council echoes the comments made by the Lord Chief Justice that remote juries would make the jury spectators rather than participants in a trial."*[141]

The Bar Council and Law Society jointly went on to argue that:

> *"The crucial concern for both the Bar Council and Law Society is access to justice. The impact of the proposed Clause 168 on access to justice is unclear and unproven, with very limited evidence of the effects a remote jury may bring. How jurors interpret body language and facial expressions can be key in a trial and it is simply not known what impact hearing a trial remotely would have in this area."*[142]

Indeed, the Bar Council's view – in common with that of the Law Society – was that the fact that the provisions of this Bill might become law during the dying embers of the pandemic, when remote jury service would no longer be required, was curious, and perhaps indicative of differing motivations for the reduction in the visibility of jury trial.

This Bill therefore serves to highlight the dangers that traditional forms of lay participation in use in the contemporary criminal justice system face. This begs the question whether the scales

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[139] The Law Society, Law under lockdown: the impact of COVID-19 measures on access to justice and vulnerable people, 25 September 2020, https://www.lawsociety.org.uk/en/topics/research/law-under-lockdown-the-impact-of-covid-19-measures-on-access-to-justice-and-vulnerable-people last accessed 9/10/21

[140] Fielding N, Braun S, Hieke G, Chelsea Mainwaring Video Enabled Justice Evaluation Final Report (May 2020), Sussex Police and Crime Commissioner, https://www.sussex-pcc.gov.uk/media/4862/vej-final-report-ver-12.pdf last accessed 1/8/2020

[141] Bar Council Police, Crime, Sentencing and Courts Bill 2021, Briefing for Committee Stage – Bar Council Summary (May 2021) https://www.barcouncil.org.uk/uploads/assets/be1af036-bfa8-443a-b0ee968987e4a3c6/35a10138-1d43-4bda-8cbb040dc3655fee/Bar-Council-Briefing-Police-Crime-Sentencing-and-Courts-Bill-Committee-Stage-May-2021.pdf last accessed 2/11/21

[142] Bar Council and the Law Society, Police, Crime, Sentencing and Courts Bill, Committee Stage Briefing for MPs – Part 12, Clause 168: Remote Juries, https://www.barcouncil.org.uk/uploads/assets/91e75e09-336b-4f00-ba16baf568b78457/Bar-Council-Briefing-PCSC-Remote-Juries.pdf last accessed 2/2/22

of justice are tipping toward efficiency and cost over the foundational democratic cornerstones of the system? These foundational principles of an adversarial system include placing lay participants at the heart of the system, achieved in the main through mechanisms such as the use of lay magistrates and jury service.

1.7 Conclusion

As has been highlighted in this chapter the criminal justice system is at a crossroads. To argue that cost efficiency only became an issue for the criminal justice system following the GFC and Covid-19 pandemic would be incorrect: cost rationalities in relation to public service provision have always been a concern. However, recent years have witnessed a clear attempt to contain expenditure and reduce costs and penalise inefficient practice.

The period from the mid-1990s to 2010 saw a consumerist focus placed on the criminal justice system with a focus on improving the environment within which criminal justice functioned. The underlining notion of user control and consumer choice on the one hand seems beneficial but one wonders if the governmental driving force was the pressure if would exert on public agencies to provide more productive and cost-efficient services. Subsequent austerity in public services have reduced the government's financial imprint on the court system and continued the relentless focus on 'efficiency', whether or not this impacts on justice.

The Covid 19 pandemic is arguably the final straw in pushing the criminal justice system into an identity crisis. Are legitimacy and the perception of fairness and public confidence to remain as critical foundations of the system? Given the increasingly managerialist tendencies in the criminal justice system as will be discussed throughout this thesis, the ramifications for the right to a fair trial and the perception of the fairness of the criminal justice system are starting to be questioned. This therefore necessitates a discussion of the importance of public confidence and the perceived legitimacy by the public of the system.

Whatever the central drivers, managerialism is now embedded in the criminal justice system and has been responsible for a focus on the performance of the system over justice. As recent reforms (including the Bill discussed above) continue to target the traditional forms and modalities of criminal trial and procedure, it is important to understand the principal features of the prevailing criminal justice process, and why such features are so highly valued. Such

characteristics are in danger of being denuded, as notions of efficiency and cost-savings – exemplified by a managerialist approach to public service delivery – eat away at traditional aspects of public institutional life. In subsequent chapters this thesis will discuss a move towards the marginalisation of lay participation in the system. This will culminate in Chapter 5, where it will explain how the managerialist lenses through which success is decided is hampering innovation in the system. Such initiatives, which place community a t the centre of the justice process, include the North Liverpool Community Court. Chapter 2 will now explore the theory behind the perceived importance of such community participation, emphasising the crucial role of lay participants in the dispensation of justice.

Chapter 2: Theoretical considerations - Why Damaska?

The principal aim of this chapter will be to explore the pioneering work of Damaska in relation to lay participation in the criminal justice system. His research is amongst the most influential in the field examining modes of adjudication, focusing to a great extent on the comparative dimensions of justice apparatus. His most relevant work approaches the issue from the perspective that modalities of justice administration may be sorted into two categories: those which aim to resolve conflict, and those which are designed to enforce state policy. As will be explained, Damaska's theory in this area holds that there is a robust, linear relationship between the foundational priorities of the authors of the justice framework concerned, and the procedural form(s) that the relevant justice system ultimately exhibits. In short, the starting point for explaining the features of any justice system must be to examine whether the approach taken proceeds from "a contest morphology" or from "the morphology of inquest."[1]

Whilst it is noteworthy that most modern justice systems enforce criminal justice through processes which are backed and nominally brought by the state, idiosyncrasies in how proceedings are conducted remain across distinct jurisdictions. Anglo-American justice systems, for example, retain many of the features of 'contest morphologies' despite proceedings usually being brought in the name of the state. The contests inherent to these procedural forms often involve the participation of non-expert lay persons. Accordingly, in spite of a move away from adversarial – or contest – morphologies towards state-backed inquests, vestiges of the more traditional approaches to criminal justice remain. Hallmarks of these approaches in English and Welsh legal systems include juries and lay magistrates, the topics of subsequent chapters.

By examining Damaska's framework in this way, the chapter will provide justification for why his theories were selected as the lens with which to evaluate the role and importance of lay participation in state justice systems. This chapter will develop the ideas discussed in Chapter 1 concerning the importance of lay participation in democratic society. The discussion will also highlight the importance of securing public trust that lay participation engenders in the system and why it is such a fundamental feature of the criminal justice system that should be preserved.

[1] Damaska MR (1986), The Faces of Justice and State Authority, New Haven: Yale, P88.

2.1 Principles of Fair Procedures in the Criminal Law

Functional institutional analyses of society have evolved based on key precepts such as Durkheim's social structures, Ehrlich's social controls and Rawls' concepts of justice, each of which focuses to some extent on how law and society interact.[2] Key immovable foundations of the criminal justice system are the principles of fairness and accountability. Durkheim claimed that as society complexifies, civil law gradually supplants criminal law as a disciplining force on general behaviour, meaning that restitutive law, rather than penal law, would eventually prevail.[3] Ehrlich developed a sociology of law, claiming that social networks and customs were as important to societal functioning as written law, reducing the importance of compulsion and state enforcement as moderators of individual conduct.[4] Rawls' notion that lay individuals who are not aware of the outcome of social policy evaluations or resource allocation models can provide equity,[5] in that "basic fairness among people is given by their being represented equally" in a democratic society.[6] These concepts are critical for society, those involved in the criminal justice system and the defendant. Indeed, Rawls equates the basic idea that citizens are free and equal with the concepts of justice as 'fairness'[7] in that "each person has an equal claim to a fully adequate scheme of equal basic rights and liberties..."[8] These principles are based on a liberal interpretation of democracy which placed value on citizen's freedom and equality and positively encourages the introduction of democratic concepts into the criminal justice system and along with respect for lay adjudicators as promoters of fairness and justice.[9]

Meyer identifies that in its most basic, descriptive form, legitimacy can be understood as securing the approval of people belonging to the same group in negotiating and agreeing shared norms and institutional arrangements. In a more normative form, Meyer argues, legitimacy requires conditions to be in place that shape and influence justifications for the application of

[2] Schiff D, 'Socio- Legal Theory: Social Structure and Law' (1976) 39 The Modern Law Review P287-310, P292
[3] Durkheim, E. The Division of Labour in Society. Trans. W. D. Halls, New York: Free Press, 1997
[4] Ehrlich, E. (1913; 2001). Fundamental Principles of the Sociology of Law. Transaction Publishers, New Brunswick.
[5] Rawls J, A Theory of Justice (Oxford; oxford university Press 1999), P118
[6] Rawls J, The Law of Peoples (Harvard University press; Cambridge 1999), P115
[7] Sadurski W, "Law's legitimacy and "Democracy- Plus" (2003) 26 Oxford Journal of legal Studies P377-409, P402
[8] Rawls, J. (2005) Political Liberalism (Columbia University Press, New York) p.5.
[9] Clayton M, Justice and Legitimacy in Upbringing (Oxford; Oxford University press 2006) P14.

power and influence. In both cases, legitimacy itself is seen as "a property of an authority or institution that leads people to feel that that authority or institution is entitled to be deferred to and obeyed."[10]. It is worthy of note that legitimacy in the criminal justice system has a core role in 'co-operative social relations' to define what 'wrong' is.[11] Moore identifies what they consider to be an interdependent relationship between legitimacy, moral credibility, technical efficiency, fairness and procedural restrictions.[12] Indeed, Moore argues that there is a need "to make the criminal justice system more efficient and effective and make it more fair and just."[13] This is corroborated by the wealth of evidence[14] substantiating the claim that the criminal justice system needs to target fairness but also seek efficiency (although fairness ought to remain the over-riding priority). Indeed, the optimum fair trial is one in which a judgment is reached by unbiased and unprejudiced persons on the basis of reliable evidence equitably presented in an open court;[15] there is debate as to whether lay adjudication trials fulfil the requirements.

2.2 Damaska

Traditionally, the English criminal justice system has been characterised by its adversarial nature. Understanding its provenance is important to determining whether this adjudication method ought to be preserved. As noted above, Damaska's work focuses on two distinct modes of adjudication. The first centres its processes on resolving conflict, whereas the second is designed to enforce state policy. The method of adjudication is the key determinant of the choices of procedural form. In particular, he argues that the conflict-resolving form favours, as he terms it, a "contest morphology", whereas policy-enforcing regimes favour "the morphology

[10] Sunshine J and Tyler T R, "the Role of procedural Justice and legitimacy in shaping Public Support for Policing The role of Procedural Justice and Legitimacy in Shaping Public Support for Policing (2003) 37 Law and Society review P513-548, 514.

[11] Bottoms A and Tankebe J, 'Criminology: beyond procedural justice: A dialogic approach to legitimacy in Criminal Justice 2012 Journal of Criminal law and criminologyP 119-170 and P151-152.

[12] Moore M H, 'Notable Speech: Legitimizing criminal Justice policies and Practices' (the perspective on Crime and Justice series 1997 < https://www2.fbi.gov/publications/leb/1997/oct973.htm>accessed 15 September 2015

[13] Moore M H, 'Notable Speech: Legitimizing criminal Justice policies and Practices' (the perspective on Crime and Justice series 1997 < https://www2.fbi.gov/publications/leb/1997/oct973.htm>accessed 15 September 2015

[14] Ministry of Justice England and Wales, Transforming the criminal justice system 2014 ,https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330690/cjs_strategy-action plan.pdf> accessed 8August 2015, the Rt Hon Sir Leveson, "review of efficiency in Criminal Proceedings" 2015 https://www.judiciary.gov.uk/wp-conmtent?uploads/2015/01/review-of-efficency-in-crimianl-proceddings-20151.pdfaccessed 28 September 2015

[15] Powell L F, 'The right to a Fair Trial' (1965) 51 American bar association Journal P534-538, P534

of inquest."[16] Whilst many jurisdictions – including England and Wales – exhibit policy-enforcement norms, these systems retain vestiges of contest and conflict-resolving procedures. Lay juror participation in trials – in contrast to the employment of career judges – are evidence of these vestiges, whereby lay persons with no prior specialist knowledge of law or the rules of evidence are accorded high levels of influence in criminal trials. On this basis, Damaska argues that lay persons – particularly juries – are fundamental elements of adversarial legal systems, increasing participation between the parties to a legal dispute and reducing the influence of legal professionals over the criminal justice system.

2.2.1 Damaska and adversarialism

To Anglo- Americans the adversarial system epitomises the virtues of liberal administration of justice, in contrast to the perception of the inquisitorial system as an antipodal authoritarian process.[17] The adversarial model encounter jurors as decision- makers with discretion in their decision-making; in contrast, as Damaska and Goldstein[18] discuss, the inquisitorial model features include a career judiciary, a desire for rigid rules and official documentation. In this model, a judge endeavours to discover facts while simultaneously representing the state in a trial.

In particular Damaska argues that the administration of criminal justice, and questions concerning who has control over such procedures and how they are conducted, are crucial to determining the fundamental legitimacy of the relevant system. As stated by Damaska "an identical social policy can be realized to a degree through very different procedural arrangements and that very different policies can be implemented in similar proceedings."[19] Accordingly, these procedures do not evolve in a vacuum: they are a product of the ideological and political shifts that impact upon the protections afforded to defendants and why particular procedural forms are taken. Traditionally, the Anglo-American criminal prosecution has been

[16] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p16 and 181
[17] Goldstein A "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure, 26 Stanford L Rev. 1974 P1009, P1017-19
[18] Goldstein A "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure, 26 Stanford L Rev 1974 P1009, P1017-19
[19] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 P7-8

linked to tenets of classical liberalism.[20] J.P Dawson[21] has discussed that "important changes in the design of the legal process were traced to differing designs of centralization, to the participants of laymen in the administration of justice and to similar factors."[22] More recently, procedural forms have been increasingly influenced by economic and social organisation of modern states, factors which must be taken into account when considering the form of justice being employed.

As discussed by Damaska, procedural features such as reliance on documents or preferences for oral testimony are attributable to different goals of justice which interact with the features rooted in the character of officialdom.[23] Anglo-American criminal procedure remains a policy-implementing process; it is still the case that where the fact finders are lay jurors rather than career civil servants, the image of the decision maker as an independent arbitrator between government and individual gains credibility. However, the organisation and authority of the state's prosecuting arm also lends credibility to the adversarial or contest design of proceedings. Although the guilty- plea mechanism appeared historically for reasons independent of the vision of criminal justice as conflict resolution, this characteristic feature perfectly dovetails with conflict-solving forms. The eighteenth and nineteenth centuries saw liberal ideology have its most powerful hold on the western legal imagination and the crystallisation of the concept that administration of criminal justice is to resolve disputes between the government and autonomous members of society.[24] Attention must then turn to the societal perception of the fairness and transparency of the processes and the impact this has on both the criminal justice system and society itself.

The social perception of the fairness and transparency of the criminal justice system is therefore critical to a successful criminal justice system. The next section will examine the notions of Procedural Fairness/Justice and the utility of Damaska's taxonomy, which he conceptualises as the 'Hierarchical' vs 'Co-ordinate' ideal. This will be used to inform the later analyses of lay participation in achieving the aim of fairness in criminal justice systems.

[20] Griffiths J, Ideology and Criminal Procedure 79 Yale LJ 359 1970. Kadish S, ed, Encyclopaedia of Crime and Justice Vol 1 The Adversary System 1983 and Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p9

[21] Dawson J P A history of Lay Judges Harvard University Press 1960

[22] Dawson J.P. A history of Lay Judges Harvard University Press, 1960

[23] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p16 and 181

[24] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p16 and 181

2.2.2 The Hierarchical Model, the Co-ordinate Ideal and the criminal justice system

In his comparative framework, Damaska assembles the civil and common law jurisdictions into distinct categories, namely the 'hierarchical' and the 'co-ordinate'. The hierarchical model is associated with civil law jurisdictions; in contrast, the co-ordinate ideal is applied in general to common law jurisdictions.[25] The distinction between the two may on occasion be fuzzy: Damaska accepts that traits from one category may be found in jurisdictions which properly belong to the other. However, the departure of such jurisdictions from the ideal types will generally be minimal. The fundamental attributes of the hierarchical ideal are decision-making "in accordance with technical standards with narrow choices and emotional disengagement."[26] In these circumstances, discretion is removed from decision-makers and correspondingly, individualised justice is reduced. In contrast, the co-ordinate ideal is characterised by less formality in decision-making, and the entrusting of authority to a body of lay decision-makers sitting in a single level of authority who make decisions according to differing community standards.[27]

2.2.2.1 The Hierarchical model and its impact on procedure

The Hierarchical model is akin to classic bureaucracy. It is a system comprised of professional officials organised into a hierarchy, who make decisions based on technical standards.[28] In common law systems, perfunctory and conclusory statements of grounds are the norm yet invite rebuke and reversal in hierarchical judicial systems. Simultaneous review of a judgment by different echelons of authority would violate the hierarchical sense of order and rank. This could therefore provide opportunities for subordinates to try and hide their mistakes or to try to rectify their own mistakes, which would in turn nullify the work of their superiors. The increased importance attributed to "quality control" by superiors in a hierarchical organization detracts from the importance of original decision making. This distinction is a key difference between decisions in a hierarchical structure and in a co-ordinate ideal.[29]

It is suggested that a good test in assessing the intensity of hierarchical attitudes is to reduce

[25] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p16 and 181
[26] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p181
[27] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p17
[28] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p17
[29] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p17

the evidentiary significance of official documentation: by ignoring the significance of this evidence then the hierarchical process is no more. Damaska argues that the higher the reaches of procedural authority are, the more readily attracted to syllogistic models of decision-making rather than logical legalism[30] they become.[31]

Two methods by which first–instance proceedings can be distinguished are: (i) where all material bearing on the case is considered in a single block of time; or (ii) where proceedings are developed through separate sessions where material is gradually assembled in an 'instalment' style. A genuinely concentrated trial – however well-prepared – requires decisions based on fresh impressions and superficial rhetoric. Bureaucrats dislike such approaches as a basis for decisions, instead preferring an instalment style process with regular review mechanisms, therefore unless concentrated trials are imposed on judicial bureaucracies, they are likely to adopt a piecemeal style towards proceedings.[32]

It must be remembered that ideological currents in England dictated that a public trial, rather than judge-centred proceedings, be made the focal point of the whole process. This approach meant that even where the jury trial was not adopted, professional judges could not make decisions based solely on evidential material. A principle was thus adopted that evidence should be presented in its original form[33] rather than through documents alone.[34] Outwardly the public trial doctrine reigned supreme, with a witness having to be heard by the trial court; however, the record of preliminary proceedings continued nevertheless to play a crucial role with presiding judges studying the preliminary proceedings file and making frequent reference to its material at trial. [35]

The ethos of official exclusivity stifles private procedural action so the hierarchical apparatus developed proper incentives for professionals to perform their functions. The hierarchical legal process is synonymous with action performed by officials personally in charge of a procedural segment or at least with an activity performed in their presence and under their direct

[30] Logical legalism as discussed by Damaska on P22 Faces of Justice and State Authority, Yale University Press 1986 as favouring sweeping ordering schemes and looking at standards without context and which are more general in nature therefore creating a system of interlocking principles. This is seen as creating consistency in decision making.
[31] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p17 and 51
[32] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p51/52
[33] Original form in this context means orally presented to the court
[34] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p51/52
[35] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p52

supervision. It follows that actions performed in their absence are not part of the hierarchical process.[36] "In a hierarchical organization where the spirit of logical legalism reigns,[37] it is considered ideal that the legal process be regulated by an internally consistent network of unbending rules."[38] On its face, this would favour a managerialist approach to issues although it is possible that in an adversarial system using only judges it might be easier to ensure the rules were followed in their entirety. Given the importance of lay officials to a Co-ordinate ideal and the focus of this thesis discussion will now turn to the procedural implications of the Co-ordinate Ideal.

2.2.2.2 The Coordinate Ideal and its impact on procedure

If judicial authority is structured as a single undifferentiated echelon, then no one person has the specialized task of gathering and sorting procedural material and there are not higher officials to whom proceedings are transferred to following initial judgement. It is therefore fair to describe proceedings that centre around the original and final adjudicator as a homogenous single level of authority.[39]

The Anglo-American models of justice have a strong affinity with this type of compressed procedural model where only a moderate degree of investigative elements[40] are injected into the criminal prosecutions by justices of the peace, who bind suspects for trial. They are better described as "traffic controllers at the gates of the justice system rather than investigators assiduously collecting evidence."[41]

Anglo-American jurisdictions display attachment to the one level adjudication; this could be due to the fact appellate remedies came late to the common law world, which has not embraced regular avenues of appeal. It must further be remembered that in a horizontal apparatus of justice the fact that original decisions are presumptively final does not imply that they are all vested with finality and immediately enforced. Despite instruments existing for judgments to

[36] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p53/54
[37] It needs to be remembered that logical legalism aspires to principled consistency, inherited procedural arrangements vulnerable to serious criticism and have little chance of survival as per Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p54
[38] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p54
[39] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p57
[40] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p57
[41] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p57

be modified it is characteristic of the process in a "single echelon of authority that procedural devices designed to ensure quality control precede rather than follow the initial decision."[42]

By limiting the practice of reviewing the original decision and its makers, it follows that decision makers are less likely to provide clear and expansive justifications for their findings as occurs in most common law systems. Supervision is sporadic and confined to the most serious blunders. Even if review does take place, it is indirect in nature; it is not concerned with the propriety of reasoned decisions but with reconstructing what was decided and speculating whether the outcome can be reasonably attacked. What is clear is that the right to appeal is not perceived as central to due process. This context arguably provides insight into the why jurors do not have to explain or justify their verdicts as well as the secrecy attached to the deliberations in the jury room. Only the most egregious of jury impropriety prompts investigation.

2.2.3 Reliance on Oral communication and Live testimony

In a system heavily reliant on temporary lay individual involvement there is no need for long institutional memory. In fact, live testimony becomes paramount as lay individuals do not have the necessary skills needed to make decisions based on cold files. To a layperson, recorded testimony in the form of a statement appears lifeless. This live presentation of evidence to a panel of twelve members of the community who have not become case hardened is a key feature of trial by jury. It is also of vital importance in the perception of the procedural fairness of the system itself and the perception of the current English criminal trial as a series of exquisite confrontational steps. If lay involvement in the form of jurors or even magistrates were to disappear from the system in favour of Judges, there is a possibility that the procedural fairness of the system could be brought into question by the community as it would be so far removed from them.

2.2.4 Substantive Justice and Procedural Regulation

In a coordinate system there will be complex technical rules in place to regulate behaviour

[42] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p57

before the lay decision maker. It is worth remembering that rules regulating practice and evidence are in the hands of the Judge who has the power to enforce them or not. Damaska argues that in the coordinate apparatus, lay officials are enabled to innovate and experiment, something they are unwilling to do in the bureaucratic equivalent.[43] It is of course also noteworthy that the level of discretion afforded to officials in determining which procedural rules are to be adhered to are predominantly in their own hands, leaving them with significant inherent authority and discretion. On this basis, one may argue that this concentrates excessive procedural discretion in the hands of the lay person (especially jury members) particularly given the inability to truly discover what happens in the jury room.[44]

A further key issue when attempting to compare the two systems is that one is based on legal steps taken by officials, whereas the other delegates procedural action to outsiders. It has to be remembered that visible lay participation in the Anglo-American administration of justice continues to infuse notions of substantive justice into the courtroom. The fundamental differences in ideas between substantive justice and those inspired by legalism demonstrate the problem with developing a discussion between the ideals. The legal process is further affected by the type of government employed; governments can either be designed to manage society or to provide a framework for social interaction.

2.3 Two types of State and the ends of the Legal Process

In order to fully discuss the insights Damaska can offer on the issue of lay involvement discussion must now turn to the role the type of state has in the legal process and thus the role lay people have in the criminal justice system.

2.3.1 The Reactive State

A reactive state provides a supporting framework for its citizens to pursue their goals it has to enable spontaneous forces of social self-management. The state believes there are no inherent state problems; rather problems associated with social and individual (private) interests.[45] The state therefore protects order and provides a forum for dispute resolution if citizens require it,

[43] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p24
[44] This is discussed further in Chapter 3
[45] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p73

although in order to protect order there must be a degree of preventative action which can result in a considerable extension of managerial activity. The state therefore, "acts only to protect interests which ideally would be urged by groups or individuals"[46]; this can be seen by how the state protects the Interests of those who cannot protect themselves (for example, children and the incapacitated). However, it is important to note that even when the state acts in this way the individual in question still retains their unique identity.[47]

In reactive ideology, all state activities become inseparable from the resolution of conflict. The legal process in a reactive state assumes there is actual dispute and will not engage until the dispute is brought before them, placing the burden on the citizen to bring a case forward. Given the prominence of self-management in a reactive state there is a strong reliance on dispute resolution and the notion that claims should be settled and that resorting to the state should be the last resort.[48] As Damaska discusses, the reactive state wants its courts to elaborate and strengthen the normative framework for social self-management but conciliation may produce a decision which does not reflect the law as related to the issues in controversy; rather an accommodation which usually fails to produce fixed reference points.[49] However, when the controversy comes before the courts, this conciliatory approach[50] can no longer be used. Once before the courts, the central structural principle is that of a contest between two sides. Although this does not mean the idea of self-management is completely disregarded, as settlements can be reached outside the court, the position that a contest between opposing sides in a dispute remains the default.

2.3.2 The Activist State

In contrast to the passive reactive state, the Activist state espouses and strives toward an all-encompassing theory of the good life and uses it to materially and morally better its citizens. Everything can be assessed in terms of state policy and shaped to its demands. A prevalent concept under this ideal is that people should be linked by their attempts to achieve common goals which are all subordinate to the overriding state interest.[51]

[46] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p73
[47] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p73/74
[48] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p78/79
[49] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p79
[50] Which can be characterised by the reliance on dispute resolution and the idea that a middle ground should be sort between competing claims/agendas
[51] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p80/81

Under an activist government, individuals do not need to be reliable judges of their own best interests as their perception is shaped by potentially defective social practices and norms.[52] The more the image of government changes, the easier it is to allow self-definition, as citizens will increasingly desire what the state intends them to want.[53] Activist law instead informs its citizens what to do and how they should behave, its controlling notion is that all law springs from the state and expresses its policies.[54] This does not mean it cannot be modified or changed to ensure state programmes are realised; however, it remains difficult.

This is a fundamental difference between the reactive and activist states. In a reactive state the norm will be a law which can always be transformed into a bundle of personal entitlements. This cannot be applied to the environment under an activist state where the citizen possesses no rights simply by virtue of his being an end in himself. The notion that a citizen could set his own self-interest in opposition to the state's interest is fundamentally counter to the activist state's ideologies. The state is lexically superior and should not be seen as on the same level as an individual: therefore, there is no capability of having the two interests balanced. Indeed, the procedural objective is to apply the law in the context of contingent circumstances. State officials are required to advance the best interests of the state; therefore, the purpose of activist justice is to implement state policies when brought before an adjudicator. An activist state needs its legal process to be designed as state official controlled inquiry.

There are considerable contrasts between the roles played by the state in Anglo-American contexts on the one hand, and European countries on the other. The former is characterised by a much greater degree of emphasis placed on private or voluntary action for the fulfilment of social needs.[55] This has been explained as resulting from the greater success of their capitalist markets, the more effective and pervasive the market the more limited need for government to become directly involved their power could be limited to the economic and social spheres bypassing state apparatus.

[52] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p81
[53] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p81
[54] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p81

[55] This is a comparison to the Inquisitorial model in which the Court actively investigates as well as the court processes.

In Damaska's lexicon, Anglo-American legal systems in general are exemplars of the reactive state in practice. By contrast, in many European countries, the state tends to adopt a more active role in shaping and managing societal affairs. As a consequence, the Continental model was traditionally more managerial than the Anglo-American model which focused on organic growth, which meant continental lawyers, even if engaged by *laissez faire*, could still only contemplate the legal process in comparatively restricted areas, but in these areas, they were well defined and procedural arrangements in place to ensure consistency.

2.3.3 Conflict solving, policy implementing justice

As discussed in Chapter One the criminal justice system is coming under increasing pressure from managerialist ideals redolent of the Continental model. Damaska's perspective provides a lens – through the focus on the issues of conflict solving and policy implementing justice – to explain the success of the capitalist markets as a rationale for why England and Wales could avoid a more managerialist approach to criminal justice and the court system. Since the financial crash in 2008, and the erratic market conditions that preceded it, the UK government has been under increasing pressures in relation to its finances. Following the challenge of Covid these discussions have only gained traction.

McEwan[56] suggested in December 2011 that the criminal justice system in England and Wales was undergoing a process of transition arguing that there was a move away from the traditional adversarial criminal justice system to a new system across Europe increasingly dominated by managerialist concerns. A move away from the traditional adversarialist approach in the UK was not in itself surprising as England and Wales had at the time ever closer links with Europe who are of course associated with the inquisitorial approach to criminal justice. The point of interest is that instead of a convergence towards either the adversarialist or inquisitorial approach the move has been towards a managerialist approach. McEwan suggests "since the nature of legal processes has been said to be linked to the political structures and philosophies of the states in which they operate",[57] these developments suggest that there are many societies

[56] McEwan J From Adversarialism to managerialism: criminal justice in transition, Legal Studies Vol.31 No.4 December 2011 p519-546
[57] McEwan J From Adversarialism to managerialism: criminal justice in transition, Legal Studies Vol.31 No.4 December 2011 p520

currently in a state of significant political transition.[58] The rest of this section shows how according to both Damaska and McEwan the political situation in any given jurisdiction impacts the justice the society receives and where the emphasis is placed in relation to that model of justice.

2.3.4 The Reactive state and conflict solving type of proceeding

As noted by Damaska, no legal system reflects a pure hierarchical or co-ordinate model: there is a spectrum of hybridity. In the reactive state the legal process takes the shape of a forensic contest that needs to be regulated and this regulation is merely a baseline for litigants.[59] As the spirit of laissez faire weakens, it is less readily assumed that the goals of justice can be attained when litigants are left free to select the form of procedure they desire as Judges can overturn verdicts on appeal even if a procedural error was not raised in trial.[60]

Proceedings are thought of as a contest between two opposing parties before a neutral third party which generates structural pressures towards a judgement in favour of the party who wins the courtroom battle; this may mean the focus is not on the issue under discussion but on the display of forensic skills extolled by the parties in the courtroom. The design and rules regulating arguments are therefore critical. Interestingly different arguments can be made depending on whether a jury or judge are present, as a judge is perceived to have the capacity not to be influenced by evidence introduced erroneously.

The reactive ideology reinforces a procedural perspective on the administration of justice: in brief, how a decision is reached counts as much as what it says is a key theme in an adversarial system. A feature of the conflict solving process is that it vests control over procedural action in the parties. The issue is 'which' party controls proceedings. The more the court relies on the parties to define legal issues and to supply applicable legal theories, the more the lawsuit approximates a pure conflict solving mode.[61] Ideally the judge decides the case within the legal

[58] McEwan J From Adversarialism to managerialism: criminal justice in transition, Legal Studies Vol.31 No.4 December 2011 p520
[59] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p98/99
[60] Criminal Procedure Rules Part 34-37 https://www.legislation.gov.uk/uksi/2020/759/contents/made last accessed 2/11/2021
[61] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 P98/100

limits the parties have prescribed. Until recently it was a serious question in many common law jurisdictions whether a judge may invoke authority that the parties have failed to cite. Many English judges still regard it as improper to rely on a precedent or a legal argument that counsel for the parties have not canvassed; if the judge thinks that important authority has been overlooked by the litigants, he/she will schedule the case for further hearing. The continuing influence of counsel on shaping the legal instructions that judges give to the criminal jury is comparatively striking and draws in to question how much counsel perceive the jury to be an entity to be coerced into believing their portrayal of the evidence in a case.

It is perceived that a central theme of the adversarial process is the idea of competitive proof taking, in order to discuss this the examination practices concerning witnesses have to be discussed. If parties no longer decide the key factual issues, the legal process no longer performs objective dispute resolution. It is no coincidence that judges in common law systems only sparingly employ their powers of intervention in the partisan presentation of evidence and that they will disrupt a strongly competitive exercise of proof taking only in exceptional cases.

2.3.5 The Ideal position of the decision maker

What constitutes a judicial office may differ greatly based upon a whole array of issues. In actual procedural systems decisions makers are more than purely conflict solvers: they have other functions and demands which can inhibit their ability and their optimal conflict solving attitude/function. A reactive state puts fairness above justice each time the two concepts converge. In assessing an ideal conflict solving process the neutral decision maker would be one to whom the only concern is the resolution of the dispute. Ideally the decision maker must enter the case unprepared and unaware of all matters specifically related to the issues only to be tutored through the process of evidentiary presentation and argument by a highly skilled and intelligent individual.[62] Damaska argues that "the conflict solving process is purer and it operates better, if the decision maker is an empty receptacle for legal argument rather than a repository of legal learning."[63] The Anglo-American administration of justice is focused on the notion that the decision maker must be taught the law applicable to the case in question. Jurors rely on counsel and the presiding judge to provide them with the necessary legal material to

[62] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 P74-79 and 84-89
[63] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p139

decide the case. Their deliberations on this material allow the local community through them to have a say on how it is applied in any given case arguably making them ideal decision makers from this perspective.

2.3.6 The Active State and the policy implementing type of proceeding

The legal process of a truly activist state is a process organized around the central idea of an official inquiry and is devoted to the implementation of state policy. In the legal process of the reactive state decisions are justified more in terms of the fairness of procedures than result accuracy. In contrast, procedural rules and regulation in an activist state occupy a much less important and independent position.[64]

Activist states in their purest forms attempt to seduce citizens away from private concerns to mobilize them in pursuit of governmental goals. The state encourages a variety of forms of citizen involvement with the administration of justice other than the more classical roles; for example, citizens are permitted to act as amici curiae to voice opinions on matters before the court, so that new channels of procedural input are carved out, exceeding the bounds of mere character witnesses.[65]

Hierarchical officialdom has been associated with such procedural features as the succession of methodical stages, reliance on documentation, the tendency toward official exclusivity and many other characteristics. Coordinate officialdom has been related to features such as temporal compression of proceedings, preference for oral testimony and readiness to delegate procedural action to non-authoritative persons.[66] A key analytical skill is to realise that procedural features attribute to different goals of justice which interact with the features rooted in the character of officialdom.

Although the guilty-plea mechanism appeared historically for reasons independent of the vision of criminal justice as conflict resolution, this characteristic feature of Anglo-American criminal procedure perfectly dovetails with conflict solving forms although significantly minimising lay involvement in the system, as was discovered in Chapter One.

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[64] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 P80-82
[65] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 P80-83
[66] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p18/19

2.4 Anglo- American machineries of Justice

During the development of conflict solving forms in the eighteenth and nineteenth centuries and honing of civil proceedings in Anglo-American countries, various currents of liberal ideology then exercised their most powerful hold on the western legal imagination. The idea that to administer criminal justice is to resolve a dispute between the government and an autonomous member of civil society fully crystallized.

The relationship between Anglo-American apparatus of justice and the co-ordinate ideal is very problematic. "The workings of the English adjudicative centaur- part professional and part lay is usually expressed by saying that the adjudicative function was in the hands of the judge who took his facts from the jury."[67] The Continentals perceived the English judge as the moderator of a judicial conference and announcer rather than the quintessential decision maker, they were perceived as the jurors. The Continentals therefore felt that the real decision makers in the traditional English apparatus of justice was the lay contingent because of this the English system did not develop as many features associated with bureaucratic structures. Of course, it needs to be remembered that the English jury became purely adjudicative after the sixteenth century transformation from groups of neighbours and witness to a panel of uninvolved persons to whom the facts must be proven.

It is however important to note that although Angevins placed a considerable degree, of influence on centralization, disposition of most criminal cases remained in the hands of local justices of the peace, acting alone or in partnership with the local jury, with minimal interference from the central royal authority.[68] Importantly, local justices of the peace were strongly influenced in their decision making by prevailing community norms rather than by technical legal rules detached from their social matrix. Indeed, it has been argued that the most powerful influence on these lay justices was in fact the prevailing notions at any given time of concepts such as fairness and common sense rather that any technical literature such as manuals they may have been given: "the apparatus of justice was not impervious to change: the province of local lay magistrates was narrowly circumscribed and the lay jury went into a general

[67] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 P39 but also see Pound R The Spirit of the Common Law 1921, University of Nebraska College publications p170-171

[68] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 P40

decline, especially in civil cases."[69] Regular appellate courts were set up at the turn of the century and a space was created for more rigid hierarchical relationships.

It is the continued importance of the lay jury which ensures a strong orientation to substantive justice – perhaps even more so in America than in the UK today. To Anglo-Americans the adversarial system epitomises the virtues of liberal administration of justice. Recently the procedural forms have been linked to economic and social organisation of modern states and they need to be taken into account when considering the form of justice being used. [70]As stated by Damaska "an identical social policy can be realized to a degree through very different procedural arrangements and that very different policies can be implemented in similar proceedings."[71]

2.5 Criticisms of Damaska

Damaska's work was not without criticism. Swart[72] argued that Damaska's structure of authority is based on the idea of a national state and a central authority making his work of limited application to international society but for our purposes this is not a consideration as this thesis is focused on a nation state. Indeed, despite his criticism Swart in his work applied the structuring of authority work by Damaska to the international criminal courts and tribunals and discovered they represented a hybrid of both Hierarchical and Coordinate ideal types. Indeed, Swart also highlights that this is because of the absence of lay participation in the trying of cases which is normally hierarchical and the sway towards non-technical decision making as seen in the coordinate ideal. This analysis re affirms the importance of discussing and applying this model to this thesis.

Chiavario[73] another critic of Damaska's work focuses on the impact of lay participation in Italian Juvenile courts and military courts as well as court of assizes.[74] Chivario highlights that lay participation is not consistent with Damaska Hierarchical ideal which traditionally characterised judicial apparatus in Europe. His work highlights that there is potential hybridity

[69] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 P43
[70] Goldstein A Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure 26 Stanford 1974 L Rev P1009 P1017-1019 and J Griffiths Ideology and Criminal Procedure 79 Yale LJ 359 1970
[71] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 P43
[72] Swart B, 'Damaska and the Faces of International Criminal Justice' (2008) 6 Journal of International Criminal Justice P87
[73] Chiavario M, 'Some Considerations on the Faces of Justice by a 'Non – Specialist' (2008) 6 Journal of International Criminal Justice P69
[74] This court deals with the most serious of crimes and consist of six lay judges and two professional judges.

in existence between purely hierarchical and coordinate ideas. It also highlights those traditionally hierarchical countries place value on the impact and importance lay people can play in the system to the extent that they adapt their traditional foundational basis to accommodate it.

Frase[75] has argued that Damaska's models were developed to enable procedural systems to be explained, described and ordered at a given time and do not pay enough attention to the notions of evolution of systems. This idea is again raised by Markovits[76] who felt that the models did not apply to the Soviet Union as since its collapse it has developed more adversarial procedures such as jury trials. However, despite these criticisms of Damaska's ideals their applicability to the value lay participation can have in the English and Welsh criminal justice system is not undermined. The criticisms discussed above focus on systems which do not fit into one category or another due to the evolution of complexity of a give nation states model.

2.5.1 Herbert Packer's Crime Control and Due Process Models

Packer highlighted the importance of the criminal process and used two key models Crime Control[77] and Due Process[78] to evaluate it. Packer defined the criminal process as:

> *"a compendious term that stands for all the complexes of activity that operate to bring the substantive law of crime to bear (or to avoid bringing it to bear) on persons who are suspected of having committed crimes. IT can be described, but only partially and inadequately, by referring to the rules of law that govern the apprehension, screening, and trial of persons suspected of crime. It consists at least as importantly of patterns of official activity that correspond only in the roughest kind of way to the prescription f*

[75] Frase R, 'Sentencing and Comparative law Theory in J Jackson, M Langer and P Tillers (eds) Crime, Procedure and Evidence in a Comparative and International context: essays in Honour of Professor Mirjan Damaska Oxford: Hart 2008 P351

[76] Markovits A, 'Playing the Opposite Game: on Mirjan Damaska's the two faces of Justice and State authority' (1998-1999) 41 Stanford Law Review P1315

[77] "The Value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process." Packer H, Two Models of the Criminal Process, University of Pennsylvania Law review, Vol 113, November 1964 No1 p 9

[78] The due Process model focuses on the accused individual and wants a system that provides a "formal, adjudicative, adversary factfinding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him." Packer H, Two Models of the Criminal Process, University of Pennsylvania Law review, Vol 113, November 1964 No1 p 14

procedural rules."[79]

The distinction between the crime control and due process models is based upon the "concept of the primacy of the individual and the complementary concept of the limitation on official power."[80] In a crime control model key feature are:

> *"[P]eople are rational-economic calculators in deciding whether to break the law; deterrent threat is the main weapon in the armoury of criminal justice; offenders – and thus crime rates – are responsive primarily to the risk of punishment, which can vary on dimensions of certainty, severity and celerity; increasing the severity of sentencing, and extending the reach of enforcement strategies, are therefore seen as sensible responses to crime; and, offender rights tend to be seen as a constraint on effective crime control."*[81]

Because of its potency in subjecting individual citizens to the violence and coercion of state power, the criminal justice process must be fettered with "controls and safeguards that prevent it from operating with maximal efficiency."[82]

The variance between the Crime Control and Due Process models focuses predominantly on the emphasis placed on the traditional adversarial method of justice in Anglo American systems. The Crime Control model deemphasises these aspects in contrast to the Due Process model which accords them high levels of importance.[83] This debate is of course highly relevant to the tensions the current criminal justice system faces in respect of whether the adversarial underpinning of the system are being undermined. The Crime Control model focuses its attention on the operational efficiency of the system in respect of the screening of suspects, determination of guilt and the punishment that is dispensed.[84] . But, unlike Damaska's models,

[79] Packer H, Two Models of the Criminal Process, University of Pennsylvania Law review, Vol 113, November 1964 No1 p 2
[80] Packer H, Two Models of the Criminal Process, University of Pennsylvania Law review, Vol 113, November 1964 No1 p 16
[81] Hough, M and Jackson, J and Bradford, B and Myhill, A and Quinton, P (2010) Procedural justice, trust and institutional legitimacy. Policing: a journal of policy and practice, 4 (3). p 203-210.
[82] Packer H, Two Models of the Criminal Process, University of Pennsylvania Law review, Vol 113, November 1964 No1 p 16
[83] Packer H, Two Models of the Criminal Process, University of Pennsylvania Law review, Vol 113, November 1964 No1 p 9
[84] Packer H, Two Models of the Criminal Process, University of Pennsylvania Law review, Vol 113, November 1964 No1 P16

they do not explain the varying modes of authority that can explain the importance of lay participation in respect of public perceptions of the fairness and legitimacy of the system.

Although of undeniable importance in the debates concerning a move to a more managerialist basis rather than adversarialist, the limited discussion about the future of lay involvement compromises its utility in making sense of court reform and renewal in the English and Welsh context. Accordingly, whilst Packer's models focus on this being achieved through the concepts of innocence and guilt, this thesis is concerned about how the coercive power of the state can be limited through the use of lay involvement in the system, and the associated modalities of justice that flow from such inclusion. Damaska's arguments are therefore more relevant as they provide a tool for analysing the role lay individuals can play and the impact the state model of control has on the role lay people in the system can perform.

2.5.2 Procedural Justice Theory

As articulated by Thibault and Walker procedural justice concerns the idea that individuals not only look to the outcomes of decision-making processes known as instrumental compliance but place importance on the procedures used to reach the decision[85] known as normative compliance. The key distinction is based on whether the reason for compliance is self-interested – normative or based on a moral or ethical obligation to commitment to obey the law[86]. Developing this further it can be demonstrated that Procedural justice theories articulate specific relationships between:

> *"The treatment people receive at the hands of the police and justice officials; the resultant trusts that people have in institutions of justice; the legitimacy people confer, as a consequence of this trust, on institutions of justice; the authority that these institutions can then command when they are regarded as legitimate; and people's consequent preparedness to obey the police, comply with the law and cooperate with*

[85] Thibault J; Walker L, La Tour S and Houlden P 1974 Procedural Justice as Fairness Stanford Law Review 26(6) P1271-1290

[86] Hough, M and Jackson, J and Bradford, B and Myhill, A and Quinton, P (2010) Procedural justice, trust and institutional legitimacy. Policing: a journal of policy and practice, 4 (3). pp. 203-210.

justice."[87]

From this it becomes clear that procedural justice can be seen as a process-based form of regulation.[88] This process has therefore four key elements; trustworthiness, respect, neutrality and voice.[89] Trustworthiness is focused on the perception from the public that authorities are honest and concerned about their communities' best interests[90]. Respect is focused on the public's perception of the professional conduct of authority and how seriously they take them.[91] Neutrality focuses on how transparent, fair and without basis procedures and decisions are.[92] Voice is focused on citizens ability and opportunity to express their view and opinions on the decisions made.[93] This process driven model suggest the judgements, albeit subjectively made, regarding the fairness of the procedures are very powerful in influencing attitudes to the institutions enacting the procedures.[94]

This model is as discussed in chapter one is beneficial when thinking about the crossroads the criminal justice system is at. However, its use is limited in respect of lay involvement in the criminal justice system where with respect to the jury there is no evidence as the procedures that are followed or not in the jury room and provides no tool to contrast the different roles lay and district judges perform. This thesis is focused on the important role both symbolically and in actuality that lay people perform in the justice system. This model was not used as it was deemed more appropriate to an analysis of the police and the court system as a whole rather than to the future of lay involvement in the system.

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[87] Hough, M and Jackson, J and Bradford, B and Myhill, A and Quinton, P (2010) Procedural justice, trust and institutional legitimacy. Policing: a journal of policy and practice, 4 (3). pp. 203-210.
[88] Tyler T R and Huo Y J 2002 Trust in the law: Encouraging public cooperation with the police and courts New York Russel Sage foundation
[89] Goodman Delahunty J 2010 Four Ingredients: New recipe for procedural justice in Australian policing 4 4 P403-410
[90] Tyler and Huo 2002 Tyler T R and Huo Y J 2002 Trust in the law: encouraging public cooperation with the police and courts New York Russel Sage foundation
[91] Goodman Delahunty J 2010 Four Ingredients: New recipe for procedural justice in Australian policing 4 4 P403-410
[92] Tyler T R 2007 Procedural justice and the courts. Court Review: The Journal of the American Judges Association 44 ½ 25-31 http://aja.ncsc.dni.us/htdocs/publications-courtreview.htm. Last accessed 5/6/2021
[93] Hirschman A O 1970 Exit voice and Loyalty Cambridge MA Harvard University Press P272-273
[94] Gonzalez C M and Tyler M R 2007, Why do people care about procedural fairness? The importance of membership monitoring in K Tornblom and R Vermunt (eds) Distributive and procedural justice; research and social applications pp91-110 Hampshire England Ashgate Publishing limited, Tyler M R 1990 Why People obey the law: procedural justice, legitimacy and compliance, New Haven, CT Yale University Press, 2003 Tyler Procedural justice legitimacy and the effective rule of law in M Tonry (ed) Crime and Justice p283-357 Chicago The university Chicago Press and Tyler T R and Huo Y J 2002 Trust in the law: encouraging public cooperation with the police and courts New York Russel Sage foundation p248

2.6 Conclusion

Whilst Damaska's principles of legal system evolution and provenance are not valid exclusively in their theoretical applicability to modern criminal justice systems, they impart considerable influence on the field. Damaska's wider contributions concerning the importance of lay participation to justice systems also provide a critical lens through which evaluation of recent proposed reforms to some institutions of English and Welsh legal justice.

In particular, his categorisation of court processes and the manner(s) in which they reflect the stance taken by states to the machineries of democracy and justice resonate strongly with the themes of this thesis, which are concerned with debates on modalities of formal court treatment of crime. The particularities of all states and their fundamental approach to citizens' rights and obligations are crystallised in the justice apparatus found in each jurisdiction. Damaska's framework – classifying states as either reactive, or active, and the associated reflection of those classes in the hierarchical or co-ordinate ideals of court systems – provide theoretical sustenance to the claim that legal jurisdictions are mere products of wider democratic imperatives. Losing features associated with either form of system evidences the morphing of states' approaches to citizens' lives, as they become either more paternalistic and invasive on the one hand, or more liberal and detached on the other.

Perhaps ironically, in spite of the classical liberal doctrines espoused by recent ruling parties in the UK and the associated emphasis on the inviolability of individual rights and liberties, the state has been moving to a more intrusive and inquisitorial command and control model in the sphere of justice and court processes. It is arguably paradoxical that, contrary to the axioms of an approach founded on such liberal principles that the state should be seeking to become more active in criminal justice. This demonstrates that issues of efficiency and resource allocation are arguably beginning to trump more philosophical notions of liberty and the sanctity of individual rights and obligations. This pivot towards pragmatism is resulting in an approach to justice with a much stronger emphasis on managerialism, particularly in relation to the control of resources. And yet, the consequences of such moves – despite their apparent paradoxes – is that the English and Welsh justice systems reflect their founding principles to a lesser degree than was the case half a century ago.

The following chapters consider the effects of these changes in approach to justice in the context of lay involvement in the criminal justice system in England in Wales in two specific domains: the jury, and the lay magistracy. By surveying these institutions and the pressures being placed upon them, the significance of Damaska's hierarchy will emerge, as well as a picture of what the justice system in those jurisdictions may evolve to resemble.

Chapter 3: The Principles and Philosophies of Jury Involvement in Criminal Justice

3.1 Introduction

The previous chapter examined the contribution of Damaska to the debate on lay participation in the criminal justice system. Such controversies are foundational to the notion of civic participation in wider institutional and state apparatus. Perhaps the most notable manifestation of lay involvement in the criminal justice machinery is citizen involvement in the jury trial. As was discussed in Chapter Two, the English criminal justice system has been characterised by its adversarial nature, and perhaps nowhere is this more evident than in the trial by jury mechanism utilised in England and Wales in the case of serious crime(s). The scope of trial by jury is limited with the English jury almost entirely confined to serious criminal cases; even then this only represents one or two percent of trials depending on the year.[1] The vast majority of criminal cases are now tried in magistrate's courts by a bench of lay magistrates as discussed in Chapter 4. Only when a case is sent to the Crown Court and the defendant enters a not guilty plea will there be a jury trial.

As was remarked in Chapter Two, Damaska's work focuses on two distinct modes of adjudication. The first centres its processes on resolving conflict, whereas the second is designed to enforce state policy. The method of adjudication is the key determinant of the choices of procedural form. In particular, he argues that the conflict-resolving form favours, as he terms it, a "contest morphology", whereas policy-enforcing regimes favour "the morphology of inquest."[2] Whilst many jurisdictions – including England and Wales – exhibit policy-enforcement norms, these systems retain vestiges of contest and conflict-resolving procedures. Lay juror participation in trials – in contrast to the employment of career judges – are evidence of these vestiges, whereby lay persons with no prior specialist knowledge of law or the rules of evidence are accorded high levels of influence in criminal trials. On this basis, Damaska argues that juries are fundamental elements of adversarial legal systems, increasing participation between the parties to a legal dispute and reducing the influence of legal professionals over the criminal justice system.[3]

[1] Duff P, The limitations on trial by jury, (2001) Dans Revue internationale de droit pénal (Vol. 72), P603-609.
[2] Damaska M R (1986) The Face of Justice and State Authority. P77-79
[3] Jackson J, Paradoxes of lay and professional decision making in common law criminal systems, Revue internationale de droit pénal 2001/1-2 (Vol. 72), p579-594

In 2012, proposals were articulated to scrap jury trials for lesser offences, due to the estimated £30 million this would save each year.[4] This followed attempts by the then Home Secretary Jack Straw in 2000 to do the same.[5] Although these proposals were at the time(s) condemned by many legal academics and by the Law Society , they demonstrate yet another threat to trial by jury if the system cannot gain more public support through better understanding of the system in the United Kingdom. The debate on the future of trial by jury as it currently stands in this country is now a prominent dilemma. Developing a new system of trial by jury in England and Wales could have a fundamental impact on the English legal system for years to come and potentially preserve community input in a criminal justice system that is under increasing economic strain and places efficiency as a key objective.

The principal purpose of this chapter is therefore to place the role of the modern jury in criminal cases in its historical and institutional contexts. It will discuss the history of lay participation – mainly in the form of the jury trial – in the English criminal justice system. It will further discuss whether such participation can – or indeed, should – retain its status and role in the criminal justice system of England and Wales. The chapter will proceed to a discussion of the key challenges which trial by jury and the impact these could have on the future of lay involvement via the vehicle of jury trial.

The importance of this chapter is that in order to evaluate the contemporary justice system in England and Wales one must assess: (i) the historical antecedents of the jury institution, and attendant critiques of the system; and (ii) developments which have allowed managerialist concerns to encroach upon adversarialism and, by extension, the trial by jury modality. As the contemporary system struggles to cope with increased caseloads and the lack of resources available to administrators, a move away from adversarial modes towards more managerialist approaches arguably constitutes a principal driver of the criticisms the system faces. In turn, this forms the basis for the perceived threat to the future of lay involvement through jury trial and the employment of lay magistrates, a topic which will be addressed in the following

[4] Cooper R, Trial by jury faces axe in up to 70,000 cases per year to cut costs, 16 January 2012, The Daily Mail, https://www.dailymail.co.uk/news/article-2087212/Trial-jury-faces-axe-thousands-cases-courts-try-cut-costs.html last accessed 7/11/2021

[5] Travis A, Lords kill Straw's bill ending right to jury trial, 21 January 2000, The Guardian https://www.theguardian.com/politics/2000/jan/21/jurytrials.law1 last accessed 10/2/22

chapter.[6]

The following section will discuss the history and evolution of trial by jury in the criminal justice system, paying particular attention to the altercation system which preceded the adversarial trial. It will analyse the modern criminal jury trial and its institutional foundations. It will conclude by discussing conceptual and practical flaws in the jury trial system and analyse the potential consequences of such defects for the broader principle of lay participation in legal proceedings.

3.2 Historical account of jury participation in England and Wales

Historically, trial by jury has been a fundamental part of the English Legal system and "nothing in the whole of the English legal System generates so much heated and emotional argument as the merits and demerits of the jury."[7] It has often been said that trial by jury "is of a tradition so high that nothing is known of its origin."[8] Indeed, "[t]he jury is often described as 'the jewel in the Crown' of the British criminal justice system."[9] In the 18th century Blackstone described it in a famous passage as 'the palladium' or 'the grand bulwark' of the Englishman's liberties. Sir Patrick Devlin in 1956, spoke of it as "a little parliament" and the "lamp that shows that freedom lives."[10] The Royal Commission on Criminal Justice stated that "the jury system is widely and firmly believed to be one of the cornerstones of our system of justice" and Hudson has stated "juries enhance the transparency of the court process and promote public confidence in the criminal justice system and rule of law.[11] However, arguably save possibly for the so called 'dispensing power' of the jury, it is doubtful whether those metaphors are apt as main or practical justifications for the institution."[12]

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[6] Leveson Inquiry https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press , Auld, Review of the Criminal Courts of England and Wales https://www.criminal-courts-review.org.uk/auldconts.htm last accessed 1/7/22

[7] Spencer J.R, Jackson's Machinery of Justice, Cambridge University Press, Cambridge, 1989 P382

[8] Forsyth W, Appleton ,Morgan, History of Trial by Jury London: John W Parker and Son, West Strand, Cambridge University Press

[9] Review of the Criminal Courts of England and Wales RT Hon Justice Auld September Chapter 5 P1

[10] Devlin P Trial by Jury, The Hamlyn Lectures, 8th Series, 1956, p 164, also quoting, at P165, Blackstone's celebrated passage in his Commentaries, at IV, p349-350

[11] Report of the Royal Commission on Criminal Justice (1982) Cm 2263, p2 and Desmond Hudson, Chief executive of the Law Society statement on November 3rd, 2010, in response to proposals to scrap jury trials for lesser offences

[12] Devlin P Trial by Jury, The Hamlyn Lectures, 8th Series, 1956, p 164, also quoting, at 165, Blackstone's celebrated passage in his Commentaries, at IV, p 349-350

There are numerous theories as to the genesis of jury participation in the English legal system. Some academics have argued that the origin of the English jury is attributable to a national recognition in Anglo-Saxon institutions of the principle that no man ought to be condemned except by the voice of his fellow citizens. Forsyth and Morgan[13] believe that the jury's existence is not due to a preconceived theory of jurisprudence but that instead it has evolved gradually, in step with societal and legal trends. This is perhaps not surprising given that academics such as Damaska have argued that "common law could be associated with the slow process of gradually accumulating experience and with custom growing spontaneously from social circumstances rather than with obedience to rigid technical rules."[14] These principles arguably underpin the constitutional basis upon which trial by jury was built in England and Wales.

Most writers now agree the original concept of the jury was imported into England after the Norman Conquest in 1066. The right to trial by jury was institutionalised in Magna Carta of 1215.[15] The first juries in legal disputes in England and Wales were comprised of groups of individuals picked for their prior knowledge of the case or the parties involved. Over time, however, these requirements were dispensed with; indeed, individuals were required to have no prior knowledge either of the case or people involved[16] and the distinctive characteristic of the trial by jury system emerged:

> *"The jury consisted of a body of men taken from the community at large and summoned to find the truth of disputed facts, it was distinct from the judges or court. The office of trial by jury was to decide upon the effect of evidence, and thus inform the court truly upon the question at issue, in order that the latter may be enabled to pronounce a right judgement."*[17]

Because of its ancient origin and the well-known model requiring involvement of twelve randomly selected lay people in the criminal process, the institution commands public

[13] Forsyth W, Appleton Morgan History of Trial by Jury London: John W Parker and Son, West Strand, Cambridge University Press
[14] Damaska M R, The faces of Justice and State Authority, Yale University Press 1986 P 42.
[15] Thomas J. McSweeney, 'Magna Carta and the Right to Trial by Jury', in Magna Carta: Muse and Mentor, Randy J. Holland, ed., Thomson Reuters, 2014 P139-157
[16] Devlin, P, Trial by Jury, The Hamlyn Lectures, 8th Series, 1956, p 164, also quoting, at 165, Blackstone's celebrated passage in his Commentaries, at IV, p 349-350
[17] Stephen J.E.R, The Growth of Trial by Jury in England Harvard Law Review , Oct. 26, 1896, Vol. 10, No. 3 (Oct. 26, 1896), p 152

confidence. This confidence extends to members of the profession itself: judges and legal practitioners invariably believe that, in general, juries reach the correct verdicts.[18] Indeed, the Runciman Royal Commission in 1991 went on record to state that:

> *"we are conscious that the jury system is widely and firmly believed to be one of the cornerstones of our system of justice. We have received no evidence which would lead us to argue that an alternative method of arriving at a verdict in criminal trials would make the risk of a mistake significantly less."*[19]

In spite of its many flaws, the jury retains its aura as one of involvement of the community in the administration of justice. The jury trial has a rich institutional history, and the institution of the jury has for long been a powerful symbol in our criminal justice system. For many its adversarialist function counts for more than its efficiency as a fact-finding tribunal, as many distinguished academic lawyers have observed.[20] Baroness Kennedy of the Shaws eloquently articulated the basis for trial by jury as "… jury tradition is not only about the right of the citizen to elect trial but also about the juror's duty of citizenship. It gives people an important role as jurors - as stakeholders – in the criminal justice system. Seeing the courts in action and participating in that process maintains public trust and confidence in the law."[21]

3.3 The altercation model

Prior to the birth of the modern adversarial model in England and Wales, a so-called altercation trial – a precursor to adversarialism – was used to try cases. An altercation trial was understood as an opportunity for the accused to speak in person on the charges and evidence against him to the jury. Serjant Hawkins described the process as "the innocent accused will be as able to defend himself on "a matter of fact, as if he were the best lawyer"[22], whereas "the guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not be

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[18] Thomas C, Are Juries Fair? Ministry of Justice Research Series1/10Febrary 2010

[19] The Royal Commission on Criminal Justice Report, Cm 2263 London: HMSO (1991) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/271971/2263.pdf p2

[20] see e.g., Baldwin and McConville, Jury Trials, 1979 at p 1; Derbyshire P The Lamp That Shows That Freedom Lives: Is It Worth the Candle? [1991] Crim. L.R. 740, at p 740-1; Sir Louis Bloom-Cooper, QC in Article 6 and Modes of Criminal Trial [2001] EHRLR, p 1-19

[21] Criminal Justice (Mode of Trial) (No. 2) Bill, House of Lords, 28 September 2000, Hansard, HL, col 995

[22] See Hawkins, PC 33-46 [Michael Fosrer], A report of some proceedings for the trial of the Rebels in the Year 1746. To which are added discourses upon a few Branches of the Crown Law 183, 193-207 Oxford 1762.

so well discovered from the artificial defence of others speaking for them."[23]

The key distinction with the birth of the adversary trial in the 1730s was that in altercation trials the accused was largely silenced, with little opportunity for defence counsel to test the prosecution case[24]; the introduction of a more adversarial model constituted a radical change from the previous altercation style trial. James Fitzjames Stephen pointed out why the burdens of production and proof were so primitive in the days of the altercation trial:

> *"When the prisoner had to speak to himself, he… could not, without a tacit admission of guilt, insist on the inconclusiveness of the evidence against him, and on its consistency with his innocence. The jury expected from him a clear explanation of the case against him; and if he could not give it, they convicted him."*[25]

The introduction of defence counsel disentangled these threads and allowed legal representatives to not only push the judge to ascertain whether the prosecution had discharged his burden of producing sufficient evidence but also, crucially, to admit evidence to rebut the prosecution evidence. Indeed, by the 1750s the unstructured bickering associated with altercation trials was being replaced with a "consistently crisp division of testimony along partisan lines."[26] It is important to note at this time that the prosecution's production burden should be distinguished from the prosecutions burden of persuasion, i.e., the standard of proof in a case.

Accordingly, by the late eighteenth century, fundamental flaws were emerging in the altercation system, two prominent examples of which are described by Langbein as the 'combat' and 'wealth' effects. Specifically, the combat effect denotes the notion that adversarial procedure emphasises 'wining' rather than 'truth' as the primary objective, which can lead to procedural issues such as distortion or suppression of evidence, misleading cross-examination, the coaching of witnesses by counsel, and other truth-contaminating devices.[27]

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[23] 2 Hawkins, PC 400 in Langbein, J, The origins of Adversary criminal trial, From Altercation to Adversary trial, Oxford scholarship online, 2005 P36 .
[24] Langbein, J, The origins of Adversary criminal trial, From Altercation to Adversary trial, Oxford scholarship online, 2005.P10-61
[25] Fitzjames Stephens J, Selected writings of James Fitzjames Stephens: A General View of the Criminal Law Oxford University Press K. M. Smith 2014 P193
[26] Langbein, J, The origins of Adversary criminal trial, From Altercation to Adversary trial, Oxford scholarship online, 2005. P10-61
[27] Burns R, The Rule of Law in the Trial Court, 56 DePaul L. Rev. 307 (2007)

These dynamics may be amplified further by the 'wealth effect' whereby richer parties have superior access to legal resources; in particular, legal expertise which allows them to exploit the combat effects to the fullest. Indeed, some academics have questioned whether in developing the 'beyond reasonable doubt' standard judges were motivated by their awareness of truth impairing tendencies that adversary trial procedures revealed especially in cases concerning unrepresented defendants. Summary offences which notably had lighter sanctions and the absence of the adversary jury trial demonstrate at this time a contemporaneous movement away from a 'beyond reasonable doubt' standard of proof. It is at this time with the setting of a high standard of proof for felony criminal trials that one may observe the jury being instructed on the high standard of proof, which tacitly encouraged juries to probe the prosecution case, rather than focusing on a defendant's answers[28]. In this emerging adversarial system, the jury began to be conceived of as a layer of protection for the accused a safeguard against the prosecution, as well as a partial equaliser in respect of the combat and wealth effects.

In 1784 Garrow was one of the first to teach his clients that the adversarial procedure had toppled the 'accused speaks' trial and the strategic advantage of the defendant remaining silent and refocusing the trial on the asserted weakness of the prosecution case and the combat to prevail over truth.[29] This was perceived as "an epochal step, or rather, misstep, for the Anglo-American procedural tradition. A truth seeking trial procedure, such as in Europe, does not create incentives systematically to deny itself access to the person who usually knows the most about what happened."[30] Indeed in the early nineteenth century Cairns commented on the prepared nature of represented defendants statements that "[s]uch a groomed presentation was a far cry from the unrehearsed explanation of events expected in the pre-counsel trial of the eighteenth century."[31] With the coaching of defendants (combat effect) there is a further demonstration of the interference with truth seeking that the adversary system presents. Moreover, as the adversary dynamic took hold access by the court to the accused and to the witness was filtered through partisan lawyers whose interest was in winning – not in finding truth. Courts accepted this development under the guise that cross- examination of witnesses would detect and prevent prevarication and promote truth seeking, despite the view that cross-

[28] Langbein, J, The origins of Adversary criminal trial, From Altercation to Adversary trial, Oxford scholarship online, 2005. P254-255
[29] Langbein, J, The origins of Adversary criminal trial, Altercation to Adversary trial, Oxford scholarship online, 2005.P265
[30] Cairns, Advocacy 50, discussing the trial of William Corder (Bury St Edmunds (Norfolk) Assizes 1828)
[31] Cairns, Advocacy 50, discussing the trial of William Corder (Bury St Edmunds (Norfolk) Assizes 1828)

examination might be little more than a hit or miss safeguard against truth[32] and is designed partially to conceal the effect of placing partisans in charge of the production and presentation of evidence.

The introduction of defence counsel had transformed the purpose of criminal trial: trial has remained a proceeding whose primary purpose is to provide defence counsel with an opportunity for test the prosecution case, and judges since the eighteenth century have facilitated its adversarialist nature. The nineteenth and twentieth centuries witnessed this evolution demonstrated through the 1855 innovation of a statutory system that grew over the next 150 years or so into the present categorisation of cases as triable 'either-way' and further examples include the 1967 introduction of majority verdicts[33], and the 1972 widening of eligibility for jury service.[34] The latter of these developments are discussed later in this chapter.

3.4 Adversarialism Victorious: The Evolution of the Modern Jury Trial

Trial by jury has therefore taken many centuries to evolve into its current form. This evolution has enabled it to respond as necessary to the circumstances of the time, as well as catering to varying levels of demand on the criminal justice system. This distinct identity aside, juries were designed to function separate from the court with jurors employed solely to determine questions of fact. This principle was however confounded even in the early years, although arguably not to the extent it is today.

Bushell's case in 1670 saw the Lord Chief Justice make the landmark decision of establishing the jury as the sole judge of fact.[35] The jury was given the right to give a verdict according to

[32] Cross examination in its purest form was seen an opportunity for each side to present the witness story in line with their version of the case and how they feel the evidence should be construed and the verdict they want the jury to find. The reason it can be seen as hit or miss is counsel can never truly know how a witness will respond to a line of question and how best to question a witness to try to elicit the information, they need to proof their case.

[33] Langbein, J, The origins of Adversary criminal trial, From Altercation to Adversary trial, Oxford scholarship online, 2005 P324-330

[34] Auld, Review of the Criminal Courts of England and Wales https://www.criminal-courts-review.org.uk/auldconts.htm p21-22 last accessed 1/6/22

[35] (1670) 124 E.R. 1006. In this case, the jury, led by Edward Bushell, refused to convict two defendants of a crime, in spite of directions from the judge to do so. In response, the judge imprisoned the jury, fined them, and ordered that they be deprived of food and water until they changed their verdict. On appeal it was held that the judge in the case had acted beyond his powers, and the fines of the jurors were quashed. As noted by Mitchell, this case established a principle "that underpins jury equity and the idea that jury verdicts reflect public conscience rather than arbitrary law." See Mitchell A, 'Penn and Mead: Bushell's Case (1670)', September 2012 https://docenti.unimc.it/laura.vagni/teaching/2018/18710/files/bushells-case last accessed 1/6/22

conscience and could not be penalized for taking a view of the facts which was at odds with that of the judge.[36] This decision reflects the Continental standpoint as a founding principle of that system is that "the real decision makers in the traditional English apparatus of justice were laymen."[37] This was a sharp contrast to the continental machinery of justice model where it was perceived that "private and official knowledge should not mix and that the decision making was to be based only on officially acquired information. The judge was to keep separate what he knew as a person and what he had learned in the performance of official duties."[38]

The decision in Bushell therefore witnessed the birth of the modern jury: the power of juries over the verdict was clarified, as well as the principle that jurors should not be required to explain or justify their decision(s).[39] This principle may have perverse consequences. For example, so-called jury nullification (or jury equity) is central to the jury's democratic function, but as will be discussed below, is also highly contentious.

In tandem with its historical place in English legal history the right to trial by jury has also more recently been governed by ordinary parliamentary statute, namely the Juries Act 1974[40], Criminal Justice and Public Order Act 1994[41] and Contempt of Court Act 1981[42] and the Criminal Justice and Courts Act 2015[43]. The most controversial of these statutory provisions is arguably Section 8 Contempt of Court Act, which prohibits any investigation into jury deliberations.[44]

[36] 124 Eng. Rep.1006 (C.P.1670) at 1018
[37] Damaska M R, The faces of justice and state authority, Yale University Press 1986 P39
[38] Damaska M R, The faces of justice and state authority, Yale University Press 1986 P 30
[39] The judge may halt a case and direct the jury to acquit where it becomes apparent after the case has started that the prosecution case is inadequate. Although strictly the jury could object, judge directed acquittals are not normally considered jury verdicts. Baldwin J Understanding Judge Ordered and Judge Directed Acquittals in the Crown Court 1997 Crim L Rev 536
[40] (1974) c.23.
[41] (1994) c.33.
[42] (1981) c.49.
[43] Criminal Justice and Courts Act 2015 https://www.legislation.gov.uk/ukpga/2015/2/contents/enacted
[44] There have been increasing calls for a relaxation of this ban for academic research to be conducted. See McCabe S "Is jury research dead? In Fundlay M and Duff P eds, The Jury Under Attack 1988 P27. Indeed, Robertson argues "the ban has not worked as advocates predicted to protect the jury system from attack: on the contrary it has imposed yet another layer of secrecy which handicaps those who would wish to defend the system with more than anecdotal evidence." Robertson G, Freedom the Individual and the Law 7th edn 1993 p361

In contrast to the position in the US[45], trial by jury in England and Wales is therefore relatively vulnerable to attack from opponents and is generally reliant for its standing on vociferous resistance from members of the legal profession and some sections of the public to its removal. There are also significant political obstacles which reduce the capacity for governments or other state actors to pursue its removal, as well as the moral justifications for its place given the opportunities it provides for the community to engage with the criminal justice system. Although governments have tested the waters in relation to trial by jury through numerous enquiries and committees -including the 1993 Royal Commission on Criminal Justice[46], the 1986 Fraud Trials Committee[47], the 1981 Royal Commission on Criminal Procedure[48], and the 1965 Morris Departmental Committee on Jury Service[49] - no government has ever attempted to remove the jury from criminal trials completely. Arguably this is partly due to the notion that any new system would need a strong moral foundation to be established, and explanations would need to be generated as to what approach any replacement would take to building a relationship with the local community. If this could not be provided then arguably any justification to remove trial by jury - given its constitutional underpinning – could not be supported, as one cannot operate in a moral vacuum.

3.5 Views on the role and qualities of the jury system

In this section, views of the jury as an institution in the criminal justice system will be analysed. The historicity of the jury provides important indicators of its provenance and appeal. There is also much contention concerning its role; indeed, in spite of the pre-eminence of the jury system in the criminal justice system(s) of many common law jurisdictions, conflicting views as to the desirability of the institution have been frequently expressed. Both legal theorists and historians have disagreed, for example, as to whether the jury constitutes a fundamental cornerstone of the criminal justice system or a flawed relic of the past. As will be noted shortly, such sentiments persist today.

[45] In the United States the right to select trial by jury is enshrined in the Constitution in Article III Section 2 Federal Constitution of the United States of America and Sixth Amendment of the Constitution of the United States

[46] See Report of the Royal Commission on Criminal Justice (1993) Published 6th July 1993 Cm 2263.

[47] Fraud Trials Committee HL DEB 10 February 1986 vol 471

[48] Report of the Royal Commission on Criminal Procedure (1981) HMSO: HO92 and HO92/1.

[49] Report of the Departmental Committee on Jury Service Cm 2627, London HMSO 1965

3.5.1 Historical views of the jury

In the camp which lends support to the jury as an institutional feature of English law, we find theorists such as Blackstone, arguably the greatest legal theorist of the 18th century. Blackstone argued that the jury comprised a fundamental component of liberty, going as far to say that "the jury was the most admirably constituted fact-finding body in the world."[50] Nevertheless, Blackstone was concerned that trial by jury would be "[s]apped and [u]ndermined[51]" and his fears were arguably realised in the 19th century with trial by jury being eroded through the increased use of justices of the peace and other methods of trial. Further support for the institution is provided by J.H. Baker, whose view of the jury was influenced by the importation of the concept from Normandy following William the Conqueror's victory in 1066: "The Norman kings continued to make use of the Anglo- Saxon jury of accusation, sworn to name suspected criminals without hiding anything; once the suspects were produced, they were tried in the old way, by water or fire."[52] As noted by Baker, under the Normans the jury could have been perceived as a "technique for relentless government prying rather than as the bastion of liberty later theory made it."[53] Indeed, as Baker highlights, following the Church's decision to cease 'ordeals' in the criminal court, the jury began to occupy a prominent role in delivering justice. From its inception, trial by jury was seen as distinct; rather than being judged 'by God' as it were, suspects were judged by jurors, who were independent neighbours (although originally, they were supposed to have some knowledge of the event before they came to court). In accordance with this view, Devlin, a prominent judge, Devlin opined that "twelve commonplace minds may reach a sounder solution than two or three brilliant ones."[54] It took until the 14th century for it to be clear that juror's decision-making power was to be exercised collectively rather than individually, and that the jury's role was to try evidence as well as answer questions. By the Sixteenth century it was no longer permissible for jurors to inform themselves of the facts of the case before trial. As noted by Baker, the historical facets of the jury trial provide reminders that the jury may act as a bulwark against capriciousness or over-bearing state power. Commenting on this, E.P. Thompson provides similar justifications for the survival of the jury trial. Thompson argued that the jury maintained its legitimacy in part

[50] Blackstone W, Commentaries on the Laws of England, Book III, 1769/1996 Clarendon Edition, 1996 P378-379
[51] Blackstone W, Commentaries on the Laws of England, Book III, 1769/1996 Clarendon Edition, 1996 P 343
[52] Baker J Introduction to English Legal History, Oxford University press, 2019 p72
[53] Baker J Introduction to English Legal History, Oxford University Press 2019 P 73
[54] Devlin "Trial by jury for fraud 1986 6 930 Oxford Journal of Legal Studies P311 and P315

because regardless of changes in the prevailing political culture, the social profile of the jury remained unchanged. Thus, the jury, as an institution, was resistant to political and social upheaval and interference. Because of this, the jury could claim legitimacy, based upon its separation from the machinations of the state and the law:

> *"The English common law rests upon a bargain between the Law and the people. The Jury box is where the people come into the court: the judge watches them and the jury watches back. A jury is a place where the bargain is struck. The jury attends in judgment, not only upon the accused but also upon the justice and humanity of the law."*[55]

The importance of this interaction of society and the legal system cannot be underestimated; as Thompson notes, "[t]he jury is perhaps the last place in our social organisation where any person, any citizen, may be called upon to perform a fully adult role."[56] However illogical or absurd Thompson felt one may find the notion of direct democracy in society he himself noted: "I have to confess that the thing has worked. I can scarcely comprehend it myself."[57] Confirming this view, Lord Denning commented that the jury was "the bulwark of our liberties". In Ward v James[58], a civil appeal, he stated that "whenever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake, or when one or other party must be deliberately lying, then trial by jury has no equal."[59]

Devlin concurred, referring to the jury as a "little parliament"; an effective means of ensuring democracy[60]. Indeed, Devlin felt that trial by jury reduced the chances of a defendant being wrongly convicted in cases[61] and was a strong advocate of the idea that no case could be too complicated for a jury to understand. Despite Devlin's clear support for the jury and the role it occupies in society in terms of a sense of civic engagement, Devlin was aware that trial by jury

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[55] New Society (London, 19 October 1978). See also E. P. Thompson, "introduction" in Harriet Harman and Joh Griffith, Justice Deserted: The Subversion of the Jury (1st edition, National Council for Civil Liberties, 1979) P5
[56] Thompson E.P, 'Subduing the Jury' (1986) 8 (21) London Review of Books P13
[57] Thompson E.P, 'Subduing the Jury' (1986) 8 (21) London Review of Books P13
[58] [1966] 1 QB 273.
[59] Lord Denning Ward v James 1966 1 QB 273
[60] Devlin P, Trial by Jury (6th edition, Stevens & Sons Limited, 1978) 164 and Trial by Jury, The Hamlyn Lectures, 8th Series, 1956, p 164, also quoting, at 165, Blackstone's celebrated passage in his Commentaries, at IV, p 349-350
[61] Devlin P, Trial by Jury (6th edition, Stevens & Sons Limited, 1978) P164 and Trial by Jury, The Hamlyn Lectures, 8th Series, 1956 P320

was not without problems. He noted the cost implications in both monetary terms and time for trials, as well as the impact that performing jury service may exert on jurors, both economically and socially. Furthermore, Devlin frequently discussed the need for consideration of safeguards when using trial by jury indeed he was an advocate of the American model of *Voir Dire* mode of jury selection.[62] Devlin's work provides a critical opinion of the underpinnings of trial by jury but also addresses the practical realities the role faces in modern society.[63]

In contrast, some prominent jurists claim that the jury's institutional place is not justifiable. Some focus on the inexperience of most jurors; that the interests of justice are not served by the use of lay persons making judgments as to guilt or innocence. Blom- Cooper, for example, a prominent English Public Lawyer, was highly sceptical about the efficiency and ability of jurors to achieve fair trials; rather Blom–Cooper believed that "evaluating evidence in the courtroom is a professional job, it's not for amateurs."[64] Indeed, Blom-Copper claims that theorists attempting to justify the pre-eminence of juries in the criminal justice system fail key flaws in relation to the jury system, particularly concerning in whether the system of trial by jury of serious crime produces a quality of criminal justice as good, if not better, than would a wholly professional system.[65] With the importance of trial by jury as a mechanism of societal involvement in the criminal justice proposing minimising or eradicating its involvement or questioning its value has the potential to be seen as illiberal. Blom- Cooper, however, felt these were important questions to be probed in order to determine whether in relation to serious criminal offences trial by jury is the appropriate mechanism to be used as opposed to trial by judge alone or panel of experts.[66]

3.5.2 The Modern Jury in the Criminal Justice System

One of the key arguments for maintaining the institution of trial by jury was addressed by Blom- Cooper who argued that although it needed reform to adapt to modern life a key reason

[62] Voir Dire is the process through which jurors in the United States are questioned by legal counsel about their backgrounds before being selected or rejected for jury service. See Mueller, Christopher B.; Kirkpatrick, Laird C. (2009). Evidence. Aspen Treatise Series (4th ed.). New York: Aspen Publishers. §§6.2, 6.59, 7.14.
[63] Devlin P, Trial by Jury (6th edition, Stevens & Sons Limited, 1978) 164 and Trial by Jury, The Hamlyn Lectures, 8th Series, 1956, p 164, also quoting, at P165, Blackstone's celebrated passage in his Commentaries, at IV, p 349-350
[64] Blom- Cooper L, 'Jury trials 'facing fresh threat" BBC News (London, 16 April 2002) http://news.bbc.co.uk/1/hi/uk_politics/1932917.stm last accessed 28/8/2022
[65] Blom – Cooper L, 'Judgment reserved on jury trials' The Guardian (London, 20 February 2010)
[66] Blom- Cooper L, 'Judge only trials should be an option for serious organised crimes' The Guardian London 21 May 2010

for retaining it was that "the British public appears to have confidence in it."[67] The symbolism of trial by jury in relation to public perception of the fairness of the system is fundamentally important. Trial by jury after all provides a vehicle by which the public can legitimise the verdict in a particular case but more widely the criminal justice system. Trial by jury provides a vehicle by which citizens' trust in authorities can be nurtured though exposure to the system and trial by jury's ability to scrutinise the system. Schmitter and Karl, as well as Morris, have all argued about the importance direct participation has on democracy thus the lay participation through the vehicle of trial by jury provides the mechanism for direct participation by citizens in the criminal justice system.[68] It allows the representation of not only community values in the system but has always been seen as a check and balance on the state's powers as previously discussed in relation to jury nullification. This idea of the legitimising effect the jury brings to the criminal justice process has been demonstrated in Thomas's research as well as MORI data[69] and supported by Lord Devlin who stated, "the jury is the means by which the people play a direct part in the application of the law… Constitutionally it is an invaluable achievement that popular consent should be at the root not only of the making but also of the application of the law."[70]

As discussed briefly above, historical views of the desirability of the jury's place in the criminal justice system have differed to some degree. In recent years and particularly after the closure of courts due to the Covid-19 pandemic, the jury trial has increasingly been regarded as costly and unneeded.[71] Indeed, some widely read public figures have claimed that the jury trial constitutes an incompetent anachronism that merely creates opportunities for exploitation by

[67] Bloom Cooper L, "Judge only trials should be an option for serious organised crimes" the Guardian London 21st May 2010.
[68] PC Schmitter and TL Karl, 1991. "What democracy Is… and Is Not" 2 Journal of Democracy P75-P88, P77 and BM Morris, "Something Upon Which We Can all Agree: requiring a Unanimous Verdict in Criminal Cases" (2001) 62 Montana Law Review P1-58
[69] Jury Diversity Project survey conducted by MORI in Omnibus survey of April 24-28, 2003, cited in Thomas C 2008 exposing the myths of jury service criminal law review issues 6 pp 145-430 p417
[70] Devlin, Lord P 1981 The Judge Oxford University Press, Oxford p127
[71] See for example: Edwards H, 'Alternatives to the jury trial – a threat to our system of justice' Exchange Chambers blog, June 25, 2020, citing the Criminal Bar Association's position as stated by Goodwin C Q.C. on the 22nd June, when she wrote: "We cannot contemplate change to the jury system. The practice of jury trial is at the heart of our criminal justice system. There can be no erosion of this. We stand by that." https://www.exchangechambers.co.uk/alternatives-to-the-jury-trial-a-threat-to-our-system-of-justice/; see also, Simon Davis, Law Society president: 'There was a substantial backlog in existence at the time jury trials were suspended, contributed to by restrictions in sitting days, but not one which was seen as justifying moving away from jury trials themselves…Reducing jury numbers and using non-court buildings for additional court rooms are preferable solutions to tackling the backlog than restricting jury trials, especially given the reduction in social distancing measures announced today' cited in Hyde J, 'Legislation to abolish some jury trials could be passed within weeks' 23 June 2020, https://www.lawgazette.co.uk/news/legislation-to-abolish-some-jury-trials-could-be-passed-within-weeks/5104739.article

professional criminals at the general public's expense. Some of these sentiments are captured by the mainstream journalist Simon Jenkins, who recently opined at length that:

> *"Jury trials are archaic and should be abandoned other than in exceptional cases…. After three terms as a juryman, I am convinced that juries are a costly indulgence. They have nothing to do with justice except often to distort it…. Few countries any longer use juries, and most of them are former British colonies, such as the US, Canada and Australia. They are a relic of medieval civic duty that once embraced compulsory service as constables, vestrymen and dog-catchers…. Most substantive disagreement in criminal trials is over identity, digital electronics or detailed finance. These issues are usually of technical fact, rather than a balance of observation. They are rarely clarified by legal rhetoric, any more than would be a surgical operation or a scientific experiment. In addition, jury verdicts never give reasons, which must increase their susceptibility to being appealed. As a lawyer of my acquaintance put it, "juries are just cost factories."*[72]

This built upon earlier claims by Jenkins that:

> *"Trial by jury is a hangover from days when England was ruled by manorial courts and vestrymen, by impressed constables, "pricked militias" and compulsory dog-catching was the order of the day. Juries were an advance on lynching and trial by combat, ordeal and torture, but only just. Mark Twain thought them "the most ingenious and infallible agency for defeating justice that human wisdom could have devised" – although he failed to mention the revenue, they bring lawyers."*[73]

Such media criticisms were advanced following the collapse of the trial of Vicky Pryce in 2013. Pryce, as the former chief economist of a number of large public corporations and wife of a government minister (Nick Huhne) was a notable public figure. Her original trial was regarded widely as a damning indictment of the use of juries in criminal proceedings; it was dismissed following the judge's ruling that the jury suffered from "absolutely fundamental deficits in understanding"[74] on the part of the jurors. This outcome provided opponents of trial by jury

[72] Jenkins S, Our justice system is in crisis, so why not abolish jury trials? The Guardian, 22nd January 2021. https://www.theguardian.com/commentisfree/2021/jan/22/justice-system-crisis-abolish-jury-trials-covid last accessed 1/9/2022

[73] Jenkins S, Juries? It's time they went the way of the ducking stool, The Guardian, 21 February 2013, https://www.theguardian.com/commentisfree/2013/feb/21/juries-time-ducking-stool last accessed 5/9/2022

[74] Davies C, Vicky Pryce faces retrial after jury 'fails to grasp basics' The Guardian, 20 February 2013 https://www.theguardian.com/uk/2013/feb/20/vicky-pryce-retrial-jury last accessed 5/9/22

significant press, with an ensuing media frenzy.[75] It led Melanie Phillips, another prominent media commentator, to opine that: "Inevitably, the question will be asked whether the jury system is breaking down because some of the public are no longer adequate to the challenge of understanding even basic English, let alone the fundamental rudiments of a trial… it is difficult to deny that this [trial] has exposed a breath-taking level of ignorance and stupidity."[76]

In spite of such mainstream criticisms, the Law Commission has repeatedly stressed in its Consultation Papers the central importance of the system of trial by jury in the United Kingdom. This arguably the continued importance of the lay jury ensures that the orientation to substantive justice remains vital and strong.[77] On this basis, the Law Commission has always considered the impact of issues such as prosecution appeals against judges' ruling and made sure that any recommendations that are made do not diminish the importance of the role of the jury.[78]

3.6 The Mechanics of Jury Trial

In recent years, after Auld LJ's Review of the Criminal Courts of England and Wales, the jury system has undergone significant amendments to its structure, such as whom is qualified to sit on a jury.[79] Auld's reforms can be seen to contain managerialist undertones with several references made to national bodies such as a 'National Criminal Justice Board' acting as a single centrally funded agency; a far cry from the idea of local justice that lay participation in the form of lay magistrates and lay jurors were initially designed and arguably still provide.[80]

In England, a jury is comprised of twelve jurors with no alternate jurors attending the trial. A trial will be continued as long as the number of jurors does not fall below nine.[81] Qualification to sit as a juror is governed by the Juries Act 1974. To serve as a juror an individual has to be registered as a Parliamentary or Local Government elector; aged between eighteen and seventy

[75] Ten Questions posed by Vicky Pryce Jury https://www.bbc.co.uk/news/uk-21521460 20th February 2013 last accessed 10/2/ 2021
[76] Phillips M, Do we need IQ Tests for juries? Vicky Pryce trial has exposed a breath-taking level of ignorance and stupidity, Daily Mail, 20 February 2013, https://www.dailymail.co.uk/news/article-2282001/Do-need-IQ-TESTS-juries-Vicky-Pryce-trial-exposed-breathtaking-level-ignorance-stupidity.html last accessed 1/3/22
[77] Damaska M R, The faces of justice and state authority, Yale University Press 1986 P16-38
[78] Law Commission Consultation Paper No 158, Prosecution Appeals against Judges' Rulings
[79] Auld LJ, Review of the Criminal Courts of England and Wales, Lord Chancellor's Department 2001
[80] Auld LJ, Review of the Criminal Courts of England and Wales, Lord Chancellor's Department 2001 Chapter 2
[81] See Section 16(1) of the Juries Act 1974

six[82] and been ordinarily resident in the United Kingdom, Channel Islands or the Isle of Man for at least five years since attaining the age of thirteen.[83] Section 68 of the Criminal Justice and Courts Act 2015, disqualifies individuals from service if they are in hospital, subject to recall to hospital, subject to a community treatment order as a result of a mental health condition, on bail or who have received certain criminal sentences.[84] From those eligible for service, the Jury Central Summoning Bureau randomly and electronically selects from the electoral roll, and finally by an open ballot in the court.[85] Mechanically, the Lord Chancellor is responsible for juror summoning[86] and the distribution in the Crown Court. Annually approximately 400,000 people are called for jury service.[87] Failure to attend can be a breach of s.20 Juries Act 1974 and constitute contempt of court.[88]

The Law Commission has repeatedly stressed, in its Consultation Papers, the central importance of the system of trial by jury in the United Kingdom and arguably that the continued importance of the lay jury ensures that the orientation to substantive justice remains vital and strong. This has meant that the Law Commission has always considered the impact of issues such as prosecution appeals against judges' ruling and made sure that any recommendations that are made, do not diminish the importance of the role of the jury.

In spite of this support from central government, even the strongest of trial by jury advocates concede that model needs some reform to enable it to continue as a constitutional stalwart of the English Legal System. Much of this mooted reform is designed to ensure that the jury remains competent and legitimate in engaging with new emerging areas of law, which would otherwise be unlikely to be tried by jury due to the underlying complexity of the trial content. Moreover, as noted in previous chapters, the criminal justice system is coming under increasing financial pressure to reform its methods and structures, which exerts pressure to move away from the traditional adversarial model of criminal justice founded on principles of Anglo-American Classical liberalist principles to a more managerialist approach. The key questions

[82] See Section 1(1)(a)(b) and Schedule 1 of the Juries Act 1974 and Section 68 of the Criminal Justice and Courts Act 2015; Section 68 Criminal Justice and Courts Act 2015
[83] Schedule 1 of the Juries Act 1974 and Schedule 33 of the Criminal Justice Act 2003
[84] See House of Lords (n 37) https://bills.parliament.uk/bills/1343 last accessed 9/9/22
[85] See Section 11(1) of the Juries Act 1974
[86] Jurors are randomly selected electronically by the Jury Central Summoning Bureau from the electoral roll and by open ballot in court.
[87] Davis M, Croall H and Tyrer J, Criminal Justice (4th edition, Pearson 2010) P312
[88] Juries Act 1974 outlines the criteria need to qualify to serve on a jury

therefore become whether trial by jury can continue in the modern world – and if so, in what form.

Before assessing the key issues trial by jury needs to address it is important to discuss the contemporary English court structure and the jury's place in it. Trial by jury, as stated previously, is not clearly codified in any constitutional statutes, instead it is regulated by ordinary statute subject to alteration by Acts of Parliament. Devlin also highlighted this when he argued that "[t]he jury system is the creation of the judges, Statutes have touched it only on the fringe."[89] Indeed, Lloyd-Bostock and Thomas have stressed the ease with which the right to trial by jury can be amended due to its governance by ordinary statute.[90]

3.7 Flaws in the Jury system

The next section will assess some of the key critical claims made about the jury system. Thematically, the discussion will explore criticisms of the fundamental foundations of the jury system, before addressing more technical questions concerning jury diversity, acquittal rates, jury nullification, the impact of the media and jury tampering. Collectively these themes will help provide a lens through which to analyse not simply the benefits the jury can bring in terms of representation of the lay voice in the system but also the ability for the jury to be subjected to extraneous influences and the impact these could have on public perception of fairness and justice. The validity or otherwise of these criticisms informs the legitimacy of the jury as an institution.

3.7.1 The role of the jury: historical accident?

Critics from academia have made significant contributions to the debate on the future of the jury.[91] Some, for example, have pointed to the need to restrict jury trial; in particular because the emergence of the system is more historical accident than conscious design, taking shape in

[89] Devlin P, The Judge (1st edition Oxford University Press 1979) P117

[90] Lloyd-Bostock and Thomas (1999) Decline of the 'little parliament': juries and jury reform in England and Wales. Law and contemporary problems , 62 (2) P10-11

[91] Perhaps the best example of a critique of the jury system is from US Judge J Frank: "While the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour'. (Skidmore v Baltimore and Ohio Railroad, P167 F. 2d. 54 (1948).) See also, Ashworth A, The Criminal Process: An Evaluative Study (Oxford, Oxford University Press: 1998, 2nd Edition).

"a piecemeal and haphazard fashion."[92] Darbyshire has been at the vanguard of such attacks on the jury, pointedly arguing that:

> *"The symbolic function of the jury far outweighs its practical significance . . . this sentimental attachment to the symbol of the jury is dangerous. Adulation of the jury is based on no justification or spurious justification."*[93]

She has further contended that in contemporary English society the significance if the jury is much more limited than is generally accepted in policy circles, arguing that: "The jury's symbolic significance is magnified beyond its practical significance by the media, as well as academics, thus unwittingly misleading the public."[94]

The crux of many of the critiques of the jury system is that jurors must be less capable than professional judges in deciding legal issues correctly. Using juries therefore increases the potential for mistaken verdicts.[95] This view is based upon two key issues: (i) a claim about the optimal route to arriving at verdicts in criminal cases; and (ii) a more fundamental claim concerning the role of the judiciary in the modern democratic state.

3.7.2 The optimal route to verdicts

One of the major criticisms of the jury is that a judiciary, administered by professional lawyers, would deliver verdicts with greater consistency and fairness. This is particularly the case in relation to trials of a complex nature – those involving financial or fraud disputes, for example – which may test the limits of understanding of 'ordinary' laypersons. This claim is for the most part theoretical and is based on the axiom that the more educated the person concerned, the more likely it is that they will understand the complexities involved in such trials. Since judges are, on average, much more highly educated than laypersons, it is assumed that they would adjudicate complex cases more accurately than a jury might. Yet, as noted by Auld, the final conclusion of this calculus is not necessarily supported by evidence.[96] For example, the

[92] Darbyshire argues, for example, that "'There is little legal logic or design [to the jury] . . . They have simply evolved through the last 10 centuries or more." See Darbyshire P, 'The lamp that shows that freedom lives — is it worth the candle?' (1991) Criminal Law Review P740, P741.
[93] See Darbyshire P, 'The lamp that shows that freedom lives — is it worth the candle?' (1991) Criminal Law Review P740
[94] Darbyshire P, 'The lamp that shows that freedom lives – is it worth the candle?' (1991) criminal Law Review P740,P 746. In fact, Darbyshire has raised concerns about how conceptually sound the discussions of the jury and has pointed out that not enough focus has been placed on the role of the magistracy in contemporary English criminal justice, a key theme of this thesis.
[95] Brooks T, The Right to Trial by Jury, Journal of Applied Philosophy, Vol. 21, No. 2, 2004
[96] Lord Justice Auld, (2001) Review of the Criminal Courts of England and Wales (London, HMSO), para. 191

UK Roskill Committee found no evidence that fraud trials results in higher acquittal rates than other forms of criminal case.[97] The Committee also found that lawyers deliberately attempted to confuse jurors in such trials. This is supported by other evidence which suggest that judges do not systematically regard juries as possessed of less capacity of judgment than other legal professionals.[98] This indicates that, if juries do exhibit a lower capacity to comprehend complex issues, it may not simply attributable to educational levels.

Juries are not immune from making errors, of course. Many studies demonstrate that juries are more swayed by the performance of legal counsel during a trial, rather than by the facts at hand. As noted, centuries ago by Aristotle, the logic of an argument (*logos*) forms but one element of the persuasiveness of a person's rhetoric: speakers to an audience (including a jury) must convince their listeners of the correctness of their position additionally through appeals to the speaker's own credibility (ethos) and to the emotions of their audience (pathos).[99] This is, naturally, particularly pervasive in an adversarial setting, where personalities may be as important as evidence. On this point, Zweigert and Kotz contend that:

> *"It will be obvious that "adversary procedure" encourages attorneys to go to the very limits of what is morally and professionally acceptable, perhaps sometimes even to overstep them, by "preparing" their witnesses rather intensively for examination and cross-examination, and by dressing up as unalloyed truth what the attorney well knows to be a pack of lies."*[100]

Yet, judges themselves may also exert undue influence on the outcome in jury trials, deliberately or otherwise.[101] It is also the case, of course, that even where juries may err, all legal systems which employ the jury as a legal device, there is a legal right of appeal to a body composed of professional jurists.[102] This blunts criticism of the jury as an institution to some degree. Further, even the finding that judges are more impartial than jurors (based upon their lower acquittal rates in comparison to juries)[103] does not mean that they are entirely

[97] Roskill Committee (1986) Fraud Trials Committee Report (London, HMSO), para. 8.35
[98] Kalven Jr H, and Hans Zeisel (1966) The American Jury (Boston, Little, Brown, & Co.).
[99] Aristotle, The Art of Rhetoric (1991: Penguin Classics).
[100] Zweigert, K and Kotz H 1998, 3rd Edition Introduction to Comparative Law T. Weir (trans.) Oxford, Clarendon, p. 275.
[101] See Shuy R W (1995) How a judges voir dire can teach a jury what to say Discourse and Society, 6, p 207–22.
[102] Brooks T The Right to Trial By Jury Journal of Applied Philosophy Vol 21 Issue 2 2004 p.202.
[103] See Ashworth A (1998, 2nd Edition) The Criminal Process: An Evaluative Study (Oxford, Oxford University Press).

independent from the environment in which they work or live, in which they are exposed to the equivalent myriad of biases and prejudices of any layperson.[104]

A further criticism of the jury's role is based on the notion that judges – given their general experience and expertise – are more likely to come to the 'correct' verdict in a given case. Although 'randomness' of verdicts is largely eliminated from the jury system by the employment of a number of jurors, it is still commonly claimed that judges are more accurate in rendering verdicts; indeed, such claims are not new.[105] Yet, when replication studies are undertaken to estimate the accuracy of jury verdicts vis-vis those of judges[106], it is notable how often there is congruence between the verdicts of judges and juries. In their canonical study, Kalven and Zeisel found that juries and judges agreed at least 78 percent of the time.[107] In the case of civil jurisdictions employing mixed tribunals (comprised of panels of both judges and jurors), judges and jurors agreed up to 95 percent of the time.[108] A more recent by Spencer found that, in the US context, based on the differential judge and jury conviction rates, juries wrongfully convict in 25 percent of cases, whereas judges wrongfully convict in 37 percent of cases. In contrast, juries wrongfully acquit in 14 percent of cases, whereas judges wrongfully acquit in just 2 percent of cases. Based on these studies, it is therefore unclear as to whether judges or juries reach verdicts which are more accurate.

3.7.3 The role of the judiciary in modern democracies

A secondary problem enunciated by critics of jury trials is the fact that juries may render different verdicts on occasion from those professional judges would have reached. There are many reasons for such occurrences; however, the result is that juries do not, in some circumstances, uphold the law. In doing so, juries may subvert democracy, because the will of the legislature is not upheld. As noted at length by O'Hanlon:

> *"[I]t is often put forward as one of the merits of the jury system that a jury can bring*

[104] Jackson J and Doran S (1995) Judge Without Jury: Diplock Trials in the Adversary System (Oxford, Clarendon), p. 292.
[105] The earliest example of such a study is arguably Poisson, S.D., Recherches sur la Probabilite' des Jugements en Matiere Criminelle et en Matiere Civile, Prkdedes des Regles Generales du Calcul des Probabilites, Paris: Bachelier, Imprimeur-Libraire, 1837. See also EM Borchard EM (1932) Convicting the Innocent: Errors of Criminal Justice. New Haven: Yale University Press.
[106] Spencer B, Estimating the Accuracy of Jury Verdicts, Journal of Empirical Legal Studies, 2007, vol. 4, issue 2, P305-329.
[107] Kalven Jr, H, and Zeisel H (1966) The American Jury (Boston, Little, Brown, & Co.).
[108] Kutnjak Ivkovi, S (1997) Lay participation in decision making: A Croatian perspective on mixed tribunals, Howard Journal of Criminal Justice, 36, p. 407.

about changes in the law of the land by refusing to enforce laws which appear to them to be unjust or oppressive in some way . . . What this means in reality is that the jury, having taken an oath that they will 'true verdicts give according to the evidence' have broken their oath by refusing to give effect to the law of the land. They have usurped the role of parliament which is entrusted by the people with the task of making laws which are in conformity with the will of the people. However pardonable such action on the part of the jury may be in defiance of an oppressive and autocratic regime, it is indefensible in a modern democracy where fundamental rights and freedoms are protected by the country's constitution."[109]

One of the most fundamental drivers of the diversion from existing legal principle is jury nullification, referred to briefly above. Nullification occurs when members of a jury in a criminal trial believe that a defendant is guilty but choose to acquit the defendant anyway.[110] Such acquittals may be driven by one or more motives: for example, the belief that a particular law is unjust[111]; that the prosecution has maliciously brought a trial against a particular defendant[112]; or simply that the jurors are themselves prejudiced in favour of, or against, the defendant.[113] Prominent examples of jury nullification in action include when juries refused to convict radicals charged with publishing seditious attacks on George III[114] and the acquittal of Clive Ponting in 1985 for offences under the Official Secrets Act 1911.[115] A more recent example is the case in which extinction Rebellion protesters were cleared of criminal damage to Royal Dutch Shell premises in London, despite the judge in the case directing the jury to convict the defendants because they had 'no defence in law'.[116]

These issues are of course underlying issues in a managerialist system as opposed to an adversarial system which is better designed to adapt to the issues that jury nullification raises.

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[109] O'Hanlon R (1990/1992) The sacred cow of trial by jury, Irish Jurist, 25/27, pp. 57–68.
[110] Brooks T, A defence of Jury Nullification 2004 Kluwer Academic Publishers 401-423, 2004
[111] See Bushell's Case (1670), discussed above.
[112] Article 19 and Liberty, SECRETS, SPIES AND WHISTLEBLOWERS Freedom of Expression and National Security in the United Kingdom (November 2000) available at https://www.article19.org/data/files/pdfs/publications/secrets-spies-and-whistleblowers.pdf accessed 16 October 2021
[113] Kennedy, R. "Racial Conduct by Jurors and Judges: The Problem of the Tainted Conviction", pp. 277-282, and "Black Power in the Jury Box?", pp. 295-310, Race, Crime and the Law (1997).
[114] Beattie J.M, 'Crime and the Courts in England' 1660-1800 (1986) P424-45
[115] Smith J.C. and Birch D.J. "Case and Comment- R v Ponting" (1985) Crim L Rev P318
[116] See PA Media, Jury acquits Extinction Rebellion protesters despite 'no defence in law', The Guardian, 23 April 2021 available at https://www.theguardian.com/environment/2021/apr/23/jury-acquits-extinction-rebellion-protesters-despite-no-defence-in-law accessed 16 October 2021

And yet, judge-led legal processes are arguably no less immune from such influences as those involving lay representatives. As noted by Darbyshire – a critic of the jury trial as it exists today – justices and judges "are frequently criticised for their irrational and inconsistent sentencing patterns and gratuitous remarks."[117] Indeed, as argued by Brooks, in jurisdictions where reasoned judgments are delivered by professional judges, the influence of politics is much more recognisable.[118]

Moreover, whilst it may be the case that a small minority of juries are nullified, it is the case that in common law jurisdictions – which exhibit both the highest level of lay involvement in the justice system and the most adversarial system of trial – judges themselves are able to 'make' law via their judgments in particular cases. Unlike in civil jurisdictions – which are largely limited by precedent and by codes – in common law countries, judges can mould – indeed, can create – new legal precedents, with little democratic checks or balances.[119] In contrast, the verdict of a jury can never create binding legal precedent.

Some academics and practitioners have questioned whether the lack of transparency in relation to jury deliberations, undermine the institution. Transparency in justice is, as discussed in previous chapters, a hallmark of modern democratic states. The right of individuals to be made aware of the law, the nature of any charges made against them, and the processes by which their actions are to be judged, are fundamental pre-requisites of equality before the law. In consequence, judicial transparency requires the law and its organs to be made public, so that citizens have knowledge of the legal code.

In spite of this of course, jury deliberations are done in secret. In the past, jury deliberations had taken place in the courtroom, free for public scrutiny. Today, however, once all evidence has been presented to them, members of a jury are required to debate that evidence in secret until they deliver a verdict. They are, moreover, not required to provide reasons in delivering their verdict, and do not have to explain how they reached their decision, unlike judges. On the other hand, of course, judges at the equivalent level of magistrate or crown court in countries which do not employ juries rarely deliver comprehensive judgments, either.

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[117] Darbyshire P (1991) The lamp that shows that freedom lives — is it worth the candle? Criminal Law Review, pp. 740–52.

[118] Brooks T A defence of Jury Nullification 2004 Kluwer Academic Publishers 401-423, 2004 See Bushell's Case 1670 p.199.

[119] The seminal case of Roe v Wade 410 U.S. 113 (1973), for example, ended the prohibition of abortion across the federal United States, with no legislative intervention.

Finally, on this theme, the benefits of transparency might be overstated, if that is used to drive a wedge between lay participation in the criminal justice system and procedure. It is arguably to be welcomed that legal counsel in criminal cases are forced to publicly state their respective cases, in terms and language decipherable to lay persons. Put differently, if court proceedings in the criminal domain did *not* require the presence of lay persons and, more specifically did not require them to adjudicate, what might the effect on the justice system and civil discourse more generally be? Each specialised profession, including the legal profession, develops its own terminology, its own procedures and traditions, as well as its own technocratic devices over the course of time. As noted by Brooks, "[p]ersons can be charged and convicted of crimes in a public hearing, but the legal arguments against them might sound as if the solicitors were speaking an unknown foreign language…It is easy to see the possibility of courtroom debate becoming the exclusive domain of legal professionals, whereby judicial transparency is not realised despite well publicised proceedings."[120]

By requiring the involvement of lay citizens without legal training or experience in the criminal justice and court systems, legal professionals must aim to make a compelling case without recourse to arcane terminology or specialist language. This Hegelian danger is mortal: "knowledge of right and of the course of court proceedings, as well as the ability to pursue one's rights, may become the property of a class which makes itself exclusive . . . by the terminology it uses."[121] The presence of laypersons therefore tends to elevate transparency, rather than reduce it. By requiring legal professionals to address an audience representative of the citizenry rather than of the legal class, the courts' democratic accountability is magnified in this context.

3.7.4 Jury Composition and Diversity

The composition of a jury is a critical feature of the jury process and to achieving a fair trial. A key argument in the fairness of trial by jury has always been that one is judged by one's peers: the diversity of the jury is therefore critical if it is to be truly representative of a community. In general the meaning attached to 'trial by one's peers' encompasses concepts

[120] Brooks T A defence of Jury Nullification 2004 Kluwer Academic Publishers 401-423, 2004
See Bushell's Case 1670 p.204
[121] Hegel G.W.F. (1991) Elements of the Philosophy of Right, A. W. Wood (ed.), H. B. Nisbet (trans.) (Cambridge, Cambridge, Cambridge University Press) p.258

such as 'one's equals or neighbours'; 'a body of fair-minded persons'; 'an independent or impartial body;' a 'randomly chosen body'; or 'a representative body.'[122] in the words of Lord Denning: "We believe that 12 persons selected at random are likely to be a cross-section of the people as a whole and thus represent the view of the common man."[123]

The impartiality or otherwise of juries has always been contentious. For example, in relation to ethnic minority representation on juries, there are significant concerns – unfounded or not – that juries may not be representative of relevant social groups and that outcomes may be unduly prejudiced in this regard. Such concerns are, perhaps understandably, often more vocalised in the United States context, thanks to the more prominent focus on racial discrimination in that jurisdiction.[124] Yet, this topic has not gone unanalysed in UK circles either. In particular, there is an oft-expressed fear that all-white juries may be prejudiced against non-white defendants or, conversely, that all-white juries may be unduly lenient towards white defendants. These fears have been expressed frequently in research on popular attitudes towards the criminal justice system; for example, it is commonly cited by respondents to the British Crime Survey.[125] Moreover, such attitudes arguably persists because ethnic minorities are arrested and convicted of crimes in disproportionate levels to their white counterparties.[126] In spite of these concerns, the common law position, established in R v Ford[127], holds essentially that

[122] Marshall G, 'The Judgment of One's Peers: Some Aims and Ideals of Jury Trial' in Walker N and Pearson A (eds.) The British Jury System (1975) p.5.
[123] Crown Court at Sheffield, ex p Brownlow [1980] QB 530 at P541.
[124] Equal Justice Initiative (June 2010). "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy". Equal Justice Initiative, which "uncovered shocking evidence of racial discrimination in jury selection in every state"; Joshi A.S. and Kline C.T, 'Lack of Jury Diversity: A National Problem with Individual Consequences' American Bar Association, 1st September 2015, https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/; Rose M, Diamond S.S, Ellison C.G & Krebs A (2018) Juries and Viewpoint Representation, Justice Quarterly, 35:1, P114-138.
[125] Crime, Policing and Justice: The Experience of Ethnic Minorities - Findings from the 2000 British Crime Survey Home Office Research Study 223 (2001); Black and Minority Ethnic groups' experiences and perceptions of crime, racially motivated crime and the police: findings from the 2004/05 British Crime Survey Home Office Online Report 25/06 (2006).
[126] In 2019, according to the Annual Population Survey around 16% of the general population in England and Wales were from a BAME background. However, people from BAME backgrounds made up 23% of people arrested, 21% of people convicted of a crime and 27% of people in prison. On the other hand, Overall, in 2019 defendants from the White ethnic group were more likely to be convicted (85% of which were found guilty) than those from BAME groups (79%). See Yasin B and Sturge G, Ethnicity and the criminal justice system: What does recent data say on over-representation? House of Commons Library Insight, 2nd October 2020 at: https://commonslibrary.parliament.uk/ethnicity-and-the-criminal-justice-system-what-does-recent-data-say/. See also, The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System (2017), which found inter alia (at p.7), that: "analysis of sentencing data from 2015 shows that at the Crown Court, BAME defendants were more likely than White defendants to receive prison sentences for drug offences, even when factors such as past convictions are taken into account."
[127] [1989] 3 ALL ER 445.

neither is there a principle requiring that a jury be racially balanced nor should race be considered when selecting juries, although juries may be altered where it is found that members exhibit a history of racial discrimination.[128]

Allegations have been made that the jury is not diverse or representative of the community to which it purports to represent are therefore commonplace, although concrete evidence of such allegations is generally absent.[129] Early research into jury diversity had suggested that ethnic minorities were under-represented on juries; however, these studies were highly limited in scope. The first concentrated on just one Crown court in Birmingham, necessarily limiting the power of its findings.[130] The second, performed on behalf of the Runciman Commission[131], found that certain ethnic groups were over-represented on juries, whereas others were under-represented.[132] However, the findings of this study were based on national aggregate data and therefore regional ethnic minority population data, which would affect participation in particular regions, was excluded from the analysis. A more recent study of jury participation in urban areas conducted for the Auld Review, examined court proceedings in places including Liverpool, Nottingham and Durham, suggested ethnic minority under-representation, but Auld himself concluded these observations were limited and unscientific.[133]

Cheryl Thomas' research was designed to address such issues in relation to jury selection and diversity in the United Kingdom. The findings from her comprehensive study provide the most conclusive evidence to date that fears concerning juror diversity are misconceived.[134] Specifically, Thomas's research showed that "serving jurors were remarkably representative of the local community in terms of ethnicity, gender, income, occupation and religion."[135] Indeed, Thomas concluded that ethnic minorities were fairly represented in English crown court trials.[136] Thomas attributes some of the apparent contradictions between her findings and

[128] Sander v UK Case no.34129/96 European Court of Human Rights.
[129] Thomas C Are Juries FairMinistry of Justice Research Series 1/10 February 2010 https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf P1 last accessed 10/9/22
[130] Baldwin J and McConville M, Jury Trials Oxford University Press 1979.
[131] Royal Commission on Criminal Justice Report, Cm 2263 London: HMSO 1993
[132] Zander M and Henderson P, Crown Court Study, the Royal Commission on Criminal Justice Research Study No. 19 (London: HMSO, 1993).
[133] Review of the Criminal Courts of England and Wales, Ministry of Justice Chapter 5https://www.criminal-courts-review.org.uk/ccr-05.htm last accessed 31/8/22
[134] Thomas C (with Balmer N) Diversity and Fairness in the Jury System Ministry of Justice Research Series 2/07 (June 2007)
[135] Thomas C, 'Exposing the myth of jury service' (2008) 6 Criminal Law review P415, P422
[136] Thomas C, Diversity and Fairness in the Jury System (1st edition, Ministry of Justice, 2007 P116

earlier studies (other than methodological differences) to three highly relevant developments: (i) jury selection was reformed in 2001 by the establishment of the Central Jury Summoning Bureau, which standardised and increased the transparency of all jury selection processes[137]; (ii) the improvement in data gathering on the national population which informed the 2001 census; (iii) new eligibility requirements for jurors which were introduced in 2004[138]; and (iv) the introduction of randomised computer selection of jurors in 2001.[139]

In short, Thomas found that a number of 'myths' which persisted concerning jury service were without foundation. With respect to jury summoning, the study found:

(i) No significant under-representation of BAME groups amongst the (large) sample of Crown courts (in 83 of 84) in the survey;

(ii) That, contrary to received wisdom, the main factor affecting response to jury service summonses was not ethnicity, but residential mobility (in the case of both white and BAME respondents, engagement with summonses was high);

(iii) Juries were generally representative in terms of ethnicity of the local catchment areas of the court concerned (81 of 84 surveyed);

(iv) Few of those eligible for jury service avoid it, and the levels of service rise amongst full-time employed middle-to-high income and higher status professionals;

(v) Jury pools connected to local courts reflect closely the local demographics of population in terms of gender, age, ethnicity and employment status; and

(vi) Perhaps most importantly, it was found that juries did not discriminate against defendants based upon the defendants' race, regardless of the ethnic or racial composition of the jury concerned. This was in spite of the fact that race did influence some individual jurors in specific cases where race was not a relevant factor.[140]

This research reinforces the notion that, far from complying with the caricature often portrayed by the media, juries are in fact highly-representative, ethnically diverse and comprised of

[137] "A central body that uses a computer system to select jurors at random from electoral rolls. There is a link with the Police National Computer which permits an automatic check against each person selected." See Gooch G and Williams M, A Dictionary of Law Enforcement (2004, Oxford University Press, 1 ed.) p.54.
[138] Criminal Justice Act 2003 c.44 Schedule 33.
[139] Daly G and Pattenden R, 'Racial Bias and the English Criminal Trial Jury', The Cambridge Law Journal Vol. 64, No. 3 (Nov. 2005), p 678-710.
[140] Thomas C, Diversity and Fairness in the Jury System, 1st edition, Ministry of Justice, 2007

conscientious and responsible citizens. Accordingly, critiques which are based on the notion that powers to compose racially mixed juries are wide of the mark, because such juries are already being empanelled. More fundamentally, Thomas' data suggests that perceived weaknesses in the trial by jury process are borne out more from urban myth than reality, rendering the notion that diversity concerns as significant as unsupportable.

In comparison, research into the diversity of non-lay participants in the criminal justice system – suggests that a problem of diversity subsists. For example, district judges as a class – which will be analysed in more detail in the following chapter – exhibit a fundamental lack of diversity. In spite of a focus on increasing diversity amongst the judicial class, as of 1st April 2021, Black, Asian and minority ethnic men and women each accounted for 5% of judges in post. White women accounted for 35% and White men accounted for the remaining 55%. Moreover, the proportion of ethnic minorities is lower still for senior court appointments; just 4% of High Court and above appointees were non-white.[141] In the case of the office of District Judge (magistrate), which will be analysed in depth in the following chapter, as of 2020, only 38% of those in this position were female. Only 9% of District judges were of BAME origin.[142]

This data would, prima facie, indicate that, in spite of criticisms of the jury's qualities in terms of representativeness, the introduction of a model based on the involvement of non-laypersons – a hallmark of managerialist models – the result might be the production of a less diverse section of the community being represented and thus a less representative system than the current model. This diversity issue for the judiciary is not insurmountable, and concerted efforts have been made to address it over recent years. There is precedent for this, as successful efforts have been made to address the composition of lay magistrates, an evolution which will be discussed in the next chapter.

Theoretically given that the jury is more representative of the community from which the defendant is drawn, any disparity in verdicts between juries and professional judges might be regarded as a positive outcome. Trial by jury is of course meant to symbolise trial by ones'

[141] Ministry of Justice, Diversity of the judiciary: Legal professions, new appointments and current post-holders – 2021 Statistics (published 15 July 2021) available at: https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2021-statistics/diversity-of-the-judiciary-2021-statistics-report last accessed 1/7/22

[142] Ministry of Justice, Diversity of the judiciary: Legal professions, new appointments and current post-holders: 2020 statistics https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918529/diversity-of-the-judiciary-2020-statistics-web.pdf last accessed 1/7/22

peers and serve as vehicle for community involvement in the criminal justice system. This does pose the question as to whether too quickly presumptions and assumptions are drawn in relation to verdicts with a focus on their being a fault on behalf of the system itself rather than the system working as intended. This would seem to be supported by the data on conviction rates between the Crown Court and magistrates in 2018 which, when analysed, reveals that the conviction rate was 80% in the Crown Court, whereas in the magistrates court it was 84.8%.[143] Such disparities are not statistically significant. Any gulf between the models employed is therefore not as great as one might fear.

3.7.5 The impact of the media on jury decision – making

This section will discuss the impact the growth of the internet and in particular social media have had on the ability for the jury to perform its duties and protect the right to a fair trial. The challenge for today's society is how best to adapt to a new fabric of culture where the flow of information is instant, to a regime and framework developed before the internet was but an idea. As this section will make clear, the growth and reach of social media means that the problem of prejudicial online publicity for cases is not one that is disappearing; rather it is a crucial issue that must be addressed. In doing so, this section will look at the principles behind the limited exceptions to the rule that jury deliberations should remain secret before analysing s.8 of the Contempt of Court Act as well as the impact of s69-73 of the Criminal Justice and Courts Act 2015, in particular the new offences they introduced in relation to juror misconduct and the surrendering of electronic communication devices.

The symbolic function that has been attached to the jury has been one of the fundamental concepts as to the reluctance to allow investigations to take place into jury deliberations which would of course give insight into the impact the media and prejudicial publicity have.[144] It is a common law rule that there is a prohibition on the admission of jury deliberation evidence in criminal trials which was supported by the Department of Constitutional Affairs who felt it was necessary in order to maintain public confidence in the jury system; to allow for frank discussions among the jury when reaching their decisions ; to protect the privacy or safety of

[143] CPS key performance measures 2017/2018 q1-3 CPS

[144] McEwan R, Eldridge J, Caruso D, Differential or deferential to media? The effect of prejudicial publicity on judge or jury international journal of evidence and proof 2018 Vol 22(2) 124-143 as well as R v Mirza; R v Connor and Rollock "004 UKHL 2 2004 AC 1118

the jury or expose them to intimidation and finally to prevent the finality of the verdict being undermined to the point that justice cannot be administered.[145] This common law rule has best been articulated by Lord Slynn:

> "*The prohibition on receipt of evidence takes effect from the moment the jury is empanelled and covers not only what took place in the jury box or the jury room but covers any statement as to what the jury believed the attitude of other jurors to be as deducted from their behaviour in the box or as to what the juror thought the effect of the verdict to be. Once the verdict is given, in the presence of all the other jurors then that is the end of the matter, and the Court of Appeal would not inquire as to whether the verdict truly reflects what the juror thought."*[146]

Despite these apparent prohibitions as stated by Lord Carswell in R v Smith; R v Mercicea there are exceptions to this rule, including where the jury is alleged to have been affected by extraneous influences or where complaints have been made during the trial about improper behaviour or bias by jurors. Indeed, it is these exceptions which have allowed the prosecution of jurors accused of breaching s.8 of the Contempt of Court Act 1981. Section 8 of the Contempt of Court Act 1981 prohibits any enquiry into jury deliberations and makes illegal the systematic research of jurors by observation or recording of deliberations.

A key issue for trial by jury is therefore to ensure that the juries are not improperly influenced, this can of course be through published material they inadvertently discover or through their own research which was termed "Trial by Google[147]" by Attorney General Dominic Grieve QC MP. Contempt of court functions to regulate the behaviour of those involved in the proceedings. The Contempt of Court Act 1981 put the strict liability rule on a statutory footing. This rule outlined that publication of proceedings?[148] could be held in contempt regardless of their intent in relation to conduct which is deemed to interfere with the course of justice. This rule therefore recognised that the jury do not live in a vacuum and will read the newspapers or watch the news/ listen to the radio potentially before they have even been directed not to by a

[145] Department of Constitutional Affairs, Jury Research and Impropriety CP 04/05, 21 January 2005 46 available at www.dca.gov.uk/consult/juryresearch/juryresearch_cp0405.htm accessed 30th October 2011
[146] R v Mirza; R v Connor and Rollock 2004 AC 1118 at 1143.
[147] Trial by Google? Juries, Social media and the internet Speech 6th February 2013 Attorney General Domini Grieve QC MP https://www.gov.uk/government/organisaations/attorney-generals-office) last accessed 14/2/22
[148] Section 2(2) of the Act limited the strict liability rule to apply only to "a publication which created a substantial risk that the course of justice in the proceedings will be seriously impeded or prejudiced."

judge. AG Grieve felt in 2013 that the chances of jurors seeing previous archived news reports were relatively slim provided they didn't actively look for them. The issue of trial by Google is different and necessitates a discussion of the common law of contempt. Common law contempt is intentional and designed to undermine the administration of justice. Robust juror instructions direct the jury not to conduct their own research into the case. Indeed, the risk posed by trial by Google, or any other search engine or social media outlet is significant and offends the principle of open justice[149]. Once a juror has been exposed to material it becomes impossible to ascertain on what material the juror reached their decision and trial by Google undermines the principle of proceedings in open court with adversarial scrutiny of evidence. Trial by Google enables access to unscrutinised evidence and arguably undermines a defendant's right to a fair trial as well as contravening open justice. The threat posed by trial by Google was articulated by the Lord Chief Justice in the Dallas Case:

> "*Modern technology and means of communication are advancing at an ever-increasing speed. We are aware that reference to the internet is inculcated as a matter of habit into many members of the community and no doubt that habit will grow. We must however be entirely unequivocal. The problem therefore is not the internet: the potential problems arise from the activities of jurors who disregard the long-established principles which underpin the right of every citizen to a fair trial."*[150]

It is at this point important to discuss Professor Thomas's extensive research published in 2010 into Juries.[151] Thomas found that 78% of jurors stated that they used the internet during the trial, this included checking emails and look at information pertinent to their interests. Social media[152] is now a prominent feature of modern society and poses risks as argued by Lord Judge "In the context of current technology we must be astute to preserve the integrity of jury trial

[149] Grieves D QC MP speech Trial by Google? Juries, social media and the internet 6th February 2013 https://www.gov.uk/government/organisaations/attorney-generals-office) last accessed 10/9/22
[150] Grieves D QC MP speech Trial by Google? Juries, social media and the internet 6th February 2013 https://www.gov.uk/government/organisaations/attorney-generals-office) last accessed 10/9/22
[151] Thomas C research in 2010 and took place in three different court and looked at 62 cases and 668 jurors and sampled a wide spectrum of cases from those receiving significant media attention during the trial to those receiving none.
[152] "A group of internet-based applications that build on the ideological and technological foundations of the worldwide web which allows the creation and exchange of user generated content – Kaplan and Haenein Users of the world unite the challenges and opportunities of social media 2010 53 1 business Horizon 61

and the jury system.[153] The key issue with jurors accessing the internet during trial is that they may become passively aware of information as in high profile cases it can be difficult to avoid especially if they are regularly accessing new or emails online. This online passive awareness according to Thomas is far more likely than actively searching in relation to a case[154] but arguably poses just as much of a risk that a juror will be influenced and arguably find themselves in breach of Section 8. Indeed, the Law Commission has highlighted that "the internet and social media may make it easier for friends, families and others to identify and communicate with jurors in order to solicit information about their jury service." The impact of social media cannot be underestimated in this regard. Indeed, "the advent of the internet has had a profound impact on a juror's ability and opportunity to seek or disclose information related to their trial.[155]"

Furthermore, Thomas found that jurors on high profile media coverage cases were 70% more likely to remember the media coverage than those on low media profile cases where only 11% recalled the media attention[156]. It is of course worth noting at this point that social media has only gained in prominence since 2010, as has the ability for individuals to have easy access to media coverage such as smart watches, we have yet to see how much of an impact this will have on the figures above.

With this in mind, it is worth revisiting Thomas's findings in respect of the jurors' proactive use of the internet. Thomas focused on three key issues in relation to the internet namely: did jurors understand they should not conduct independent internet searches connected to the case; how did jurors use the internet in relation to the case and did they use social media platforms such as Facebook and Twitter to discuss the case and the implications this raises for jurors being found in contempt of court. Thomas found that in high profile cases 26% of jurors had seen information concerning the case online and 15% had seen this by actively searching for it. In stark contrast in standard cases these figures dropped to 13% and 5%, demonstrating a

[153] Lord Judge introduction by the lord chief justice in the court of appeal criminal division review of the legal year 2010/2011 2011 http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/cop-crim-divreview-legal-year-2011.pdf last accessed 1/9/22
[154] Thomas C Are Juries fair, Ministry of Justice Research Series 1/10 February 2010 https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf last accessed 14/2/22
[155] The Law Commission Contempt of court: a consultation paper 2012 consultation paper No 209 P63
[156] Thomas C Are Juries fair? Ministry of Justice Research Series 1/10 February 2010 https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf last accessed 14/2/22

clear link between media coverage and juror behaviour but it provides no proof as to whether any of this impacted on the verdict delivered by the jury. The consequence of juror misconduct and the ability to access prejudicial material online are grave with the increased risk of miscarriages of justice or trials having to be aborted prolonging the prosecution process and increasing costs in a time of increased financial pressures.

In 2011 a juror was imprisoned for using Facebook in order to contact a defendant in a case she was trying and in January 2012 a juror was imprisoned for 6 months for researching a defendant's previous convictions. After a spate of cases such as those just discussed, the Law Commission expedited its review and proposed "a discrete offence could send an important message to jurors about the seriousness with which such conduct is regarded."[157] The Criminal Justice and Courts Act 2015 adopted this offence under s.68 which made misconduct an indictable offence as well as other offences regarding juror misconduct in sections 71-74. This was a significant step, as judges had been reluctant to proceed against jurors deemed to have breached their judicial officer duties[158]. Judicial duties are being differentiated from ministerial duties, with judicial duties those concerned with deliberation and the use of their judgement rather than duties such as attending court[159]. The Criminal Justice and Courts Act 2015 in sections 69-70 enabled judges to order jurors to surrender their electronic communication devices and enable courts to search for these. S 71-74 created indictable offences in respect of jurors independently researching their cases (s71), communicating this research (s.72), disclosing the basis for the deliberations (s74) and neglecting their duty to try the case on the basis of the evidence they were presented with (s73). These steps represented a significant shift in the adoption of a more punitive approach to juror misconduct, however Thomas based on her extensive research intro juror management argued that "if people believe that simply by making it a statutory offence that will eliminate any inappropriate use of the internet by jurors, they are mistaken.[160]" These offences do indeed draw a line in the sand between pre and post 2015 juror punishment.

The true impact of the media on jury deliberations and behaviour and any impact this may have

[157] Law Commission Contempt of Court; A consultation paper (law Com no 209 2012 para 4.38.
[158] Crosby K, Before the Criminal Justice and Courts Act 2015: juror punishment in nineteenth and twentieth century England Legal Studies Vol 36 NO 2 2016 p179-208
[159] Crosby K, Before the Criminal Justice and Courts Act 2015: juror punishment in nineteenth and twentieth century England Legal Studies Vol 36 NO 2 2016 p179-208
[160] Criminal Justice and Courts Bill Deb 13 Mar 2014 col 128

on the credibility of the trial process can only be drawn when or if researchers are allowed to actively engage with jurors. This would allow researchers to discover how they formed the decisions they did in a trial, however in today's modern age with technology so prominent in society, it remains to be seen how viable if at all it would be to externally monitor the internet use of all jurors during trial.

3.7.6 Jury Tampering

Public involvement in the criminal justice system is not without its risks and jury tampering poses a significant risk to the credibility of the criminal justice system as well as the fairness of the result in any given case. This section will discuss the measures taken leading up to the Criminal Justice Act 2003, before looking at its impact and the precedent established by the Court of Appeal in R v T (R v H, R v C, R v B[161]).

As acknowledged by the European Court of Human Rights in Gregory v UK[162]:

> *"the rule governing the secrecy of jury deliberations is a crucial and legitimate feature of English trial law which reinforces the jury's role as the ultimate arbiter of fact and guarantees open and frank deliberations among the jurors."*

Secrecy in jury deliberations is regarded as a fundamental pre-requisite for the integrity of the institution. Such secrecy has several principal advantages: (i) to maintain public confidence in the jury system; (ii) to preserve the finality of the verdict – as important for acquittals as well as convictions; (iii) to ensure the jury can speak frankly; (iv) to protect jurors from threats and intimidation; and (v) to protect the privacy of jurors.[163]

Jury tampering is usually conducted through bribery or intimidation, whereby jurors are damaged physically and emotionally.[164] Attempts to 'nobble' the court in this way naturally threaten the integrity of verdicts. This is an oft-cited justification for the removal of or

[161] in R v T (R v H, R v C, R v B[161]) 2009 EWCA Crim 1035.
[162] (1998) 25 EHRR 577.
[163] Department for Constitutional Affairs, Jury Research and Impropriety: A consultation paper to assess options for allowing research into jury deliberations and to consider investigations into alleged juror impropriety (2005) Consultation Paper CP 04/05 p.9.
[164] Auld R A Review of the Criminal Courts of England and Wales 2001 Ministry of Justice P218

restriction of access to jury trial altogether.[165] Indeed, such fears were the basis of the so-called 'Diplock courts' which commenced in the 1970s, whereby any person linked to Irish terrorist groups could be tried in a jury-less trial in Northern Ireland.[166] Yet, such fears are not confined to trials of terrorist-related defendants; the Economist claimed in 1981 there were thirteen cases of jury tampering in the Central Criminal Court alone.[167] Accordingly, since the 1960s, measures have been introduced to try to counter the impact of jury tampering. The introduction in 1967 of majority verdicts in the Criminal Justice Act, was regarded as an attempt to mitigate jury tampering. These reforms received a lukewarm reception by some academics, many of whom contended that there was insufficient evidence of jury tampering to justify this change.[168]

Section 51 of the Criminal Justice and Public Order Act 1994 was the first piece of legislation to criminalise an act which attempted to intimidate or harm a juror or witness with a maximum sentence of five years in prison.[169] As demonstrated by the Auld review these measures were insufficient to contain the issue of jury tampering which gained traction in the 1980s. Despite the 1994 Act, jury intimidation continued for example in August 2002 in Liverpool Crown Court a serious drug offences trial of six defendants collapsed when two jurors were intimidated, and another offered a bribe of £10,000 to acquit.[170] A government Consultation Paper in 2005[171] discussed the need for reform of the criminal justice system to try to address this ever-increasing problem threatening the integrity of the trial.

Sections 44-50 of the Criminal Justice Act 2003 allow for trial to take place without a jury, in cases where jury tampering could occur or where it has in fact occurred[172]. Section 44 of the Act enables a judge to order a judge-only trial if the conditions contained within are met. Namely there must be "evidence of a real and present danger that jury tampering would take place [173] and that " notwithstanding any steps which might reasonably be taken to prevent jury

[165] O'Hanlon R (1990/1992) The sacred cow of trial by jury, Irish Jurist, 25/27, pp. 57–68
[166] Originally introduced under the Northern Ireland (Emergency Provisions) Act 1973 c.53.
[167] The Economist Nobbled London 18th September 1982 P31
[168] Blake N The Case for the Jury in Findlay M and Duff P Ed the Jury under attack 1st edition Butterworths 1988 143
[169] Section 51(6) Criminal Justice and Public Order Act 1994
[170] Baroness Scotland of Athal 1963 Lord Hasard Text for 19 November 2003 (23119-11) Parliament Publications
[171] Department for Constitutional Affairs, Jury Research ad Impropriety 1st edition Consultation paper CP04/05, 2005
[172] Rule 3.15 Criminal Procedure rules must be complied with when an application is made under Section 44 to conduct a judge only trial
[173] Section 44 (4) Criminal Justice Act 2003

tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.[174]" The judge's ability to discharge a jury because of the appearance of jury tampering are contained within Section 46 of the Act. Under Section 46, the judge must inform the parties he thinks the jury should be discharged and the grounds for this as well as giving them an opportunity to make representations on this. If the judge is satisfied these conditions have been met and there has been jury tampering, he can continue the case without a jury, as long as it is fair to the defendant to continue the trial without a jury.[175] Under Section 48(5)(a) if the judge continues the trial, he unlike the jury must give reasons for his decision.

Academics have been divided over these amendments to the use of the jury, but despite this, they have not been repealed since their introduction. Lord Falconer has described them as "maintaining the confidence of jurors and the public in the fairness of the criminal justice system."[176] As has been discussed, the modern world is constantly evolving and in order to maintain credibility in the system and ensure lay involvement continues to feature prominently trial by jury has to be willing to evolve. As has been identified in the following cases, judges have activated these sections sparingly and whilst this continues to be the case, these changes do not seem to be a threat to the future of trial by jury in criminal cases.

R v Twomey and others[177] was the first non-jury criminal trial in contemporary English Legal History after a case of jury tampering in 2010. Despite concerns the precedent this case would set, J, S, M v R and KS v R both demonstrate the reluctance of the courts to order trial without a jury as the Court of Appeal overturned a High Court decision to order judge- only trials. Indeed, the Lord Chief Justice stated that "The trial of a serious criminal offence without a jury... remains and must remain the decision of last resort, only to be ordered when the Court is sure (not that it entertains doubts, suspicions or reservations) that the statutory conditions are fulfilled.[178]"These cases support the notion that although the introduction of the 2004 Act could have posed a real and viable threat to the future of trial by jury, this has not materialised because the courts have been hesitant and prudent about exercising these powers.

[174] Section 44 (5) Criminal Justice Act 2003
[175] Section 46(3) (b) Criminal Justice Act 2003
[176] Department for Constitutional Affairs Jury Research and Impropriety 1st Edition Consultation Paper Cp04/05 2005 4
[177] (2009) EWCA Crim 1035.
[178] J, S, M v R 2010 EWCA Crim 1755

3.8 Evaluation

Although there are clear drawbacks to the use of lay persons in trials of serious criminal wrongs, the preponderance of evidence presented in the foregoing analysis suggests that replacing the jury system – either with judge-led criminal panels or with a hybrid arrangement (such as a mixed tribunal) – is arguably undesirable. As has been demonstrated, there are peculiar characteristics inherent in jury trials which may undermine the efficacy of the mechanism. In addition, there are financial inefficiencies in relation to jury trial in comparison with judge-led hearings. In 2016, for example, the National Audit Office estimated the average daily cost of Crown court jury trial at just under £2000, as opposed to £1150 for magistrates' hearings.[179] Other potentially undesirable features, as discussed, include:

(i) Some evidence that jurors on average suffer from limitations to understanding legal processes and standards, particularly in the context of complex legal trials;
(ii) The danger that juries, by virtue of their lack of fealty to or familiarity with the law, may engage in nullification;
(iii) The potential for jury integrity to be compromised in some way, usually via tampering or due to racial bias; and
(iv) The danger that juries are subject to extraneous influences, particularly from the media, which distort their judgment.

These drawbacks, whilst serious, must however be balanced against the considerable benefits that the jury trial vehicle bestows on the criminal justice system. Given that many of the purported criticisms of juries are either fiercely contested, or indeed, inaccurate, it falls to critical analysts of the prevailing system to consider its other merits, which themselves are not insignificant.

Certainly, in the current political climate, which is characterised by extreme political polarisation and a distrust of institutions[180], marginalisation of the jury as a criminal justice

[179] See Comptroller and Auditor General, Efficiency in the Criminal Justice System, Session 2015–16, HC 852, National Audit Office, 2016, p. 10, retrieved 15 October 2019, www.nao.org.uk/wp-content/uploads/2016/03/Efficiency-in-the-criminal-justice-system.pdf

[180] For example, see Miller J and Bermingham R, Political polarisation and participation, UK Parliament blog, 29 April 2021, https://post.parliament.uk/political-polarisation-and-participation/ argue that: "Economic, social and institutional factors can affect groups' engagement in politics and in their political identity." See also

mechanism may simply add to the view that justice is being dispensed by an out-of-touch elite.[181] Moreover, in common with the doctrines of Damaska discussed in prior chapters, and particularly in the context of the legal system and economic prosperity, it is of cardinal importance to maintain public engagement with inclusive state institutions. The most prosperous countries enjoy open and inclusive political institutions, and the legal system is no exception. In contrast, societies which do not prosper are those ruled generally by narrow elites, who use their political power to pursue their individual interests. Democratic institutions are a bulwark against the fettering of such power. As noted by Lady Hallett:

> *"The jury is an aspect of such inclusivity. It as a partnership between professional judges and the public. As such it is not only, as one US writer put it, an example of the checks and balances of democratic design usually noted in bicameral legislatures, but it is an example of shared responsibility for the delivery of justice. The jury trial promotes civic values."*[182]

There is ample empirical evidence for these claims. Thomas has shown that jurors in the US context are more likely to engage in other civic duties following jury selection, including voting in elections.[183] Sitting on juries and engaging with the legal system amplifies the understanding of the role of the law and democratic institutions amongst citizens. On this basis, jury service promotes participatory democracy by providing individual citizens with a role in delivering justice. It further grants legitimacy to the legal system, by making judges and legal professionals accountable. As noted powerfully by Hallett: "Juries ensure that in each criminal trial it is not just the accused that are on trial. They ensure that the criminal process is itself in

Berinsky, A.J., Lenz, G.S. (2011). Education and Political Participation: Exploring the Causal Link. Polit Behav 33, P357–373.

[181] Lady Justice Hallett, Trial by Jury – Past and Present, Blackstone Lecture, 20 May 2017, https://www.judiciary.uk/wp-content/uploads/2017/05/hallett-lj-blackstone-lecture-20170522-1.pdf

[182] Lady Justice Hallett, Trial by Jury – Past and Present, Blackstone Lecture, 20 May 2017, https://www.judiciary.uk/wp-content/uploads/2017/05/hallett-lj-blackstone-lecture-20170522-1.pdf

[183] Bloeser A J, McCurley C, and Mondak J, 'Jury Service as Civic Engagement: Determinants of Jury Summons Compliance' (2011) American Political Research Volume: 40 issue: 2, P179-204; Gastil J and Weiser P, Jury Service as an Invitation to Citizenship: Assessing the Civic Value of Institutionalized Deliberation (2006) 34 Policy Studies Journal, P605-627; Gastil, J and Deess, E Pierre and Weiser P, and Larner, J, Jury Service and Electoral Participation: A Test of the Participation Hypothesis (March 31, 2007). Available at SSRN: https://ssrn.com/abstract=977775; Gastil J, Deess E.P, Weiser P, J, and Simmons C, *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation* (Oxford University Press 2010).

trial… it [also] ensures that the prosecution and the judge are on trial."[184]

Preservation of jury trial also increases accountability by making proceedings accessible to the public, and therefore, transparent. Public scrutiny of court's decisions is less difficult when members of the public themselves comprise the judicial machinery, with the capacity to act against capricious or arbitrary actions of the court. Naturally, there are limits to such powers, and instances of jury nullification in particular are, in many circumstances difficult to tolerate. However, the alternative – unchecked judicial power – is arguably worse, and corrosive to the democratic state. As an institution which dispenses justice through the court apparatus, it adds legitimacy to the court. The jury system provides that twelve (or in some cases, ten) individuals, each with varied and unique experiences, must act together to convict or acquit. This stands in stark contrast to systems in which one individual – often case-hardened and unrepresentative of the general population – is expected to apply the law and reflect society's attitudes.

Given the adversarial nature of the criminal justice system in common law jurisdictions, the jury trial arguably also provides a more appropriate forum for testing arguments and evidence, as opposed to the investigative approach favoured in the civil law tradition.[185] Whilst mainstream critics of the jury claim that the system is archaic and jury deliberation redundant, based on available research it is unclear whether or not a retreat to a more 'professionalised' judicial system would result in more fairness or accuracy. There is scant evidence that professional judges exhibit superior decision-making than the jury as a collective panel. Certainly, the research cited in the above discussions is inconclusive on this point. Thomas' research, also discussed above, indicates that juries are highly representative of local communities, that they do not engage in systematic bias, and nor do they fail to understand the law and the application of legal principles.[186] Less than one percent of juries fail to reach a verdict. As Lady Hallett notes: "In other words, where evidence is gathered it strongly supports

[184] Lady Justice Hallett, Trial by Jury – Past and Present, Blackstone Lecture, 20 May 2017, https://www.judiciary.uk/wp-content/uploads/2017/05/hallett-lj-blackstone-lecture-20170522-1.pdf last accessed 2/9/22

[185] Lady Justice Hallett, Trial by Jury – Past and Present, Blackstone Lecture, 20 May 2017, https://www.judiciary.uk/wp-content/uploads/2017/05/hallett-lj-blackstone-lecture-20170522-1.pdf last accessed 2/9/22

[186] Thomas C Thomas C, Are Juries Fair? Ministry of Justice Research Series 1/10 Feb 2010 and Thomas C, Exposing the Myths of jury service- Criminal Law Review 2008

the viability of jury trial."[187]

3.9 Conclusion

As this Chapter has demonstrated, although trial by jury is facing challenges posed by today's world, these challenges do not undermine its role as a "beacon of participatory justice[188]." The challenge for trial by jury is its ability to adapt whilst still retaining the fundamental principles that have allowed it to withstand the countless reforms the criminal justice system has undergone. At a time of heightened public scrutiny and scepticism of the representativeness of institutions, it can be argued that the role of trial by jury in providing a vehicle for lay participation in the criminal justice system is as important if not more important than ever. The next chapter will proceed to examine the principles and philosophies of lay involvement in Magistrates Court and explore the founding and underpinning values to establishing the magistracy.

[187] Lady Justice Hallett, Trial by Jury – Past and Present, Blackstone Lecture, 20 May 2017, https://www.judiciary.uk/wp-content/uploads/2017/05/hallett-lj-blackstone-lecture-20170522-1.pdf last accessed 2/9/22

[188] Zedner L 2004 Criminal Justice, Oxford and New York, Oxford University Press at p 16

Chapter 4: The development of lay involvement in the Magistrates Court

4.1 Introduction

This chapter will examine the evolution of the lay magistracy in England and Wales. In recent years, there has been a significant marginalisation of magistrates, with a clear preference developing across criminal justice agencies for the use of district judges and other more efficient and so-called cost-effective remedial mechanisms. There has also been a government turn towards the increased use of out of court powers to address acts that would have historically been under the jurisdiction of the magistrates' courts. Indicatively, in 2020 prosecutions in the magistrates' court fell by 30% while out of court disposals rose by 18%.[189] Whilst some of this drop in volume may be attributed to the decline in court usage precipitated by the Covid-19 pandemic, the underlying trend had been evident for many years prior. In fact, due to a multitude of factors, delays in bringing cases to trial have accelerated since the mid-1960s. These are often attributable to pre-trial determinants including understaffed police forces, which require more time to prepare a case for trial, and over-burdened solicitors and barristers, leading to delays in preparation and processing of cases. Even when cases reach court, further delays are common, due to the range of reports magistrates need access to before they reach decisions.[190]

Recent developments therefore have profound implications for the future of lay participation in the criminal justice process. As discussed in previous chapters, the justice system is being viewed through an increasingly managerialist lens. There is a deepening of pressure on the court system to exhibit greater efficiency and operational flexibility. The chapter charts the history of the magistrates' office to centre the discussion on the traditions and structures upon which lay participation in judging cases is founded. It proceeds to discuss recent reforms to the magistracy; in particular those in the twenty-first century which have sought to professionalise the office and reduce the reliance placed on lay persons acting as judges. This movement was initiated largely under the successive Blair governments of the 2000s but has continued under more recent administrations. These sections will set the scene for later discussions which will focus on ways in which traditional methods of dealing with offending have been circumvented by the introduction of new forms of summary justice, including out-of-court disposals.

[189] https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2020 last accessed 3/9/22
[190] Skyrme T. The Changing face of the Magistracy, Macmillan Press LTD 1979 p 90-93

Against this backdrop this chapter will consider the threats posed to the role of lay magistrates, in particular from the increased use of district judges in their place, as well as from out of court disposal orders. It will also consider the impact of budget cuts to the magistrates' system, which have resulted both in a reduction in the number of lay magistrates operating and in widespread court closures. The chapter will conclude by applying Damaska's theories concerning justice and state control balanced against the concept of injustice and participative democracy. It will also consider some of the prevailing weaknesses of the magistracy system; in particular, the insistence that localism must trump efficiency. If it is the case that the citizenry – as represented by democratically elected legislators – is concerned more with efficiency than maintaining traditional modalities of justice, this would mark a shift to managerialist/ hierarchical approaches in approaches to delivering justice; moreover, the question then becomes to what extent the general public is aware of these changes in focus and direction and what implications this has for their remoteness from the administration and dispensation of justice.

4.2 The development of Justices in English and Welsh law

English magistrates were first encountered in 1195 as an experiment by Richard I's Justiciar and Archbishop of Canterbury whereby four knights in every hundred were asked to take an oath to ensure the peace in unruly areas.[191] The role was further developed and in 1264 Keepers of the Peace were appointed in every county.[192] Initially their powers were limited to detaining prisoners but by 1344 their powers had increased in capacity and now allowed them to try and sentence prisoners.

The term Justices of the Peace (JP) was born in 1361 in the Statute of Westminster[193] and saw those appointed officers adopt the role of administrative, legal and political deputies of the Crown in their respective counties, fulfilling local government functions as well as the administration of justice. Their role was summarised by Cornish and Clark as "[concerning] … the command structure of social control, over outbursts of rioting as well as day-to-day crime. They were the representatives of civil power when armed force was called in, the

[191] Slapper G, How the Law Works (3rd edition, Routledge, 2014) p190
[192] Skyrme T, The Changing face of the Magistracy, Macmillan Press LTD 1979 p1
[193] Hostettler J, Historical Perspectives in The Magistracy at the Crossroads edited by Faulkner D, Waterside Press 2012

supervisors of police, the main prosecuting authorities, and often enough the judges."[194] This position stands in contrast to the Stipendiary Magistrate (now District Judge) which is a comparatively modern development originating in the eighteenth century.[195] From 1362 JPs were required to meet four times a year hence the term 'Quarter Sessions' and from this point their duties were constantly augmented[196]. By the reign of Elizabeth I, "the whole of local government in the counties of England and Wales was in the hands of the Justices of the Peace, who were also the only body of people to whom central government could look as an instrument for implementing its general policy or securing its local or particular requirements."[197]

We thus see that by the Tudor/Stuart times one of the most influential classes of men in the country were the justices; they had become more than royal administrators and were now leaders of their counties, forming half of the Elizabethan House of Commons.[198] Their performance across England, though by no means always exemplary, was regarded as effective, save for in London. By the late eighteenth century, the corruption and inefficiency became so bad in the capital city that the government was forced to appoint Stipendiary Magistrates to sit in place of traditional lay Magistrates.[199]

Despite their generally well-regarded performance, a movement for greater democracy in local government and security started to take root in the nineteenth century, resulting in the gradual dismantling of the prevailing JP system.[200] The 1832 Reform Act[201] saw the role of justices reimagined, with the loss of their administrative functions. However, magistrates' legal functions were largely untouched; in 1848 the Summary Jurisdiction Act[202] gave the petty sessions, or magistrates' courts, increased powers to try a broader range of criminal charges, thereby recognising the summary jurisdiction the justices had been using since the sixteenth century. It wasn't until 1889 that these Petty Sessions were defined[203] but after this summary jurisdiction expanded at a rapid rate and saw for the first time magistrates disposing of the

[194] Cornish W R and Clark G de N (1989), Law and Society in England: 1750-1950, London: Sweet and Maxwell p20
[195] Skyrme T, The Changing face of the Magistracy, Macmillan Press LTD 1979 p 1
[196] Skyrme T, The Changing face of the Magistracy, Macmillan Press LTD 1979 p 2
[197] Skyrme T, The Changing face of the Magistracy, Macmillan Press LTD 1979 p 3
[198] Skyrme T, The Changing face of the Magistracy, Macmillan Press LTD 1979 P5
[199] Skyrme T, The Changing Face of Magistracy, Macmillan Press LTD 1979 P3
[200] Skyrme T, The Changing face of the Magistracy, Macmillan Press LTD 1979 P2
[201] (1832) 2 & 3 Will. IV c. 45
[202] (1848) 11 & 12 Vict. c. 42.
[203] Petty Sessions were defined as "A court of summary jurisdiction occurred, which resulted in magistrates disposing of the overwhelming majority of criminal cases."

majority of criminal cases.[204] At this time there was also a growth in their civil work and that separate juvenile courts run by justices were established.[205] The significance of the position of JP in relation to the legal system at this time is explained by Lord Merrivale: "The justice which matters most in the homes of the people is the justice administered by the magistrates in their midst."[206] At this time these justices were unpaid, part time and lay, although there were some Stipendiary magistrates, concentrated mainly in London but also reaching eleven further jurisdictions.

Further pressure on the lay magistracy's powers emerged during the later nineteenth century. New police forces assumed JPs policing duties and the new County councils formed by the Local Government Act 1888 saw JPs lose their local government functions.[207] Maitland was so concerned with this development that he opined:

> *"As a governor he is doomed, but there has been no accusation. He is cheap, he is pure, he is capable, but he is doomed; he is sacrificed to a theory on the altar of the spirit of the age…… The outlook is certainly gloomy. If the Justices are deprived of their governmental work, will they care to be justices any longer? This is a momentous question; on the answer to it depends on a great deal of the future history of England."*[208]

4.2.1 Later developments in the role of magistrate

In spite of Maitland's fears, little changed in the role of the magistrate in the first half of the twentieth century. However, reforms in the post-war period left magistrates courts faced a potentially grim future, as public confidence and respect for the position declined. This had been linked to the characteristics of lay magistrates in relation to their age or unsuitability for the role and that all classes in the community were not being represented.[209] This resulted in the Royal Commission in 1946 which analysed the appointment and removal processes, as well

[204] Skyrme T. The Changing face of the Magistracy, Macmillan Press LTD 1979 p5
[205] Skyrme T. The Changing face of the Magistracy, Macmillan Press LTD 1979 p5
[206] Lord Merrivale quote on p 5 of T. Skyrme The Changing face of the Magistracy, Macmillan Press LTD 1979 P5
[207] Skyrme T The Changing face of the Magistracy, Macmillan Press LTD 1979
[208] Maitland F.W. The Shallows and Silences of Real Life, Collected Papers Cambridge University press 1911 p 472
[209] Skyrme T The Changing face of the Magistracy, Macmillan Press LTD 1979 p 13-15

as conditions of magistrates' service. There was an understanding throughout the Commission's deliberations that the role of lay magistrates was to be maintained in the system, although there was a push to professionalise the position, in particular through the adoption of training programmes for lay persons in the justice system.

The recommendations of the Commission's 1949 report resulted in the Justice of the Peace Act[210], through which the role of the magistrate underwent profound change affecting the finance, administration and procedure of summary courts.[211] This act provided the first statutory definition of magistrates, which notably included stipendiaries. It permitted solicitors to become stipendiary magistrates for the first time. It also resulted in much greater gender representation on the bench; the number of female magistrates rose from 3700 in 1947 to 8850 on 31st December 1977, concentrated in particular in the juvenile and domestic courts.

Magistrates' training – which until the 1948 Commission[212] was described as "rudimentary"[213] – was also reformed under the Act. Following its inception in 1920 the Magistrates Association had encouraged its members to undertake training and to keep abreast of the law and procedures. However, the majority of magistrates still underwent no formal training.[214] The initiative started following the 1949 Act to professionalise the magistracy was not however without drawbacks. For example, the problem of training the entire magistracy was demonstrated when the 1953 model training scheme introduced by the Lord Chancellor was of limited success. Not all benches decided to adopt the training scheme and some magistrates refused to engage with it when it was available. Such refusals were possible given there were no sanctions or inspection regime attached to it[215].

It was not until the Magistrates Association pushed for compulsory training in 1962, accepted by the Lord Chancellor in 1964 that systematic training was introduced in 1965. This training was in two stages: training for those newly appointed, and for those a year into their

[210] (1949) c.101.
[211] Skyrme T The Changing face of the Magistracy, Macmillan Press LTD 1979 p 13-15 and Royal Commission, Justice Clerks of 1944 and Justice of Peace Act 1949
[212] Royal Commission on the Justices of the Peace London HMSO 1948 P318
[213] Raine J W, Local Justice, Ideals and Realities Edinburgh J&J Clark 1998 p1
[214] Skyrme T, History of the Justices of the Peace, Vol 11, England 1689-1989 Chichester Barry Rose and the Justice of the Peace 1991 p 316
[215] Skyrme T, History of the Justices of the Peace, Vol 11, England 1689-1989 Chichester Barry Rose and the Justice of the Peace 1991 p 318

appointment.[216] In 1979, the Judicial Studies Board was introduced[217] and its Magisterial Committee was given responsibility for the education and training of lay magistrates at a national level. The remit of this committee was focused on trying to ensure magistrates had the skills to act judicially and therefore saw the introduction of written guidance on issues such as mode of trial, bail and decision making and sentencing as well as specialist training for those chairing courts, including on issues of racial awareness.[218]

During the 1960s-1970s, with higher courts under increasing pressures, an acceleration of the process of relegating offences to summary trial occurred. The Criminal Justice Act 1961 extended the offences which qualified for summary trial.[219] The later James Committee[220] demonstrated the viewpoint of the day by focusing on attempting to increase the jurisdiction of magistrates to relieve the pressure facing Crown courts and increasing the efficiency of the court system. It recommended, amongst other things, removing the administrative and civil jurisdiction of the magistrates' courts: this was deemed necessary in order to give the magistrates the space needed to develop their skill-set given the increased complexity and breadth of the cases before them. This recommendation was not implemented in part because of the perceived ramifications. If the civil jurisdiction was removed it would fall onto the already over-capacity county courts. Furthermore, it was at the time argued that magistrates were a less expensive procedure and dispensed with their caseloads faster and at reduced cost, in particular because of the local knowledge in their possession. The James Committee also recommended the increased use of Fixed Penalty notices for crimes. This was regarded as having a multitude of benefits including decriminalising certain offences and creating space in the system to deal with the perceived more serious crimes. This policy was warmly endorsed by the Magistrates Association; perhaps ironically, given the expanded use of out of court disposals and fixed penalty notices today, this poses a significant threat to the future of lay magistrates.[221]

[216] Davies M, A new training initiative for the lay magistracy I England and Wales – a further step towards professionalisation? International journal of the legal profession vol 12 No 1 March 2005, Routledge
[217] Gillespie A; Weare S, The English Legal System (Oxford University Press 2017) p. 319.
[218] Skyrme T, History of the Justices of the Peace, Vol 11, England 1689-1989 Chichester Barry Rose and the Justice of the Peace 1991 p 318, P324-325
[219] Criminal Justice Act 1961, c.39
[220] Report of the Committee on the Distribution of Criminal Business between the Crown Court and Magistrates Courts, Cmnd 6323 HMSO 1975
[221] Skyrme T, The Changing face of the Magistracy, Macmillan Press LTD 1979 p 101

4.3 Managerialism and the Modern Magistrate: the 1990s and the New Labour Government

The approach taken to the magistracy by recent administrations evidence a concerted emergence of the promotion of so-called 'efficient and effective administration' of the magistrates' courts.[222] Despite the financial obligation placed on local authorities for their operation, magistrates had little accountability to them. In contrast to professional judges at any level, magistrates remained responsible for the administrative management of their own courts, albeit subject to increasing oversight by the Lord Chancellor's Department. Since 1949, they had done so through local magistrates' courts committees (MCCs) which were, in effect, local management boards responsible for the efficient and effective administration of their courts. In the 1960s and early 1970s the Bar Council, Law Society, Magistrates' Association and Justices' Clerks' Society had proposed centralisation of the management of magistrates' courts with a view to achieving greater efficiency, training and use of accommodation.[223] County councils at the time opposed the proposal, arguing that it was against the trend of devolution. However, the late 1980s saw managerialism increase its influence over the court system[224] which culminated in the establishment of the Magistrates Courts Service Inspectorate[225], the remit of which was to generate and apply performance measure to the magistrates' courts' administration.

Against this backdrop, the magistracy's influence continued to be weakened under the final Tory government of the twentieth century. This was initially buttressed by Julian Le Vay, who, in 1989, conducted an Efficiency Scrutiny of the Magistrates' Courts.[226] He found that neither the Roche Report nor the 1949 Act dealt with management in any modern sense:

> *"The Act left the justices' clerk with responsibility for day to day running of courts and*

[222] Seago P.L, The development of the professional magistracy in England and Wales, Criminal Law Review 2000 P631-651
[223] "Lord Beeching's inquiry in the late 1960s into the administration of Assizes and Quarter Sessions, another layer of justice countrywide steeped in antiquity, complexity and some amateurism. He recommended the abolition of both those jurisdictions and their replacement with a single, nationally administered court." "In 1976 the Layfield Committee recommended that funding for MCCs should be centralised, but its recommendations were not adopted."
[224] Raine J and Wilson M 1993 Managing Criminal Justice, Harvester: London
[225] Her Majesty's Magistrates Courts Service Inspectorate (MCSI) was responsible for the inspection of the systems that support the Crown, county and magistrates' courts in England and Wales. It has now closed.
[226] Report of the Le Vay Efficiency Scrutiny of Magistrates' Courts HMSO, 1989

court offices but did not make clear to whom he was answerable to now that he was appointed by a body separate from the bench he served. Nor was central Government given any say in the level or use of resources it was committed to provide."[227]

At this time, the cost of administering the magistrates' courts was approximately £200 million per year. Much of this budget was derived from central funds, but very little of the spending was subject to central control or review. Le Vay observed that "it would be difficult to think of any arrangements less likely to deliver value for money" adding:

"The arrangements for managing magistrates' courts and their resources retain the local, part-time, almost amateur flavour of an earlier age. The arrangements have never been systematically appraised and have not adapted to take account of the enormous increase since 1949 in the volume of business and the number of permanent staff, or the fact that central Government now foots most of the bill."[228]

Le Vay's principal recommendation was that administration of magistrates' courts should be "run as a national service, funded entirely by the Government – but with maximum delegation of managerial responsibility and control of resources to the local level"[229], a proposal rejected, seemingly, on the grounds of expense. As a compromise, in 1992 the Lord Chancellor's office assumed executive responsibility for the magistrates' courts, removing that jurisdiction from the Home Office. The government also published a White Paper, A New Framework for Local Justice,[230] which was designed to help central government assert greater budgetary control over the court system. Cash limiting measures and performance related grants of resources to courts were introduced. As noted by Bell and Dadomo: "More levers for central control were emerging, with reference being made to the managerial considerations of efficiency as well as quality of service.[231]

These reforms were furthered by the Police and Magistrates' Courts Act 1994,[232] which was described by Wasik et al as "a significant example of the extent to which the demands of

[227]Report of the Le Vay Efficiency Scrutiny of Magistrates' Courts HMSO, 1989 para 2.3
[228] Report of the Le Vay Efficiency Scrutiny of Magistrates' Courts HMSO, 1989, paras 1.5 and 2.7.
[229] Report of the Le Vay Efficiency Scrutiny of Magistrates' Courts HMSO, 1989 Vol 1, para 2.
[230] Lord Chancellor's Department, Cm 1829 London: HMSO 1992.
[231] Wasik M, Gibbons T. and Redmayne M. *Criminal Justice. Text and Materials* (Longman, 1998) P359
[232]A title criticised for juxtaposing magistrates with the police, an unfortunate resonance with the old "police courts".

efficiency and managerialism have had an impact on the criminal justice system."[233] The Act in question provided the Lord Chancellor with further operational control over local justice machinery.; for example, it gave him/her the power to amalgamate local Magistrates' Courts' Committees (MCCs)[234], appoint non- magistrates as members of the MCC[235], direct MCCs to meet certain levels of performance, as well as discretion to dismiss MCC members and replace them for a period of three months with the Lord Chancellor's appointee(s).[236]

The path to efficiency continued following the election of the Labour Government in 1997. The New Labour administration had an agenda laser-focused on increasing efficiencies across public services, including in relation to the management of the criminal justice system – at national, regional and local levels.[237] At this time, the annual cost of administration of the magistrates' courts was about £330 million.[238] Local authorities provided the courthouses and ancillary accommodation and, initially, all the funding for MCCs in their respective areas with the Lord Chancellor's Department repaying 80% of revenue expenditure.[239]

At the outset, the number of MCC areas was reduced from 105 to 42, with each MCC area corresponding to the police authorities established by the Local Government Act 1972.[240] Increasingly, members of MCCs began to be selected not as representatives of individual benches, but for the contribution they could make to making their courts more efficient. This was partly as a result of the efficiency gains that were realisable from a streamlined and rationalised structure.[241] Such savings were largely attributable to two factors:

(i) A tighter geographical spread of magistrates' courts, which resulted from the amalgamation of a number of benches and the closure of many rural courts; and

[233]Wasik M, Gibbons T. and Redmayne M. Criminal Justice. Text and Materials (Longman, 1998) P357
[234] Now Section 32 of the Justices of the Peace Act 1997
[235] Section 28 Justices of the Peace Act 1997
[236] Section 38 Justices of the Peace Act 1997
[237] Clarke J, Gewirtz S and McLaughlin E (eds) New Managerialism, New Welfare? (London: The Open University 2000); see also Bevir M and O'Brien D, New Labour and the Public Sector in Britain, Public Administration Review Vol. 61, No. 5 (Sep. - Oct. 2001), p 535-547.
[238] Auld Report Chapter 3 Criminal Courts and their Management https://www.criminal-courts-review.org.uk/chpt3.pdf last accessed 1/9/22
[239] Auld Report Chapter 3 Criminal Courts and their Management https://www.criminal-courts-review.org.uk/chpt3.pdf last accessed 1/9/22
[240] (1972) c.70.
[241] Auld R, Review of the Criminal Courts of England and Wales https://www.criminal-courts-review.org.uk/auldconts.htm Chapter 4 last accessed 28/8/22

(ii) A focus on centralising costs in the lower courts, particularly through changes in funding allocation processes.

With regard to the former point, these developments caused concern amongst magistrates about the potential threat to 'local justice.' The reformed MCCs had responsibility for large areas, with some straddling several counties. As noted by Auld, in the Cumbria area MCC, six courthouses served a population of less than half a million people, spread over almost 2700 square miles. Similarly, in North Yorkshire in 2001, nine magistrates' courts served a population of almost three-quarters of a million people, spread over more than 3000 square miles.[242]

On the latter point, prior to their abolition, MCCs were responsible for administering their own regional budgets, which were often considerable; for example, the 1999/2000 budget for Merseyside MCC was almost £10 million.[243] Yet, as the Central Council of Magistrates Courts Committees (CCMCC) observed around this time, MCCs had no budgetary control over their affairs; instead, they had to bid to the Treasury for funding each year, based upon co-operation with their relevant local authority. In this way, therefore, neither the accounting nor budgeting of MCCs were regarded as satisfactory. Moreover, because MCC budgets were subject simply to a 'cash limit' on the amount that could be requested from Treasury, they would invariably set budgets that would utilise all of the available grant funding. Further, MCC budgets were not ring-fenced vis-a-vis local authority funding; this meant that local authorities had no incentives to monitor or challenge the budget-setting process.

Such reforms also extended to the Youth Court. Following the "No More Excuses" White Paper[244] the government launched the Youth Justice Board, whose remit was to oversee local youth justice infrastructure and monitor the persistent offenders who came before the court. Section 48 Crime and Disorder Act 1998 expanded the role of stipendiary magistrates in the youth court at the expense of lay magistrates. Following the introduction of this act, metropolitan stipendiaries could sit alone without any special circumstances being present. This was extended to provincial stipendiaries via the Access to Justice Act 1999.[245]

[242] Auld R, Review of the Criminal Courts of England and Wales https://www.criminal-courts-review.org.uk/auldconts.htm Chapter 4 last accessed 28/8/22
[243] Auld p. R, Review of the Criminal Courts of England and Wales https://www.criminal-courts-review.org.uk/auldconts.htm Chapter 4 last accessed 28/8/22
[244] No More Excuses Government White paper Home Office 1998
[245] Access to Justice Act 1999 Schedule 11, paragraph 12

4.4 The Abolition of MCCs

Reports of the Magistrates' Court Inspectorate indicated that MCCs enjoyed a substantial improvement in performance after 1997.[246] In spite of this, the modernisation process continued unabated when Lord Justice Auld was commissioned to review the efficiency of the modern criminal justice system. The so-called Auld Report[247] - although designed to address inefficiencies in the criminal justice process as a whole - began with a ringing endorsement of the utility of lay justice:

> *"For centuries both tribunals of fact have been corner-stones of our system of criminal justice. In their different ways they continue to be practical and public manifestations of the citizen's involvement in the administration of criminal justice and his leavening of the power of state institutions. It is useful citizenship and is, or should be, a powerful contributor to public confidence in the system… As to lay magistrates and their role as summary judges, they do not only have centuries of tradition and public acceptance to commend them. They reflect - imperfectly, but with scope for improvement - the mix of the community from which they are drawn. Among their strengths are independence, a range of backgrounds, experience and a common-sense approach to their task."*[248]

The government's response to the Auld Review - Justice for All[249] - recommended that a single agency should be introduced to support the delivery of justice in all courts in England and Wales and enable the provision of improved and consistent service to all court users. On this basis, The Courts Act 2003[250] introduced a legal framework that enabled the changes to be

[246] HM Court Service, Supporting Magistrates' Courts to Provide Justice, Presented to Parliament by the Secretary of State for Constitutional Affairs and Lord Chancellor by Command of Her Majesty (November 2005)
[247] Auld Report. Chapter 1 For context, Part 1 imposed on the Lord Chancellor a duty to maintain an efficient and effective court system. It paved the way for a new unified courts administration as it recommended abolishing the Magistrates' Courts Committees, which were responsible for the administration of the Magistrates' Courts and replace them with local court boards. Part 2 and 3 contained provisions reforming lay justices and magistrates' courts. Part 4 aimed at improving court security in the Supreme Court, County Courts and Magistrates' Courts. Part 5 extended the concept of an Inspectorate of Court Administration, until then limited to magistrates' courts, to all the courts. The remaining Parts are not relevant to the discussion.
[248] Auld p. R, Review of the Criminal Courts of England and Wales https://www.criminal-courts-review.org.uk/auldconts.htm Chapter 1 last accessed 1/3/2
[249] The Governments reply to the Second Report from the Home Affairs Committee 5563 (2003). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/251047/5787.pdf last accessed 14/9/22
[250] The Courts Act (2003) c.39.

made and a single national service, Her Majesty's Courts Service (HMCS), which was established on 1 April 2005.[251] The policy was designed to ensure that control over the operation of criminal justice was placed on a national footing, and that national budgets for the Courts service are controlled and approved by the Lord Chancellor's office.[252] Furthermore, the requirement that the head of the court administration body – until 2005 the Justices' Chief Executive[253] - no longer had to be a qualified lawyer; instead the role is reserved for a civil servant, appointable by the Lord Chancellor. Under Part 2 of the Act, magistrates are appointed to a national, unified Bench, rather than to a local bench.[254] Under the Act, the Lord Chancellor became responsible for the appointment of all lay magistrates.[255] The abolition of the MCC also meant that appointments of Clerks to the Justices was handed to the Lord Chancellor.[256] Perhaps most significantly, the Act reformed the funding model of the magistrates court; the entirety of funding for the system is now derived from central government. Previously, 80 percent of funding came from central government, with the remaining 20 percent from the local authority.[257]

4.5 Trends relating to the Magistrates Courts under the Coalition and Tory Governments since 2010

Magistrates remain appointable by the Lord Chancellor. Lay magistrates account for about 91% of all summary criminal cases[258]. Magistrates can also be appointed to the Youth Panel which allows them to sit in the Youth Court, or to the Family Panel allowing them to sit in the Family Court. Magistrates are allocated to local justice areas and sit in benches, normally of three[259]. There are approximately 330 magistrates' courts in England and Wales and around 23,000 lay magistrates. The 2020 statistics on judicial diversity revealed that as of 1 April 2020 56% of magistrates in England and Wales were female (the same as 2019), 13% were from

[251] In 2011 HMCS itself merged with the Tribunals Service to become HM Courts and Tribunals Service (HMCTS).
[252] The Courts Act 2003 Section 5(3).
[253] The Courts Act 2003 Section 6(2)(b).
[254] The Courts Act 2003 Section 7(7).
[255] The Courts Act 203Section 10.
[256] The Courts Act 2003 Section 2(1).
[257] Dadomo, C., & Bell, B. (2006). Magistrates' Courts and the 2003 Reforms of the Criminal Justice System, European Journal of Crime, Criminal Law and Criminal Justice, 14(4), P339-365
[258] Auld Report, Chapter 4 magistrates, Review of the Criminal Courts of England and Wales https://www.criminal-courts-review.org.uk/auldconts.htm
[259] The role of the Magistracy House of Commons Justice Committee Sixth report of Session 2016-17 HC 165 published 19 October 2016

Black, Asian and Minority Ethnic (BAME) backgrounds (up from 12% in 2019) and 49% were aged 60 or over (compared to 52% in 2019).[260] Just over 1% were aged under 30.[261] A minimum or two but usually three magistrate's hear a trial with all magistrates having equal decision making powers although one will act as Chairperson. In 2020 there were also 124 District judges sitting in the magistrates' courts.[262]

The Lord Chancellor's department requires both professional magistrates and their lay counterparts to exhibit minimum standards of competence in order to ensure public confidence. However, the department also clearly distinguishes the desired characteristics of each role, stressing that lay magistrates should represent their respective communities.[263] Magistrates at a minimum sit for 26 days a year and they must also undertake training. Although most magistrates sit for between 35-45 days per year, there is resistance to allow them to sit for more than 70 days a year as this might detract from the perception that they are not case hardened and are supposed to act only in a part-time capacity. The allocation of work between district judges and magistrates and evokes strong feelings on the topic as the balance between efficient and effective use of resources is weighed against fairness and the communities involvement in decision making.[264]

4.6 The constitution and funding of the Magistrates' system

In the twenty-first century in particular, the role of lay magistrates has been progressively marginalised. This has been manifested in several substantial developments. As will be explained, there were not – in contrast to persistent claims to the contrary – any budget cuts to the magistrates' courts system between 1999 and 2009. In fact, under the New Labour

[260] Magistrates Association, Statistics published on diversity in the magistracy, 29 September 2020, https://www.magistrates-association.org.uk/News-and-Comments/statistics-published-on-diversity-in-the-magistracy last accessed 1/10/21
[261] https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2020 last accessed 1/11/21
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987892/criminal-justice-statistics-dec-2020.pdf last accessed 2/10/21
[262] https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/list-of-members-of-the-judiciary/dj-mags-ct-list/ last accessed 3/10/21
[263] Lord Chancellor's Department Working Party, The role of the Stipendiary Magistrates London 1996 The Venne Report; Lord Chancellor's Department Creation of a Unified Stipendiary Branch http: www.open.gov.uk'lcd/cpmsult/general/stipecon.htm,1998 LCD Consultation paper, Home Affairs Committee Report para 11 Hansard H L Debs Vol 573 col 1122 June 27, 1998, Lord Irvine.
[264] Leveson Review Chapter 4 https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press

administration, those budgets increased.[265] In real terms, the magistrates' court budget increased by 17 percent between 1998/99 and 2003/04, and by a further 31 percent between 2005/06 and 2008/09.[266] Instead, a more subtle dynamic evolved over that period; the increased use of district judges in place of lay magistrates. Furthermore, a reduction in the overall levels of court business dealt with by the magistrates' court system occurred which may be most heavily ascribed to the introduction of summary justice initiatives, which involved a transformation in the business and functions of the criminal courts. This chapter will now proceed to examine these trends in detail.

4.6.1 District Judges and the lay magistracy

A greater push towards efficiency in proceedings at magistrates' courts is also evidenced by the increasing use of District Judges. These justices – formerly known as stipendiaries - are paid professionals in a judicial office. Although the position was developed in 1780 - designed to address the perceived failings of lay magistrates - it was not until the late twentieth century that the office grew significantly in importance.[267] Entrenchment of a determined focus to increase the prominence and role of stipendiaries, culminated in the bestowment of a new title on the office: District Judge (Magistrates Courts).[268] Section 48 of the Crime and Disorder Act 1998 saw the expansion of the role stipendiary judges performed in the Youth Courts so they may now sit alone. This option was expanded to provincial stipendiaries through the Access to Justice Act 1999.[269]

Stipendiaries were initially located predominantly in Central London, but from 1813 the first provincial stipendiaries were established in Manchester, via local acts. In these provincial areas, the function of Stipendiaries was envisaged as a support mechanism for the lay magistracy, rather than the Inner London model of replacing them altogether.[270] "A lay justice cannot equal the professional skill of a stipendiary (district judge), but the function of magistrates is largely to decide questions of fact and for this purpose to exercise common sense

[265] Grimshaw R and Mills H, with Silvestri A and Silberhorn-Armantrading F, Magistrates' courts' and Crown Court expenditure, 1999–2009, Centre for Crime and Justice Studies, September 2010.
[266] Grimshaw R and Mills H, with Silvestri A and Silberhorn-Armantrading F, Magistrates' courts' and Crown Court expenditure, 1999–2009, Centre for Crime and Justice Studies, September 2010
[267] Seago P.L, The development of the professional magistracy I England and Wales Criminal Law Review 2000 P631-651
[268] Section 78 Access to Justice Act 1999
[269] Schedule 11 paragraph 12 Access to Justice Act 1999.
[270] Seago P L, The development of the professional magistracy I England and Wales Criminal Law review 2000 P631-651

and sound judgment against a background of knowledge and experience of the world at large."[271]

In the nineteenth and twentieth centuries, outside of London the numbers of stipendiary judges declined. Academics have attributed this to the availability of lay magistrates who provided a cost-effective dependable alternative which had the respect of the local community.[272] Between 1970 and 2000 however these patterns started to change, with the re-emergence of provincial stipendiaries. This re-emergence has been linked to three key issues; (i) firstly the Administration of Justice Act 1973[273] which enabled the Lord Chancellor to appoint temporary visiting stipendiaries to regional areas as well as streamlining the judicial appointment process; (ii) secondly, the increase in workload at summary courts workload resulting in many localities not having sufficient numbers of lay magistrates to deal with the expanding caseloads[274]; and (iii) thirdly, as discussed in Chapter One, greater focus over this period began to be placed on the efficiency of the court system and mitigating delays within it.[275]

The 1999 Act saw the unification of the two types of stipendiary magistrate, regarded as necessary to "enhance the efficiency and flexibility with which the Stipendiary Magistracy could be deployed to response to changes in national workload pattern."[276] This was achieved by allowing all stipendiaries to have jurisdiction with each justice of the peace commission area.[277] Both the Venne and Leveson Reports concluded that district judges had an important role to play in the magistrates courts, with Venne highlighting in particular the increasingly complicated work magistrates were expected to undertake, regarding it as "an evolving system of justice which will always endeavour to refine the requirements of due process."[278] By 2001, there were about 105 district judges, supported by about 150 deputy district judges sitting part-time. Approximately 50 of the full-time appointees sat in London and the remainder across the

[271] Skryme T, The changing Image of the Magistracy (2nd edition. Macmillan 1983)
[272] Zagrel C H, The social Composition of Magistracy 1971 11 Journal of British Studies 113 Alugo C, Richards J, Wise G and Raine J, The magistrates court and the community 1966 160 p 329
[273] Administration of Justice Act 1973
[274] Seago P. L, The development of the professional magistracy I England and Wales Criminal Law review 2000 P631-651
[275] Magistrates Courts: Repot of a Scrutiny HMSO London 1989 the Le Vay report; Court service, corporate plan HMSO 1995 p4 M Narey Review if the Delay in the Criminal Justice system http://www.homeoffoce.gov.uk/cpd/pvu/crimrev.htm,1997 last accessed 28/1/21
[276] Burney E, LCD Consultation Paper para 15 J.P. Magistrate, Court and Community (Hutchinson, London 1979) p216
[277] Section 10C Access to Justice Act 1999
[278] The Role of the Stipendiary Magistrates the Venne report 1996 pp18 para 5.4

rest of England and Wales.[279] The only distinction in power between a district judge and a magistrate is the ability of district judges to sit alone.

The increased use of district judges in place of magistrates has been regarded as a threat to the continuation of the delivery of local justice. Such judges have a nationwide commission[280] – albeit from a base court – a feature viewed as advantageous given they are more mobile than lay magistrates. In contrast, lay magistrates must live within fifteen miles of the boundary of their commission area. Furthermore, unlike district judges, lay magistrates regard themselves as "the custodians of the community"[281] and take pride in representing that area, providing a unique understanding of the locality they serve.[282] A 2011 Ministry of Justice report found that magistrates were seen as better connected to their communities and less 'case hardened' but that district judges were seen as more efficient and operating better case management.[283]

On this basis, academics have supported "the continuance of a lay and local system as a democratic and educative bridge between the public and the courts."[284] But, importantly, the Venne Report qualified its recommendation by a reminder of the value to the system of stipendiaries taking a fair share of routine work thanks to: (i) their speed and contribution to the efficient administration of justice; (ii) a need to expose them to and giving them experience of every aspect of the work of a magistrates' court; (iii) the salutary effect that their customary presence in court in such cases can have on those who habitually prosecute and defend in them; and (iv) to not exclude or give magistrates the impression of excluding them from the more interesting work of the court.[285]

Although prima facie, the development of the stipendiary/ district judge role was pursued for reasons of efficiency, studies evaluating the nature and extent of the cost savings are not conclusive. Morgan and Russell have articulated that District Judges deal with cases more

[279] Auld Report Chapter 3 p.73. https://www.criminal-courts-review.org.uk/chpt3.pdf last accessed 12/12/21
[280] S78(1) Access to Justice Act 1999
[281] Sanders A, Core Values, the Magistracy, and the Auld Report (2002) 29 Journal of Law and Society P324-341.
[282] Report of the Interdepartmental Committee on Magistrates Courts in London (Cmnd 1606, 1962) (the Aarvold Committee) Home Affairs Committee Report para 198
[283] The strengths and skills of the Judiciary in the Magistrates courts, Ministry of Justice research series 9/11 November 2011
[284] Seago P.L, The development of the professional magistracy in England and Wales, Criminal Law review 2000 P631-651
[285] The Role of the Stipendiary Magistrates The Venne report 1996 p18

quickly than magistrates, and district judges do not incur court clerk costs. On the other hand, however, though one District Judge can handle the work presently handled by about 30 magistrates, it would need a significant increase in the use of District Judges to achieve reductions on any scale in administrative staff and courtroom costs.

Accordingly, the supposed costs of maintaining lay magistrates might not be excessive when compared to those of district judges. When indirect costs – for example those pr premises and administration are accounted for – district judges remain moderately more expensive than magistrates. Morgan and Russell also found evidence that district judges were more likely to remand in custody and impose heavier sentences on offenders than lay magistrates, adding further costs in the form of custodial expense.[286]

The evidence on this issue is therefore mixed, primarily because of the complexity of associating costing to magistrates versus district judges. On this topic, a 2011 Ministry of Justice study came to ambiguous conclusions. It found:

- district judges were more expensive per case than magistrates, because of their salaries;
- however, when 'either way cases' were considered, district judges were less costly when the costs of lawyers, legal aid, and magistrates volunteer expenses were factored in; and
- district judges were faster at handling those cases.[287]

Again, therefore whilst superficially the focus of government in appointing professional judges appears to be on costs and efficiency, there are potentially other considerations driving the reduction in the role and influence of lay participants in the court system. This makes sense from a managerialist perspective: the greater the autonomy and localism of the justice concerned, the less power that centralised authorities are likely to have over the functioning of the criminal justice system. Moreover, Morgan and Russell concluded that, in the round, to eliminate or greatly diminish the work of magistrates would not be widely understood or supported.

In fact, such a repudiation of adversarialist perspectives undermines the foundations of the

[286] Auld Report Chapter 4, https://www.criminal-courts-review.org.uk/ccr-04.htm last accessed 1/3/21
[287] The Strengths and skills of the judiciary in the magistrates' courts, Ministry of justice, research series 9/11 November 2011

system themselves:

> *"… many lay magistrates are wary of what they see as the asset-stripping consequences of employing stipendiaries. Why, they ask, should they volunteer to give so much of their unpaid time to this public office if they are deprived of the opportunity to hear interesting cases likely to engage their intelligence? By the same token, stipendiary magistrates think it odd if their legal expertise is not exploited by allocating to them the most legally and procedurally demanding cases in which serious decisions must be made."*[288]

4.6.2 Court closures and reorganisational costs: the erosion of the magistrates' courts

In keeping with other themes concerning efficiency and the alleged unsustainability of expenditures on the court and justice system, HMCTS has, since 2010, been under pressure from the Treasury to cut its spending. Most of these cuts are imagined to be achieved via the Ministry of Justice's efficiency exercise, which is designed to generate £1.2billion for a digital modernisation programme. [289]In 2010, the Treasury claimed that one third of this revenue ought to be raised from the sale of court buildings. In response, between 2010 and 2020, of 320 magistrates' courts in England and Wales, 164 were closed. 151 parliamentary constituencies contained a magistrates' court which closed, with 13 constituencies containing at least two courts which closed.[290] Moreover, the government plans to close 77 more courts by the year 2025/26.[291] The sale of court buildings has generated at least £233 million since 2010.
Accordingly, in conjunction with the efficiency drives of recent UK governments in relation to procedural justice, there have also been widespread and concerted reorganisations of the court system in England and Wales. A proportion of these closures are directly related to the change in procedural form and format of the court system: moving some processes online naturally requires less physical space for the administration of justice.[292] Accordingly, this section

[288] Morgan and Russell, The judiciary in the Magistrates' courts, RDS Occasional Paper No 66 (Home Office, 2000) p.31.
[289] Ministry of Justice, Modernising the Criminal Justice System: The CJS Efficiency Programme, 21 December 2011.
[290] Constituency data: Magistrates' court closures published Wednesday 13 May 2020 https://commonslibrary.parliament.uk/constituency0data0magistrates-court-closures/ last accessed 1/11/21
[291] National Audit Office, HM Courts & Tribunals Service: Transforming courts and tribunals – a progress update HC 2638 SESSION 2017–2019 13 SEPTEMBER 2019.
[292] Transform Justice, Court Closures Briefing, February 2018 http://www.transformjustice.org.uk/wp-content/uploads/2018/02/Court-Closures-Briefing-Final.pdf last accessed 1/8/21

examines the impact that court closures may have on the lay magistracy and its ability to administer local justice. It also comments on these reforms as potential causes of degeneration in the relationship between local communities and the justice system, as links between the two are dismantled.[293]

An extension of the court closure campaign – as occurs with the upheaval of any long-standing bureaucratic structure – has been the reorganisational costs that have been imposed on the magistracy and its constituents. These costs are not necessarily financial, and also include those which arise from talent drains attributable to perceived attacks on the office. As noted by Brodie:

> *"Faced with the requirement for savings, [the civil service] bureaucracy has, unsurprisingly, produced plans that reduce funding not for itself but for the magistrates, in the form of a programme of local court closures. Court closures, especially in rural areas but also in cities, will reduce, or even destroy, the local connection between magistrates and the communities they serve. It will be increasingly difficult to recruit and retain magistrates outside the remaining centres."*[294]

As we have seen from the discussion in respect of court closures, magistrates' courts have been under increasing budgetary pressures from successive governments which have focused on efficiency cost cutting and reducing delays in the system. This has resulted in reorganisations and reforms with ever tightening financial controls leaving magistrates with little control over their administrative functioning of their courts and they are operating in ever tighter managerial frameworks. Magistrates have struggled to continue to act in ways which reflect their goal of acting in the interests of all people and resolving situation often involving political pressure and community feeling, whilst operating with ever limited resources available to them.[295] One of these tensions that magistrates need to address is local worries and consistent sentencing on a nationwide scale: "If localness adds to the sense of legitimacy then it is a good thing; but if local means inconsistency then it detracts from legitimacy. The balance is local identify versus

[293] Seago P.L. The development of the professional magistracy in England and Wales, Criminal Law review 2000 P631-651
[294] Brodie S QC, The Cost to Justice Government Policy and the Magistrates' Courts, Policy Series no. 75 (2011) P1
[295] Faulkner, D, The Magistracy at the Crossroads, edited by Faulkner D, assisted by Dickinson S, Waterside Press 2012

geographical inconsistency.[296]" And yet, the centralisation of the magistrates' courts system is itself a cause of significant financial turbulence.

There have been several significant consequences for the justice process as a result of these reforms, in particular on marginalised groups. For example, the geographical distribution of magistrates' courts poses difficulties for some defendants; distances to access so-called 'local' justice may now exceed fifty miles. HMCTS states that 95% of the population should be able to reach court by 9.30am if they left at 7.30am, yet this may be an unrealistic assumption for those using public transport. On this theme, the Law Society in 2020 expressed significant concerns about the impact that such closures have on those:

- from low-income households;
- with disabilities or mobility issues
- with children or caring responsibilities;
- from rural areas or without access to a car;
- who own a business - longer travel times may mean extra costs, such as overtime pay for staff;
- who rely on an interpreter - they're not paid for their travel time so may be less willing to attend court.[297]

Moreover, the Law Society emphasised the "value of having magistrates who understand local issues at a hearing."[298] This of course speaks to the themes discussed in this thesis; namely that magistrates courts ought to be pivotal in delivering local justice. Addressing this very issue John Bache JP, national chair of the Magistrates Association said to the Guardian on 27 Jan 2019:

> *"Justice should wherever possible, be administered locally and, with half of all magistrates courts having closed since 2010, many courts are already worryingly remote from the communities that they serve…… A more dispersed court estate will affect the retention and recruitment of magistrates, as some will have to step down if their local court closes and people will be less likely to apply in the first place if the*

[296] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012 p 14
[297] The Law Society, Court closures, 20 May 2020, https://www.lawsociety.org.uk/en/campaigns/court-reform/whats-changing/court-closures last accessed 28/8/21
[298] The Law Society, Court closures, 20 May 2020, https://www.lawsociety.org.uk/en/campaigns/court-reform/whats-changing/court-closures last accessed 28/8/21

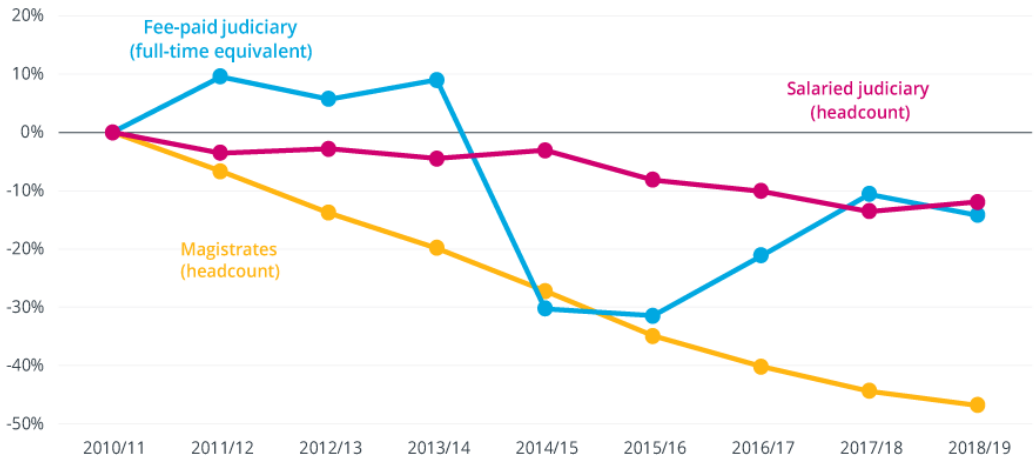
nearest court is not in their immediate area. Longer travel distances for magistrates will also increase the cost of meeting their travel expenses."[299]

There is no doubt it was a drive towards efficiency savings that results in the closure as discussed below of local courthouses and a reduction in the number of magistrates benches.[300] Yet, as we shall discuss in following sections, such efficiencies may be obtained at the expense of traditional principles of justice, including localism. Furthermore, the significant reorganizational costs associated with vast court closure programmes are likely to inflict long-term damage on the office of the magistracy – and with it, on lay involvement in administering criminal justice.

Indeed, as part of the efficiency drives under New Labour, the number of staff working in magistrates' courts fell between 1999 and 2004 by 14 percent. This reflects the reduction in workload that magistrates must contend with: between 1998 and 2008, there was a 16 percent fall in the number of defendants proceeded against in the magistrates' courts. Importantly, indictable offences – those which are most likely to require a trial – fell by a substantial 22 per cent.[301]

Over the last ten years, this trend has only accelerated. The number of cases received in the magistrates' court fell by 6.6 percent between 2012/13 and 2018/19. However, the number of 'either way' and 'indictable only' offences declined by 18.6 percent and 27.2 percent respectively over the same period.[302] This alone indicates that far fewer triable offences are being handled by lay justices. More significantly, as demonstrated in the following chart, the total number of magistrates has fallen substantially since 2010:

[299] Bowcott O and Duncan P, Half of Magistrates courts in England and Wales closed since 2010, The Guardian, Sun 27 Jan 2019 17:57GMT.
[300] The Role of the Magistracy House of Commons Justice Committee Sixth report of session 2016-17 HC 165 Published 19 October 2016
[301] Grimshaw R and Mills H, with Silvestri A and Silberhorn-Armantrading F, Magistrates' courts' and Crown Court expenditure, 1999–2009, Centre for Crime and Justice Studies, September 2010.
[302] Institute for Government Performance Tracker 2019, available at https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts last accessed 1/7/22



As is clear from the findings represented, the rate of attrition with regard to paid judges (i.e. district and stipendiary magistrates) as opposed to lay magistrates has been much less pronounced. Indeed, in spite of deep cuts over this period to the Ministry of Justice budget, numbers of paid judges sitting in the magistrates' courts have held up well. This is contrast to cuts in the number of lay magistrates sitting in English and Welsh magistrates' courts: the headcount has dropped from 26,960 to 14,348. This constitutes a reduction of 46.8 percent.[303] Other justice system staff numbers have also fallen considerably over the same period. This trend resulted in Transform Justice, a charitable organisation which promotes a better justice system, to conclude that the magistracy "faces a workforce crisis not of its own making"[304], amid the findings that in almost 15% of sittings in 2017/18 there were only two magistrates as opposed to the desired three.

Although magistrates now work more efficiently – with an average of 102 cases per year dealt with by magistrates in 2019, in contrast with just 68 in in 2012 – the loss in magistrate numbers are not offset by such efficiencies. In fact, spending on HMCTS fell by 18.4% in real terms between 2011 and 2019.[305] As noted by the Institute for Government:

[303] Institute for Government Performance Tracker 2019, available at https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts last accessed 1/7/22

[304] Transform Justice, Written evidence to the role of the magistracy, follow-up inquiry, House of Commons Justice Committee, February 2019, retrieved 12 October 2019, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-role-of-the-magistracy-followup/written/96494.html last accessed 1/11/20

[305] Grimshaw R and Mills H, with Silvestri A and Silberhorn-Armantrading F, Magistrates' courts' and Crown Court expenditure, 1999–2009, Centre for Crime and Justice Studies, September 2010

> *"Focusing solely on the administrative processing of cases, the data suggests that the efficiency of the criminal courts did improve between 2010/11 and 2015/16 – but not enough to maintain waiting times in the face of deep spending cuts. Since then, waiting times have fallen, but this may have been as much about the cessation of cuts and a fall in demand as improved efficiency."*[306]

Thanks to such reforms, waiting times at courts increased substantially at magistrates' courts over the period 2011-2015, from 7.9 weeks to 8.8 weeks. As the Institute for Government pithily concludes: "Across the whole period from 2010/11 to 2018/19, criminal courts have had to make efficiencies to meet demand, which has fallen by less than spending."[307]

4.6.3 The expansion of Summary Justice to include pre court Summary Justice

As noted previously, the introduction of more streamlined justice procedures included the advent of wider summary justice powers. Blair's New Labour administration increased dramatically the use of summary justice in the criminal justice system and this trend has continued. Summary justice in English law has always meant "proceedings in a court of law carried out rapidly by the omission of certain formalities as required by the common law."[308] It was traditionally regarded as any proceedings conducted in the magistrates' courts involving summary offences. Recently however summary justice has also been seen to embody what Morgan calls "pre-court summary justice" which involves recourse to the law but not to the courts.[309]

New Labour made it central to their manifesto that summary powers were given to police or other officials, in particular to combat issues such as anti-social behaviour.[310] What can be seen

[306] Institute for Government May 2021 Policy paper : Reforms to the adult out of court disposals framework in the Police, Crime Sentencing and Courts Bill: Equalities Impact Assessment https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-equality-statements/reforms-to-the-adult-out-of-court-disposals-framework-in-the-police-crime-sentencing-courts-bill-equalities-impact-assessment assessed 30th June 2021 and https://www.gov.uk/government/publications/adult-out-of-court-disposal-pilot-evaluation-final-report

[307] Institute for Government May 2021 Policy paper : Reforms to the adult out of court disposals framework in the Police, Crime Sentencing and Courts Bill: Equalities Impact Assessment https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-equality-statements/reforms-to-the-adult-out-of-court-disposals-framework-in-the-police-crime-sentencing-courts-bill-equalities-impact-assessment assessed 30th June 2021 and https://www.gov.uk/government/publications/adult-out-of-court-disposal-pilot-evaluation-final-report last accessed 1/9/21

[308] Morgan R, Summary Justice Fast – but fair? Centre for Crime and Justice Studies August 2008

[309] Morgan R, Summary Justice Fast – but fair? Centre for Crime and Justice Studies August 2008

[310] Morgan R, Summary Justice Fast – but fair? Centre for Crime and Justice Studies August 2008

from this increase in summary justice is an acknowledgment by government that the criminal justice system must compete for its resources with other public services. This has resulted in a system whereby legitimacy is arguably achieved by providing a framework which enables individuals to be treated with integrity and protect against wrongful conviction whilst protecting citizens from crime. Ashworth and Redmayne have argued these objectives are put into effect by the principle of 'proportionality of imposition.' This principle denotes that the level of criminal intervention must be proportionate to the seriousness of the crime committed[311], meaning the more serious the crime the more serious the sanction and therefore the greater the safeguards needed to ensure justice is done – and seen to be done.[312]

The English and Welsh jurisdiction is not an outlier on the global stage in respect of increasing the use of pre court or administrative processes/ decisions in relation to criminal justice. Instead, as Morgan has argued, most systems have developed these processes whereby the police or prosecutorial authorities can deal with a crime or other offence without the necessity of bringing the case to court. Interestingly however, England and Wales are unique in their continued use of lay magistrates. This sets up intriguing questions concerning the potential impacts that the move toward pre-court and summary justice may exert on may have on the office of lay magistrate. The following discussion explores the appropriateness of the increased use of summary justice in England and Wales.

Arguably one of the biggest threats posed to magistrates in recent times is the increased use of out of court disposal. Axiomatically, the expanding employment of such summary mechanisms limits the cases brought before the courts. In tandem with the reduction in cases being tried in magistrates' courts, a further consequence of the migration of cases in this manner is the lack of transparency and accountability of the justice system in relation to members of the local community. It is of course true that all jurisdictions provide police and prosecutorial agencies with administrative powers to impose out of court summary penalties but no country in the world relies on lay magistrates to the extent and manner that England and Wales do in administering the bulk of criminal justice.

Accordingly, the threat posed by these out of court disposals to the long-term future of the lay

[311] Seriousness is thought of in relation to both the degree of harm and the culpability of the individual
[312] Ashworth A and Redmayne M 2005 The criminal process third edition Oxford, Oxford university Press Chapter 2 and Morgan R Summary Justice Fast – but fair? Centre for Crime and Justice Studies August 2008

magistracy – and arguably the risk to the defendants right to be tried on the merits - requires further discussion. The remainder of this section will therefore examine the legislation which was passed to enable these out of court disposals, before analysing the most recent data on their use. It will also consider the implications their introduction may have for lay magistrates. These discussions must also be undertaken in the context of increasing concern expressed in Parliament and the media about their expanded use:

> *"The substantial growth in the use of out-of-court disposals has created some disquiet among criminal justice professional over inconsistencies in their use, in particular for persistent and more serious offending, we found wide variations in practice across police force areas in the proportion and types of offences handled out of court."*[313]

A key risk posed by out of court disposals is that they ignore the impact of the offence on the community. This may lead to an amplification effect whereby the community becomes distrusting of the court system with respect of the action taken to address the offence, but also with respect to the potential treatment of future offending[314].

The justification for the introduction of summary pre court procedures was based on what Morgan labelled the "model of effectiveness[315]" and was born from the phrase "nipping it in the bud"[316] used in Lord Falconer's Report on anti-social behaviour.[317] In order to address the behaviour that was of concern to the public it was concluded that summary pre-court procedures were a superior option to court hearings as they enabled a rapid and simple solution which economised on time and expense, as well as sparing members of the public from attending court. The pre-court procedures included in the Report were numerous and wide ranging in their impact. They included:

- Cautions, reprimands and final warnings;
- Fixed penalty notices,

[313] HM Inspectorate of Constabulary/ HM Inspectorate of the CPS (2011) Exercising Discretion: The Gateway to Justice, London: Criminal Justice Joint Inspection.
[314] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012
[315] Morgan R, Summary Justice Fast – but fair? Centre for Crime and Justice Studies August 2008
[316] The theory behind this idea was that by removing the unwanted behaviours, part of the plant the rest of the plant/ society was able to flourish.
[317] Lord Falconer, Doing Law Differently: Strengthening Powers to tackle Anti-Social Behaviour Home Office 2006

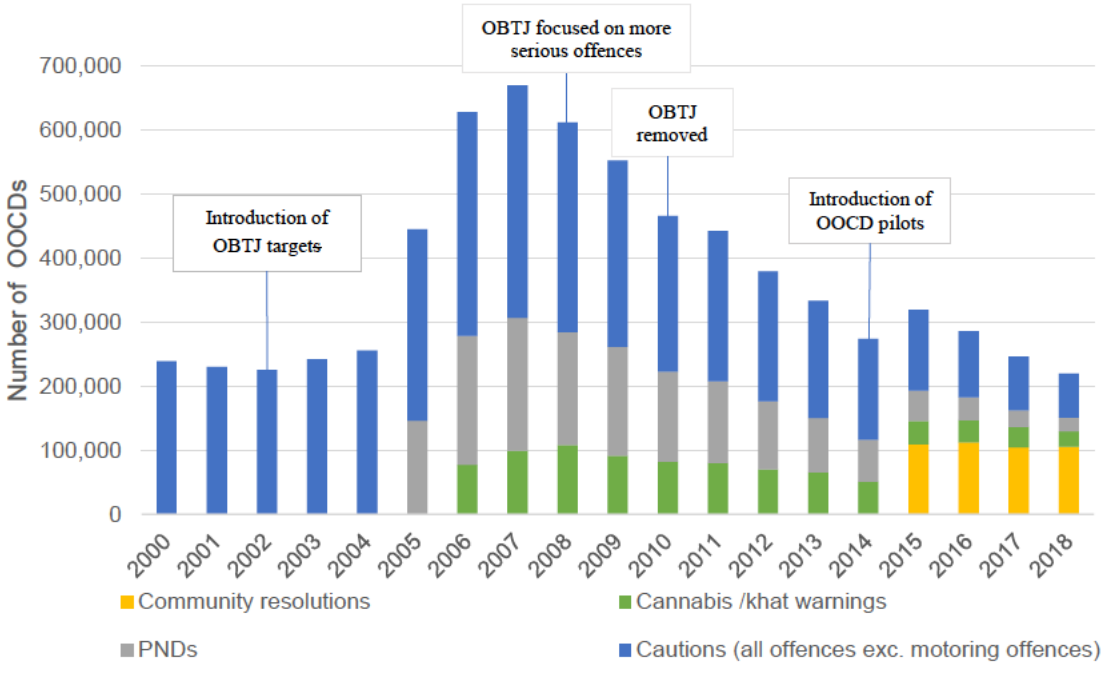
- Penalty notices for disorder;
- Conditional cautions,
- Cannabis warnings; and
- Youth Restorative Disposal.

The powers in question were designed not to marginalise the role of the magistracy but to provide quick, effective and simple procedures which are closely related in time to the offending behaviour. The theory upon their introduction was that it would create additional time for the magistrates courts to allow them to provide speedier and more efficient hearings for more serious offences.

At first glance this would appear to demonstrate confidence in the role of the magistracy in the court system. The magistracy and the Judiciary however have long articulated concerns about whether the use of the procedures constitutes justice or makes people feel safer in their communities. Whilst they have conceded that such mechanisms ease pressure on the courts and prison systems, helping government hit their targets for efficiency in the criminal justice system, other negative consequences may flow from their use. For example, a major feature of the employment of such sanctions is the low visibility of the decision-making processes. Further, the fact that such sanctions rank as criminal convictions, result in obvious questions of impartiality and competence given that the majority of staff making these judgments were police officers and junior Crown Prosecution Service staff.

This disquiet was borne out by experience. The introduction of OOCDs was buttressed by the introduction over the same period of targets – referred to as 'Offences Brought to Justice' (OBTJs) for police services to meet. The targets did not distinguish between different forms of offence; crucially, neither did it distinguish between the method of disposal sought. This meant that the targets that the police services were set did not discriminate between a police caution and a conviction won at trial. Predictably, criminal justice agencies switched from targeting more costly offences to tackle (which also carried much more uncertainty in terms of a successful prosecution) to those offences that could be dealt with under OOCDs. In fact, the proportion of offences dealt with under OOCDs increased from 23% in 2003 to 43% in 2007.[318]

[318] Sosa K, Proceed with Caution: Use of Out-of-Court Disposals in England & Wales, Policy Exchange, July 2012



[319]

Concerns regarding the use of targets are of course, not limited to the criminal justice system. In a seminal piece of work, the economist Charles Goodhart coined the notion that setting targets related to policy inevitable end up in gaming by participants. Formally, the eponymous Goodhart's Law states that 'any observed statistical regularity will tend to collapse once pressure is placed upon it for control purposes.'[320] In simpler terms, this means that when a measure becomes a target, it ceases to be a good measure. In the context of OOCDs, deep suspicions emerged that such mechanism were not being employed for proper purposes. The peak of the use of OOCDs brought a flurry of media attention which focused on discussion of the impact that government targets had exerted on the criminal justice system. The Chief Superintendent of Cheshire, for example, was quoted as saying that government targets for offences brought to justice had corrupted the use of penalty notices for disorder.[321] The Times went as far in 2007 to claim that the justice system was being used not for delivering justice, but for revenue raising.[322] These are classic Goodhart Law outcomes; OBTJ targets were abolished in 2010.[323]

[319] Gibson C, Out of Court Disposals: A review of policy, operation and research evidence, The Sentencing Academy, February 2021.
[320] Goodhart, C (1975). "Problems of Monetary Management: The U.K. Experience". Papers in Monetary Economics. 1. Sydney: Reserve Bank of Australia.
[321] Morgan R Summary Justice Fast – but fair? Centre for Crime and Justice Studies August 2008 p.19
[322] Morgan R Summary Justice Fast – but fair? Centre for Crime and Justice Studies August 2008 p.19
[323] Gibson C, Out of Court Disposals: A review of policy, operation and research evidence, The Sentencing Academy, February 2021.

These arguments surrounding the use of pre court procedures demonstrate the inherent tensions in the system of adopting a more managerialist approach to justice. If the key focus on the criminal justice system is not simply justice being done, but also being *seen* to be done, then the use of these pre court summary justice methods poses a real threat not only to magistrates but to the foundational basis upon which the system is built, as well as the public's confidence in it. Indeed, these fears were enunciated in an unprecedented move in August 2007 when the Magistrates Association publicly condemned the use of out of court procedures and highlighted the threat they felt this development posed:

> *"The Magistrates Association has repeatedly cautioned about the dangers of inappropriate use of out of court disposals. There is an undoubted risk that targets can lead to the wrong cases- more serious cases- being kept from court. Of course, there are very minor matters that do not need prosecution but can the numbers quoted all really to very minor matters? Serious cases should come to court. It is the magistrates court which uphold and dispense summary justice."*[324]

The magistrates association were not alone in expressing their concern about the ever-developing field of pre court summary procedures with Lord Leveson[325] in response to the expansion of these powers through the Police and Justice Act[326] stating:

> *"I do not believe that I am alone in expressing concern about these powers. It is not a question of not trusting the police or the CPS or challenging the will of parliament. It goes back to the origins of our system of summary justice, carried out in public by members of the public, appointed as magistrates, whose decisions can be scrutinised by the public, can be the subject of public debate and, if appropriate, appeal to the court in public."*[327]

Each of these observations demonstrates the levels of disquiet raised surrounding the

[324] Magistrates Association letter in The Times 14 August 2007 as quoted in Morgan R, Summary Justice Fast – but fair? Centre for Crime and Justice Studies August 2008 p 20
[325] Lord Justice Leveson Public Lecture Centre for Crime and Justice Studies, Kings College London 2007
[326] (2006) c.48 s.17.
[327] Lord Justice Leveson, Public lecture to Centre for Crime and Justice Studies, Kings College London 2007 as cited in Morgan R, Summary Justice Fast – but fair? Centre for Crime and Justice Studies August 2008 p 20

introduction and continued use of pre court summary justice. In particular, senior members of both the police service and judiciary harboured significant concerns about the role such mechanisms were playing in the marginalisation of the role of summary courts in deciding the appropriate punishment of criminal cases. The use of these powers can have serious consequences for the offender even if the offence itself is not of the most serious in nature.

A further significant concern espoused by many observers was in relation to the fact that the procedures in question adopted a relatively unaccountable approach to criminal justice whereby those taking these decisions - whether police officers, prosecutors or other figures - were not required to justify their decisions. The relative inconsistency in findings indicates that disparity of outcome may undermine the dispensation of justice. In 2010, the Office for Criminal Justice Reform (OCJR) concluded that OOCDs were disproportionately issued to offenders based upon race, gender and age.[328] It also led to defendants feeling under pressure to agree or admit to actions they otherwise would not. The fact that criminal justice agencies frequently adopted differing approaches to the use of OOCDs also led to a perception that geographical location – rather than the nature of the relevant offence – was a more significant determinant of the likelihood of the use of OOCDs, with the Criminal Justice Joint Inspectorates (CJJI)[329] in 2011 reporting that "[l]ocal practices – even within individual forces – were seen to heavily influence decision-making. This gave the appearance of a postcode lottery in relation to the disposal actually chosen."[330]The use of cannabis warnings (CWs), for example, exhibited huge skews depending upon the police force concerned. Nationally, CWs accounted for 6.6% of all OBTJs in 2011. Yet, there were significant disparities in their application and use: in London, CWs accounted for 13.69% of all OBTJs, whereas in neighbouring Kent, CWs comprised just 2.11%.[331] In spite of the abolition of OBTJs, the continued widespread employment of OOCDs has led many to conclude that public confidence in criminal justice agencies is being eroded.[332]

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[328] Initial findings from a review of the use of out-of-court disposals: A report by the Office for Criminal Justice Reform, February 2010, p.8.

[329] The CJJI is a product of long-standing cooperation between the four criminal justice inspectorates (of Constabulary; the Crown Prosecution Service; Prisons; and Probation) which was formalised by the Police and Justice Act 2006. The CJJI work together to address issues that involve more than one criminal justice agency and have a direct impact on the public who use the justice system. See https://www.justiceinspectorates.gov.uk/cjji/about-cjji/ last accessed 1/10/20

[330] Criminal Justice Joint Inspectorates (CJJI) (2011) Exercising Discretion: The Gateway to Justice. London: Criminal Justice Joint Inspectorates, p.19. Available at: https://www.justiceinspectorates.gov.uk/hmicfrs/media/exercising-discretion-the-gateway-to-justice-20110609.pdf last accessed 1/12/21

[331] Ministry of Justice, Criminal Statistics 2011, Vol. 3 Part 8

[332] Sosa K, Proceed with Caution: Use of Out-of-Court Disposals in England & Wales, Policy Exchange, July 2012

4.7 Policy Review of OOCDs

The July 2021 policy review of OOCDs reflected some of the themes discussed above. The primary aim of the reforms contained in the review was to "simplify the adult Out of Court Disposals (OOCDs) framework, to ensure consistency across police forces in the way low-level offences are dealt with out of court."[333] The reform proposals were originally published in 2014[334] and piloted in three police forces between 2014 and 2015.[335] This was following a public consultation in 2013-2014 during which respondents highlighted the inherent problems with the OOCD framework, as discussed above.

In the year to March 2020 the use of out of court disposals was regarded by the Ministry of Justice to be stable and in compliance with the long-term downward trend in the use of OOCDS, which was arguably as a result of changes in police practice and the availability of OOCDS. However, 2020 data on out of court disposals shows that: "Excluding cautions, there were 167,000 OOCDs in the year ending December 2020, an 18% increase compared to the previous year. This increase was driven by a 32% increase in community resolutions, of which 135,000 were issued."[336]

As of 2021, the list of OOCDs consists of Simple Cautions, Conditional Cautions, Community Resolutions, Penalty Notices for Disorder (PNDs), Fixed Penalty Notices, Cannabis Warnings and Khat Warnings. However, on 13th May 2021 the government published its Policy paper on adult OOCDS and reforms to the system (excluding the role of Fixed Penalty Notices). The proposals will see the existing categories of OOCD reduced from the current six in number to

[333] Home Office, Reforms to the adult out of court disposals framework in the Police, Crime, Sentencing & Courts Bill: Equalities Impact Assessment, Policy Paper July 2021.
[334] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/370053/out-of-court-disposals-response-to-consultation.pdf assessed 1/7/21
[335] May 2021 Policy paper : Reforms to the adult out of court disposals framework in the Police, Crime Sentencing and Courts Bill: Equalities Impact Assessment https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-equality-statements/reforms-to-the-adult-out-of-court-disposals-framework-in-the-police-crime-sentencing-courts-bill-equalities-impact-assessment assessed 30/6/21 and https://www.gov.uk/government/publications/adult-out-of-court-disposal-pilot-evaluation-final-report accessed 30/6/21
[336] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987892/criminal-justice-statistics-dec-2020.pdf P 7 last accessed 1/7/21

two[337]; namely:

(i) Diversionary caution: this will be similar in nature to the current statutory Conditional Caution, which allows police to set enforceable conditions within a specified time period. If breached, a prosecution for the original offence can be pursued. Conditions could be rehabilitative (e.g., engagement with mental health or substance abuse services), reparative (e.g. financial compensation, restorative justice process, formal apology) or punitive (e.g. unpaid work). Receiving this would form part of a criminal record. Diversionary cautions will become spent after 3 months, or, if earlier, when a prosecution is commenced due to non-compliance in line with the current conditional caution.

(ii) Community Caution: this will be similar in nature to the current Community Resolution, intended for low-level offences and will become spent immediately.

A key piece of feedback from the consultation which informed the Report's proposals was:

> *"It was felt that police forces and PCCs should be more directly accountable to their local communities for their use of OOCDs, with a more transparent system for explaining and justifying their operation of OOCDs, especially in the case of serious or repeat offences."*[338]

The reform proposals therefore are aimed partly at addressing a perceived gap in trust and accountability considerations in the use of OOCDs. Indeed, the proposed changes in the use of OOCDs highlight the inherent problems that have been demonstrated by their use and the need

[337] The Policy paper states that "Primary legislation will be introduced to establish two OOCDs in statute: Diversionary Caution - along the lines of the current statutory Conditional Caution, which allows police to set enforceable conditions within a specified time period. If breached, a prosecution for the original offence can be pursued. Conditions could be rehabilitative (e.g., engagement with mental health or substance abuse services), reparative (e.g., financial compensation, restorative justice process, formal apology) or punitive (e.g., unpaid work). Receiving this would form part of a criminal record. Diversionary cautions will become spent after 3 months, or, if earlier, when a prosecution is commenced due to non-compliance in line with the current conditional caution. Community Caution - along the lines of the current Community Resolution is intended for low-level offences and will become spent immediately. As such, police would use only two statutory OOCDs, Diversionary and Community Cautions, and not PNDs, simple cautions, cannabis or khat warnings. see https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-equality-statements/reforms-to-the-adult-out-of-court-disposals-framework-in-the-police-crime-sentencing-courts-bill-equalities-impact-assessment last accessed 10/7/21

[338] May 2021 Policy paper : Reforms to the adult out of court disposals framework in the Police, Crime Sentencing and Courts Bill: Equalities Impact Assessment https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-equality-statements/reforms-to-the-adult-out-of-court-disposals-framework-in-the-police-crime-sentencing-courts-bill-equalities-impact-assessment assessed 30th June 2021 P

felt in government for a review of their use thanks to the potential threat they posed to public confidence. Although now far from their peak use in 2007 OOCDs in any format may present the same inherent problems. OOCDs provide a key analytics tool in highlighting the important safeguarding role the magistrates have performed at the entry level to the criminal justice system and as this is eroded by these increased pre-court summary justice procedures. As noted above, there are significant public anxieties concerning the use of such remedies, especially given the inconsistency with which police services apply penalties and the lack of functional oversight mechanisms to address such issues. For example, the CJJI has noted considerable concerns about the quality of the decision-making and variability in application and procedure in the context of OOCDs. In its 2011 report[339], the CJJI found that at least one-third of OOCDs that it had analysed were not administered properly, noting that: "The substantial growth in the use of out-of-court disposals has created some disquiet among criminal justice professionals over inconsistencies in their use, in particular for persistent and more serious offending."[340]

These fears arguably reflect increased managerialist concerns about efficiency rather than fairness and justice, which effectively undermine the very system they claim to be improving. Pre court summary justice, exemplified by the OOCD procedure, arguably provide a classic illustration of "managerially driven new widening"[341] at the expense not simply of justice but also the public's confidence in the system. Such fears are, of course, analogous to engagement of the public through lay magistrates and other roles for laypersons. In the context of OOCDs, it must be noted that their use is equivalent to sentencing. On this basis, it is arguable that more accountability and scrutiny with regard to those criminal justice agencies involved in issuing such sanctions ought to be instated. In particular, the OOCD may be viewed as a managerialist tool utilised by authorities to make the administration of justice more efficient. By providing specialist criminal justice agencies powers to dispense justice at will, with little scrutiny, resources and time may be saved. Yet, in promoting these processes at the expense of administering justice through traditional means where offenders are provided with greater access to justice, public accountability of the actors involved is diminished.

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[339] Criminal Justice Joint Inspectorates (CJJI) (2011) Exercising Discretion: The Gateway to Justice. London: Criminal Justice Joint Inspectorates. Available at: https://www.justiceinspectorates.gov.uk/hmicfrs/media/exercising-discretion-the-gateway-to-justice-20110609.pdf last accessed 28/8/21

[340] Criminal Justice Joint Inspectorates (CJJI) (2011) Exercising Discretion: The Gateway to Justice. London: Criminal Justice Joint Inspectorates.https://www.justice.gov.uk/downloads/publications/corporate-reports/hmi-prisons/BPL_CJI_20110401.pdf last accessed 28/8 21 P4

[341] Cohen S 1985 Visions of Social Control, Cambridge Polity Chapter 2

As noted by Gibson, the lack of accountability relating to such summary justice manifests in two distinct dimensions: internal accountability, and external accountability. Accountability is undermined because proper scrutiny of the use of powers of intervention such as OOCDs is insufficient. Safeguards and processes are established with the intention of ensuring that at least some layers of internal accountability exist in relation to the administering of OOCDs; for example, certain OOCD sanctions must be authorised by senior officers: simple and conditional cautions may not be authorised by any officer below the rank of sergeant. All other offenses may be dispensed by any ranking officer, with police services relying merely on the recording of decisions. Yet, doubts concerning the efficacy of these processes remain; self-reporting of decisions is problematic:

> *"By issuing an out-of-court disposal, a police officer may be perceived as acting as judge and jury, and officers – and indeed forces – should be able to justify the decisions they make. The recording of a rationale, which need be no more than a few lines on the custody record, crime report or other appropriate place, is necessary to account for the action taken and is part of the drive towards greater transparency."*[342]

More significantly, there are other processes designed to ensure that external accountability is undermined where OOCDs are being used excessively. In response, Scrutiny Panels have been introduced to oversee the dispensation of such OOCDs[343], and to provide local input into the governance of the relevant justice processes to ensure "appropriateness and consistency across the country."[344] Yet, whilst such panels may facilitate external accountability of criminal justice agencies approaches to the use of OOCDs, variations in practice may continue to undermine the consistency of such oversight mechanisms.[345] This defect had arguably still not been rectified in 2020, when the chair of the Magistrates Association later claimed that, whilst such Scrutiny Panels were useful: "Panels [ought to]…be established in every area to scrutinise

[342]Criminal Justice Joint Inspectorates (CJJI) (2011) Exercising Discretion: The Gateway to Justice. London: Criminal Justice Joint Inspectorate p. 24 https://www.justice.gov.uk/downloads/publications/corporate-reports/hmi-prisons/BPL_CJI_20110401.pdf last accessed 28/8/21

[343] Criminal Justice Joint Inspectorates (CJJI) (2011) Exercising Discretion: The Gateway to Justice. London: Criminal Justice Joint Inspectorate p24 https://www.justice.gov.uk/downloads/publications/corporate-reports/hmi-prisons/BPL_CJI_20110401.pdf last accessed 28/8/21

[344] 2015, the House of Commons Home Affairs Committee

[345] Gibson C Out of Court disposals A review of policy operation and research evidence, Sentencing council Feb 2021 https://sentencingacademy.org.uk/wp-content/uploads/2022/02/Out-of-Court-Disposals.pdf last accessed 14/9/22

the police's use of out-of-court disposals, identifying inappropriate use and tackling inconsistency. This would help to increase confidence in the justice system, not only among magistrates but also the wider public."[346]

When examined in conjunction with the single justice procedure discussed below one can see the potential these measures have for the continued squeeze on the work of lay magistrates and further marginalisation of their role.

4.8 The Single Justice Procedure and online hearings

The move away from contested modalities of criminal justice towards more streamlined and 'efficient' processes is further exemplified by recent court reforms introduced under recent governments. This has been manifested in a recent development in UK courts; namely, the new Single Justice Procedure (SJP), introduced by the Criminal Justice and Courts Act 2015.[347] The SJP involves uncontested adult cases where the charge is summary-only relating to non-imprisonable offences. Such offences may now be dealt with on the papers – i.e., in writing only - by a single magistrate supported by a legal advisor without the attendance of a prosecutor or defendant.[348] This process is not available if a defendant pleads not guilty or they have expressed that they do not want to be tried by a single justice. In operationalising the SJP, magistrates and their legal advisers will have the capacity to hear more complex cases, whilst defendants may resolve charges against them in a convenient and timely manner, with the option to pay fines immediately and granted the certainty of an outcome from the outset. Indeed, the Ministry of Justice has been a strong advocate for the Single Justice Procedure stating that the process:

> *"provides an opportunity for magistrates – as a bench of three to spend the majority of their time on more serious cases, allowing for more attention on the cases which have a direct impact on victims and communities."*[349]

[346] MA Chair Bache J on need for scrutiny panels, 20 January 2020, https://www.magistrates-association.org.uk/News-and-Comments/ma-chair-john-bache-on-need-for-scrutiny-panels last accessed 1/4/21
[347] (2015) c.2 s.48
[348] Role of the Magistracy house of Commons Justice Committee Sixth report of the Session 2016-17 HC 165 published 19 October 2016
[349] MAG0050 paragraph 10 as cited in Role of the Magistracy house of Commons Justice Committee Sixth report of the Session 2016-17 HC 165 published 19 October 2016

The SJP leverages the recent introduction of digital hearings and online justice mechanisms. The digitisation of the entire process was commenced in 2016, with the first nationwide online conviction system ready from 2018. The initial phase of the rollout comprised very minor criminal offences (including railway and tram fare evasion and possession of unlicensed fishing equipment) before being expanded to encompass the entire gamut of appropriate offences.[350] The tensions that afflict the criminal justice process - which have been clearly delineated throughout this chapter – are further evidenced by the adoption of such procedures. For example, as noted by Donoghue, although the SJP may bring about speedier and more efficient modes of settling offences, "it is possible that the convenience of avoiding the 'formal' court process altogether may lead a defendant to admit to something for which he or she would otherwise have a defence, thereby resulting in an increase in guilty pleas in online courts."[351] The stigma of appearing in court may also make defendants less reluctant to plead guilty – and indeed to make a false admission of guilt – to an offence where such processes are available.[352] Research confirms that defendants without access to representation frequently do not understand or recognise the merits of their case[353] and nor do they always resist the pressure to enter a guilty plea in spite of having a viable defence.[354] Those with legal representation, who are generally more affluent, are much more likely to avoid the full costs of the SJP, whether that be because they enter a plea deal with the court or because they are advised to take their case to trial.[355]

Given the potential for accused persons of falling prey to issues associated with greater use of technology and, tangentially, the impact this has on the significance of lay participation in the justice system, new challenges for equitable public participation emerge. The embrace of a technocratic and efficiency-based approach to the court system undermines the legitimacy derived from public perceptions of authorities' adherence to principles of accountability,

[350] The Public Law Project, The Digitalisation of Tribunals: What we know and what we need to know https://publiclawproject.org.uk/content/uploads/2018/04/The-Digitalisation-of-Tribunals-for-website.pdf last accessed 5/9/22

[351] Donoghue J, The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice, 80 Modern Law Review (2017) P1016.

[352] Donoghue J, The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice, 80 Modern Law Review (2017) P1016

[353] Padfield N, 'The Right to Self-Representation in English Criminal Law' (2012) 83 Revue internationale de droit penal P357.

[354] Gibbs P., Justice Denied: Unrepresented Defendants in the Criminal Courts(London: Transform Justice, 2016.

[355] Donoghue J, The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice, 80 Modern Law Review (2017) P1017.

transparency and fairness. One effect of mechanisms such as the SJP is to reduce the public's perception that arbitrary power will not be wielded against them by the state.[356] This is why Damaska places such stock in the judicial apparatus as a bulwark against such trends, arguing that by treating offenders appropriately, greater public confidence in the justice system is maintained. Moreover, there is significant evidence that perceptions concerning the fairness of a process directly impact the confidence in, and compliance with, the outcome of justice proceedings.[357]

4.9 Analysis: The importance of the lay magistracy to civic society

Since its inception, the office of magistrate has been an integral part of the judiciary of England and Wales. As has been revealed in discussions thus far in this chapter, the magistracy has occupied a foundational role in the English and Welsh justice systems for a considerable period of time. The fact that this role is becoming increasingly marginalised speaks to a wider trend in the socio-legal function of lay persons in the justice system. The involvement of lay persons – traditionally regarded as bulwarks against state power and managerial approaches to justice – have been subject to an increasingly ad hoc and centralised reform agenda, something which the magistracy has not escaped.

Yet, the importance of the office to political, democratic and socio-legal legitimacy cannot be overstated. As non-professional independent judges, magistrates are regarded as foundational protectors of the rights of citizens; in particular the protection of citizen's against violations of their rights by executive power. In so doing, they increase faith and confidence in public institutions, strengthen the legitimacy of state authority and increase transparency in its determinations.[358] In tandem, the role of magistrate has been underpinned by the linked principles of "local justice" and "justice by one's peers."[359] On this basis, Gibbs observes that magistrates have the unique potential both to perform a role that combines judgment by peers and a consistent link between the community and the court system.[360]

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[356] Easton J, Where to Draw the Line? Is Efficiency Encroaching on a Fair Justice System? The Political Quarterly, Vol. 89, No. 2, April–June 2018
[357] Solum L.B, 'Procedural Justice' (2004) 78 S Cal L Rev 181
[358] Hostettler, J, The Criminal Jury Old and New: Jury Power from Early Times to the Present Day. (Winchester: Waterside Press 2004)
[359] The role of Magistracy report, sixth report of the session 2016-17, House of Commons Justice Committee Hc165, Published on 19 October 2016 by authority of the House of Commons.
[360] Gibbs P and Kirkby A, Judged by peers? The diversity of lay magistrates in England and Wales, Howard League What is Justice Working papers 6/2014

The inclusion of citizens in the composition and procedural of a court enhances social order because it bestows legitimacy on the institutional framework, by allowing those citizens to have a voice and influence the course of proceedings. Such arrangements are commonplace across the world: in many countries, citizens participate as lay judges in decision-making bodies, either with or without the input of professional judges.[361] As noted by Kuzelewski, this is, in part because "[l]ay persons support and enhance democratic political institutions and act as a check on authority"[362] in particular by acting as a check on the power(s) of state-backed prosecutors and professional judges. In so doing, they enhance democratic governance; they act as a form of representative democracy in legal institutions. (Malsch 2009).[363] Because lay persons bring life experience and cultural contexts to the adjudication process, as well as an appreciation of the social group they are drawn from, links between local communities and the justice system are established and strengthened. Importantly, the justices involved also return to the community once a hearing is over, sharing the lessons they learned about the law and ensuring an accountable and transparent legal system.[364] This stands in contrast to the – oft fraught – relationship between citizens and full-time professional justices, who are often referred to as 'out of touch' and representative of an 'elite' group with scant relevance to community.[365]

By representing society, then, lay justices add legitimacy to the justice system. They also act as a bulwark against technocracy by making proceedings and processes more accessible. This is exactly the category of problem that Damaska cited in relation to the court system, placing substantial weight on the importance of viewing forms of justice in light of their social and economic context. Indeed, one of Damaska's key insights was to highlight the developing trend

[361] For example, in many civil law countries lay judges sit on panels alongside professional judges. Such countries include Germany, Austria, Denmark, France, Finland, Hungary, Italy, Norway, Poland, and Sweden, and in post-Soviet countries including the former Czechoslovakia and in countries of the former Yugoslavia.
[362] Kuzelewski, K, The Non-Professional Judge as a Component of Civic Culture in Poland, Studies in Logic, Grammar and Rhetoric 65 (78) 2020
[363] Malsch. M, Democracy in the courts: lay participation in European criminal justice systems (Ashgate, Farnham: 2009)
[364] Goldbach, T.S., Hans, V.P. (2014). Juries, Lay Judges, and Trials. Cornell Law Faculty Working Papers No. 122.
[365] For example, see Hazel Genn, Paths to Justice: What People Do and Think about Going to Law, National Centre for Social Research; The Community Legal Service: Access for All? (1999) "; Pleasence, P, Balmer N.J, Patel. A, Cleary. A, Huskinson. T, and Cotton, T. Civil Justice in England and Wales 2010: Report of the First Wave of the English and Welsh Civil and Social Justice Panel Survey (London: Legal Services Commission 2011); Nigel Balmer Summary Findings of Wave 2 of the English and Welsh Civil and Social Justice Panel Survey (London: Legal Services Commission 2013); Buck, A., Pleasence, P. and Balmer, N.J. (2008) "Do Citizens Know How to Deal with Legal Issues?" (2008) 37(4) Journal of Social Policy P661

towards professionalisation and centralisation, forming organised expertise.[366] The three quotations below provide empirical links between Damaska's principles and the pressures facing lay participation in the criminal justice system and the perceived move towards a more managerialist model of criminal justice:

> *"it is no longer true that magistrates' courts provide local justice because of centralisation."*
>
> *"It may be that 'local justice' is irrelevant now."*
>
> *"The allocation of work between lay and professional magistrates has been the subject of much examination, professional and academic, over the years. Any attempt at a logical and tidy solution to the question is impeded by the way in which summary justice in this country has evolved over the centuries to its present mix of a small number of professional judges exercising singly the same jurisdiction as a large number of lay magistrates sitting in panels."*[367]

These arguments implicitly include, or are sometimes expressly coupled with, the notion that, as compared with professional judges, magistrates are less 'case-hardened' and, therefore, approach their task with fresher or more open minds. As noted by Lord Patel in this context:
When we consider the history and the role magistrates have conducted in the criminal justice system the impacts of this change in approach and focus become increasingly significant. Instead of an individual being judged by one's peers and the views of the local community being embedded into the system instead we see decisions becoming routine (in the words of Damaska "habitual") meaning that the individual narrows the factors that concern them in making a decision and sees the elimination of more personal factors. This has arguably been in the English and Welsh criminal justice system with discussions concerning "case hardening" of judges in comparison with lay justices and the impact that this may have not simply of local community ties to the system but also the perception of whether the system truly reflects modern society. The increased use of district judges (and before them stipendiaries) has seen a move from individualised justice towards a model that values the pursuit of greater consistency

[366] Damaska MR, The Faces of Justice and State Authority, A comparative approach to the legal process, Yale University Press, New Haven and London 1989 P 71-94 and P181-206
[367] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012 p3-5

of decision-making across larger classes of people. Yet, this results in a detachment from the details of life or a focus on the formulation and application of standards. As Skyrme observes:

"The collective views of a cross-section of the population, representing different shades of opinion, can be more effective in dispensing justice acceptable to the public than the decision of a single individual necessarily drawn from a fairly narrow social class and whose experience of local problems may be limited."[368]

These details of life underpin the initial impetus to incorporate lay magistrates into the system and to deliver on the ambitions of administering the concept of local justice. As a consequence, whilst the increasingly dominant hierarchical model much more aligned to the managerialist approach characteristic of contemporary magistrates court systems sees no place for lay involvement. In sharp contrast to this approach is Damaska's 'co-ordinate ideal', which adopts few bright lines to distinguish officials and their attitudes from the rest of society and embodies the traditional approach taken to Anglo-American justice. The co-ordinate ideal "sees power vested in amateurs who are called upon to perform authoritative functions ad hoc, or for a limited time.[369]" This model embraces many of the characteristics we have seen in relation to all aspects of lay involvement whether in the form of magistrate or jury. It embraces the notions of spontaneity and improvisations and reacting emotionally and being "green" as opposed to highly trained and institutionalised[370].

The application of Damaska's theory to the magistrates court system demonstrates that - despite having the potential to undergo some hardening in approach - their personal and official attitudes are not separated as distinctly as those of career officials. Indeed, as Damaska argues lay individuals desire to bring to the role their "ordinary generalist attitude". It is this attitude which is so crucial to the community feeling that the system represents them as the coordinate ideal rejects decision making approaches which are removed from the prevailing ethical, political or religious norms or common sense. Magistrates are of course not a perfect embodiment of this model as the community standards they represent in theory cannot always be identified as the prevailing attitudes in society. This is why the diversity of the profession

[368] Skyrme T, The changing Image of the Magistracy (2nd edition. Macmillan 1983) p.8
[369] Damaska M. R, The Faces of Justice and State Authority, A comparative approach to the legal process, Yale University Press, New Haven and London 1989 p 24
[370] Damaska M.R, The Faces of Justice and State Authority, A comparative approach to the legal process, Yale University Press, New Haven and London 1989 p 23-28

as discussed in chapter 5 is so important from both a theoretical and practice-driven perspective.

The tension between notions such as the hierarchical and co-ordinate ideals Damaska articulated may be illustrated through the lenses of the Magistrates courts. As will be discussed in the following chapter the increased use of stipendiary and, latterly, district, judges has ushered in the growth of the hierarchical ideal, prioritising the ideas of professionalisation, vertical ordering of officials and attachment to technical decision making.[371] This shift in approach is reflective of the increased managerialist approach to criminal justice in England and Wales. An inherent problem is that in gravitating towards the hierarchical model there is a move away from 'individualised justice', towards what Damaska warns is a 'routinization of activity' where 'issues that come before the official are no longer apprehended as presenting a unique constellation of circumstances'."[372]

These observations have implications not simply for the criminal justice system, but the prevailing political and social systems. Modern democracy is, to some extent, based upon the values of civic society. The main determinants of a civic society are:

- The exercise of sovereign power by a state through its (often elected) representatives;
- The operation of state authorities under the law;
- A system of legal protections for citizens' fundamental rights and institutions which guarantee their observance; and
- Legal guarantees of citizens' participation in society.[373]

The final category of civic society may be observed in two areas: civic group activity and individual social activity. Kuzelewski notes that the:

> *"basis for the formation of civic society is civic culture as a participatory culture, i.e., a set of recognised and socially accepted values, beliefs, specific attitudes and patterns*

[371] Damaska M.R, The Faces of Justice and State Authority, A comparative approach to the legal process, Yale University Press, New Haven and London 1989 p18-23
[372] Damaska M.R, The Faces of Justice and State Authority, A comparative approach to the legal process, Yale University Press, New Haven and London 1989 p19
[373] Kastrati, A. 'Civil Society from Historical to Contemporary Perspectives' (2016) *European Journal of Multidisciplinary Studies*, 1, no. 1.

of behaviour. It is a bridge between the conscious and responsible participation of individuals in society and the recognition and fulfilment of their duties towards the state and society."[374]

These duties, responsibilities and obligations are manifested in the administration of justice by lay participants; the adoption of such roles by non-professionals enhances participatory political culture, in which citizens possess a keen sense of influence in social decision-making. The last twenty years has seen magistrates inveighed with a special responsibility to be active in their communities by engaging in discussions on a wide range of issues, from community punishment and rehabilitation to crime prevention. Traditionally the preserve of the justice's clerks who, now as civil servants are restricted in how they can engage with discussion groups, magistrates now perform this role. Engagement is considered to be crucial in helping magistrates adopt a higher public profile and be viewed as more engaged and accessible[375]. Despite the greater mobility of society today the cases dealt with the in magistrates court predominantly are the result of offenders who live in the community committing offences against other members of the same community.

Such participation therefore generates both greater involvement and engagement by the community in societal organisation but engenders trust in social and political institutions, as well as co-operation and tolerance between citizens themselves. The participation of lay persons in the justice system is therefore an indication of a well-developed and legitimate civic culture.

4.10 The survival of the lay magistracy

It is clear that Maitland's assertion, cited earlier in the chapter, was erroneous in relation to the potential death of the magistracy; instead, the role of magistrates and their judicial functions were expanded and strengthened until the 1990s[376] when a diminution of their role began. Nonetheless, any reduction in the remit or ability of magistrates to perform their role therefore threatens the ability of the system to be truly connected to the community, which traditionally

[374] Kuzeleski D, The No professional judge as a component of Civic Culture in Poland Studies in Logic, Grammar and Rhetoric 68 78 2020 p.125-26
[375] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012 p 5-36
[376] Donoghue J.C, Reforming the role of magistrates: implications for Summary justice in England and Wales The Modern Law Review Vol 77 NO 6 November 2014 pp 928-963

has been there to protect the public, and act as symbolic permanent gatekeepers of community values in the criminal justice system. Public distrust of both government and lawyers has meant that citizens have viewed the lack of professional training and salary for lay magistrates as illustrative of their independence and therefore a key strength of lay involvement rather than the weakness it is sometimes articulated as being[377].

It is important to draw a distinction between Magistrates 150 years ago and magistrates today. Arguably the view that magistrates were "prejudiced, prosecution minded middle class bigot motivated by lust for power[378]" was accurate in earlier times but there have been radical changes to the office of magistrate since. To survive as they have done magistrates had to be acceptable to both the public and the government. As Leveson suggested "some see magistrates as 'surrogate jurors' or as a manifestation of democracy in the administration of criminal justice."[379] Moreover, as noted above, at a higher-level lay participation in the justice system remains a marker for continued participatory democracy. Skyrme argues the acceptability of the magistracy is threefold in nature: (i) firstly, the historical depth of the roots of the lay magistracy in England and Wales and the concomitant desire to preserve and respect tradition; (ii) secondly the ability of magistrates to adapt to changing conditions; and (iii) thirdly the intrinsic merits of the system itself, which are unique amongst judicial mechanisms.[380]

From a practical perspective, justices appeal to the government because their system is flexible; sudden fluctuations in the volume of work can be handled by calling upon justices to sit more or less often in more or fewer courts as the need arises. In contrast, full-time judges have little scope to expand their output if work increases yet act as a drain on the public purse in the absence of cases to try. These individuals combine knowledge, experience and understanding of the problems facing different sections of the community, enabling them to deal with cases in line with these values in a way the professional courts cannot. Lay magistrates' elasticity of person-power may be seen as cost effective and the social and political composition of the lay magistrates has appealed to the politically minded who saw them as an opportunity to democratise the courts and enable better representation in the system. We will discuss in the

[377] Dawson J.P, A history of lay judges Harvard university press Cambridge 1960 p 145 and P. L. Seago, The development of the professional magistracy in England and Wales, Criminal Law review 2000 P631-651
[378] Skyrme T, The Changing face of the Magistracy, Macmillan Press LTD 1979 p 8
[379] Leveson Review Chapter 4 p 104 https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press last accessed 1/11/21
[380] Skyrme T The Changing face of the Magistracy, Macmillan Press LTD 1979 p 6

next chapter whether this was in fact a fallacy or a justifiable argument for the retention of lay magistrates.

The perception of localism embedded in the magistracy has also aided its survival. Traditionally the administration of criminal justice in England was seen as the responsibility of the local area; crime is in general a local issue and as we have seen, the jury system developed from the same origin. This resulted in the local area administering and financing the criminal courts until 1972 when the new state funded system was born, although the magistrates courts were not included in this new system thanks to the significant reforms of 1949, discussed above.[381] However the tension in relation to finances can be seen from the commencement of the Magistrates Court Committees in 1949 where we see that local authorities were not inclined to fund magistrates in the way a supporter of magistrates may have wished. This system therefore resulted in failures to provide adequate accommodation or maintenance of magistrates' courts. It also saw no thought paid to career progression, in particular of magistrates' clerks, resulting in staff deficiency in this model. Proponents of the magistrates system argued that a centralised control model would have ensured magistrates received the resources they needed; however, it would have also led to a more efficiency minded model resulting in less magistrates sitting in their local areas and arguably less local influence in the role.

The argument over the centralisation of magistrates in 1970 saw many of the tensions raised today debated. There was strong support for the notion that the local community needed to preserve their place in the administration of justice but there was also support for a more centralised efficient system. The decision which ultimately eventuated was a middle ground: the preservation of the essentials of the existing system but with attempts to regulate and improve it through mechanisms such as better staff training and the amalgamation of some petty sessional divisions.

However, reforms in the twenty-first century to the magistrates system have departed from this accommodation. As Lord Justice Auld noted in his review, many magistrates believed that

[381] Skyrme T The Changing face of the Magistracy, Macmillan Press LTD 1979 Chapter 14 Administration and Organisation

there was an agenda to "squeeze" lay magistrates out of the system.[382] At the time of the Auld reforms, one leading critic noted in the context of the combination of benches and court closures that: "The 'efficient', centralised anonymity which characterises and demoralises so much of modern Britain is increasingly the driver of modern justice. Since so many of those who call the shots in all this are part of the deracinated metropolitan class, who have themselves lost much of their sense of locale and of the virtues of community life, then prospects for local justice look bleak."[383] Similarly, the Chief Executive of the Central Council of Magistrates' Courts Committees spoke of the government going "down the road of abandoning local accountability" through the imposition of "a huge, centrally run monolithic agency, lacking any local input and accountability, which takes decisions without reference to the local situation. It really would spell the end of local justice as we know it."[384]

In spite of his commitment to the lay magistracy, Auld's reforms introduced – arguably for the first time - a real threat of sweeping professionalisation of the role. In light of the introduction of a centralised executive agency, Raine attributed this threat to three fundamental drivers:

(i) the recruitment of new magistrates being discouraged by terms and conditions of service because of greater remoteness from the local area and community;
(ii) more central control following the end of Magistrates' Courts Committees; and
(iii) difficulties flowing from the division of work between lay magistrates and District Judges.

Indeed, his primary concern was that the reforms made by Auld would result in a diminution in quality both of local democratic participation and the degree of community orientation.

4.11 Magistrates Courts and Localism

As discussed, an original principle underlying concept of lay magistrates was the prioritisation of local judgement in administering justice, as noted by Skyrme: "The system of lay justices reflects, through citizen participation the traditional English involvement of the layman in the

[382] Auld Review, Chapter 4, para. 12. https://www.criminal-courts-review.org.uk/chpt4.pdf last accessed 13/9/22
[383] Phillips. A, (Lord Sudbury, Liberal Democratic peer), "We must hold on to local justice", (2 December 2000), The Observer.
[384] Webster. D, "Fighting the Threat to Local Justice", (May 2002) The Magistrate P140.

administration of justice. It enables the citizen to see that the law is his law administered by men and women like himself and that it is not the esoteric preserve of the lawyers."[385] The preservation of locality of justice as a critical issue was also articulated by Leveson who argued in 2000 that: "There is a widely and firmly based instinct that lay and local justice is a bridge between the public and the court system which otherwise might appear remote."[386] The Magistrates Association in 2011 furthered this notion, concluding that:

> *"It is important that justice is seen to be done in local areas- so the justice agencies are accountable to local people…Centralisation is a concern. It is impossible to have local justice without local courts."[387] However, as we will discuss justice is becoming less local in geography and local now has a wider definition than it might historically have had."*

Magistrates were initially appointed because they were community leaders, enjoying enhanced social status and respect in their communities and endowed with attributes such as leadership, integrity and respectability. As articulated by Gibbs "the very point of having a lay magistracy is for them to be part of the community and to be able to influence... things happening in the criminal justice system and in the community."[388] The importance of the representativeness of the magistrates was articulated by Lord Patel:

> *"If it is the administration of justice that we are speaking about, then we should ensure that there is also a justice of administration: a justice that reached out to those who are excluded and actively brings them into the process and a justice that recognises that no single group can expect to make judgement in the interests of the community if it is not rooted in the community that it presides over. That is the real basis of respect and it is something that must be tangible."[389]*

Court closures and the commensurate reduction in the numbers of magistrates operating in

[385] Skyrme. T, The Changing face of the Magistracy, Macmillan Press LTD 1979 p 8
[386] Home Affairs Committee report judicial appointment 1995-99 HC 52-1 para 198 and Sago, Walker and Wall the development of the professional magistracy in England and Wales Crim L R 2000 p 649-651
[387] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012 p 14
[388] Q1 The Role of the Magistracy House of Commons Justice Committee Sixth report of session 2016-17 HC 165 Published 19 October 2016
[389] Lord Patel of Bradford, House Lords, debate to ask HM Government what plans they have for developing the role of the magistracy in the Big Society 2 November 2011

England and Wales arguably erode the bedrock upon which the institution of lay magistrates was founded. Similarly, in the 2011 Magistrates Association report, a Police Superintendent noted that "Our feedback... is that the community wants a stronger link with magistrates. Maintaining confidence in communities is important- and communities need to see an outcome that meets their needs for that community[390]". This insight would suggest that court closures may threaten the foundational basis upon which magistrates were developed and undervalue the impact of that perception of local justice.

In undermining this foundation, arguments which focus on the "modernisation" of the magistracy, with attending turning towards the efficiency and effectiveness of their office in comparison to lay magistrates, are routinely made. Indeed the notion that one cannot have local justice without local courts was a theme in forums and interviews in the 2011 Magistrates Association report: the issues of centralisation and hierarchy were accorded significant importance;[391] one magistrate stated that "top-down administration was undermining magistrates' ability to deliver a high quality service"[392] whereas the preponderance of public opinion was that "it is no longer true that magistrates courts provide local justice because of centralisation."[393] These are themes to which we will return later in the chapter in discussions of the impact of managerialism on criminal justice apparatus.

4.12 Potential drawbacks to the use of lay magistrates

In previous sections of this chapter, the analysis focused largely on the unique qualities and advantages in terms of legitimacy that the magistrates' office brings to the criminal justice system. Yet, it must be acknowledged that there remain some fundamental issues with the use of the magistrates' system. In particular, of course, there were some serious issues with the funding and operation of magistrates' courts which became increasingly apparent towards the end of the twentieth century. Magistrates' budgets were dispensed by central government, but not controlled or monitored in any systematic way; this delegation of powers to spend public money with little oversight cannot be regarded as the basis for participatory democracy. Arguably, therefore, the processes and justifications with regard to the funding of magistrates'

[390] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012 p 23
[391] The Magistracy in the 21st century Magistrates Association 2012
[392] Jagger G, JP MAG007 as cited in The Role of the Magistracy House of Commons Justice Committee Sixth report of session 2016-17 HC 165 Published 19 October 2016
[393] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012 p 13

courts – as with many other public services – were appropriate candidates for review.

Training of magistrates was also an issue; it was believed in that – at least in some dimensions – some lay magistrates were not trained sufficiently to act as dispensers of justice. This has, however, now largely been rectified. The development of training procedures at a national level was regarded as especially important given that the public had begun to expect a criminal justice system which provides high quality service performed by accountable and identifiable individuals.[394] The maintenance of the public trust and confidence in lay magistrates therefore necessitated some degree of consistency and training. Under HMCTS, mandatory training for all first-year magistrates is now in place.[395] This training recognises the desirability of mentoring for new magistrates. This more comprehensive training is the result of the gradual increase in training that can be seen through the introduction of the Magistrates Training Initiative (MTI) in 1999.[396] The latest training initiative – MTI 2 – avoids issues of concern with regard to MTI that the dual roles of magistrates as appraiser and appraisee under the training system might to lead to bias or unfairness.[397]

Yet, there are also deeper issues with the use of the magistrates' system which one must address. There are of course, issues with lay involvement in the criminal justice system which transcend the role of magistrate; this thesis has surveyed them in Chapter One. However, there are also factors which may undermine the role of magistrates which are applicable for the most part to this judicial position in isolation – by virtue of the role itself and the qualities the population tend to ascribe to the function of justice and the relative importance of the characteristics of those in positions to exert judgment. As to the importance of this to the

[394] Davies. M, A new training initiative for the lay magistracy I England and Wales – a further step towards professionalisation? International journal of the legal profession vol 12 No 1 March 2005, Routledge
[395] Under the MCC model initial training was designed to provide an understanding of the legal system and the magistrates place within it as well as on sentencing and structured decision making. This was then supplemented by court and prison visits. Additional training was then provided after the first year which was more detailed and focused on detailed instruction and practice of the law and procedure as well as decision making. In comparison in 2021 In the first-year training involved initial introductory training which must be completed before sitting as well as initial core training and consolidation training but also within the first ear there will be a mentor appointed and magistrates are subject to a first appraisal after a year.
[396] The Magistrates New Training Initiative was comprised of a system of competencies ad appraisal and resulted in production of individual training and development records for magistrates and was overseen by a Bench training and development committee. The MNTI introduced 4 basic competencies: (i) An understanding of the framework in which magistrates operate; (ii) An understanding of ad ability to apply basic law and procedure; (iii) The ability to think and act judicially; and (iv) the ability to work as a member of a team. For bench chairs two further competencies are required: (v) the ability to manage people and processes; and (vi) the ability to communicate effectively in court. These are applicable to the criminal court system only.
[397] Davies. M, A new training initiative for the lay magistracy I England and Wales – a further step towards professionalisation? International journal of the legal profession vol 12 No 1 March 2005, Routledge

argument based on democracy, it is doubtful, even if benches of magistrates were representative of the community, what that quality would bring to the judicial role if not heavily overlain by the objectivity and skills that should come with courtroom training and experience. Moreover, as Morgan and Russell have observed by reference to other jurisdictions:

> *"… there is no straightforward relationship between the degree to which democracy is embedded and lay involvement in judicial decision-making. Many longstanding democracies involve lay persons while others do not. The reestablishment of democracy in a country does not necessarily stimulate the introduction of lay involvement in judicial decision-making, sometimes the reverse occurs, depending on the cultural and political tradition."*[398]

For simplicity, I separate these considerations into two broad themes, each of which may lead to biases in judgment which do not necessarily afflict professional judges: (i) the notion that magistrates – as local persons – may not always act independently from their surroundings, in particular because they are (often subconsciously) unduly influenced by people and fellow legal professionals; and (ii) the linked notion that 'local' justice must be preferable to centralised justice, which is made all the more disputable by findings that – contrary to the claims that they are emblematic of their communities – magistrates are not particularly representative of local communities. Whilst I doubt that these factors alone are as persuasive as the arguments made in prior sections concerning the role and function of magistrates as representatives of civic and democratic principles, it must be conceded that they do have the capacity to undermine the claim that localised justice remains preferable to a centralised and managerialistic system.

4.12.1 Are magistrates independent?

The first potential issue with the lay magistracy is the potential for its members to be influenced by external and internal dynamics. For example, there are numerous potential influences magistrates could fall foul of including justice clerks and other legal professionals, any of which might undermine the concept of judicial independence. There are also more subtle

[398] Morgan R and Russell. N, The Judiciary in the Magistrates court https://webarchive.nationalarchives.gov.uk/20110218143303/http://rds.homeoffice.gov.uk/rds/pdfs/occ-judiciary.pdf accessed June 2021

influences; for example, a long-standing magistrate – even if they are putatively a lay person – will have significant levels of experience and expertise in legal procedure. Each of these may impact the role of magistrates and undermine the legitimacy of the role in the eyes of the local community and wider public.

For a concerted period, observers have been concerned with the influence that criminal justice professionals, in particular justices' clerks, may exert on magistrates.[399] The position of law clerk as a full-time paid professional was formalised in the twentieth century. Reforms in 1999 introduced the requirement that law clerks obtain the same formal legal qualifications to practise as a solicitor or barrister. Since all law clerks now must have sat such exams, the corpus of recruits is derived from narrower backgrounds. Their main duties are to advise the Magistrates on questions of law, mixed law and facts, and practice and procedure.[400]

Because magistrates are exposed routinely to such professionals, it is expected that they may become accustomed to the influence of such persons which, prima facie, might indicate that any identifiable biases of law clerks become those of the lay magistrate concerned. This was first noted in the 1950s, when several cases emerged accusing law clerks of interfering with proceedings, due to bias.[401] Later clarifications to the duties and extent of the powers of court clerks were included in the 2000 Practice Direction (Justices: Clerk to the Court), which officially records the duties of court legal advisers.[402]

In spite of Practice Directions emphasising the impartiality of law clerks, they remain present in court and are often called to the magistrates' chamber. Although they are not supposed to get involved in questions of fact or decision-making, research by Darbyshire suggest that this does occur.[403] As noted by Holvast, certain features of specific assistance roles carry risks of having undue influence, especially in circumstances where the assistant is more knowledgeable than their counterparty.[404] Research from the US suggests that the ability of law clerks in some

[399] Skyrme. T, The Changing face of the Magistracy, Macmillan Press LTD 1979 p 89-91
[400] Holvast. N, 'The Power of the Judicial Assistant/Law Clerk: Looking behind the Scenes at Courts in the United States, England and Wales, and the Netherlands' (2016) 7 IJCA 10
[401] Darbyshire. P, The Magistrates' clerk, Southampton, Barry Rose Publishers Ltd 1984, p.30-60
[402] Practice Direction (Justices: Clerk to Court); 2 Oct 2000.
[403] Darbyshire. P, Sitting in Judgment: The Working Lives of Judges. Oxford, Hart Publishing 2011.
[404] Holvast. N, 'The Power of the Judicial Assistant/Law Clerk: Looking behind the Scenes at Courts in the United States, England and Wales, and the Netherlands' (2016) 7 IJCA 10 p.18

contexts to influence judges are far-reaching.[405] Such potential for undue influence in the law clerk context is arguably heightened as their roles expand and become more formalised.[406] As a substantial proportion of judicial duties are ceded to law clerks or court managers, such influence can only increase. Whether or not this influence is regarded as benign depends upon the view one adopts on the function and role of courts and legal representatives. Certainly, however, the lack of institutional safeguards on law clerks in England and Wales, in comparison to members of the judiciary (including lay members), may lead to further erosion of the lay component of the justice system.

4.12.2 Do magistrates represent their local communities? Is localism desirable?

Arguably, the larger issues with regard to magistrates are twofold: first, do they in actuality exhibit representativeness of the local community as a whole, thereby conforming to localist principles; and second, is local justice desirable?

As we have encountered earlier in this chapter, historically support for lay magistrates was based on the fundamental concept that they were ordinary members of their community. Magistrates are a separate entity from other roles in the judiciary, they have to be seen as being fully immersed in their community and balance their life as an ordinary local citizen with juridical office in the form of lay magistrate this balance and recognition of their dual role and identity is critical.[407] In spite of the pronouncements of principles of representativeness, increasingly studies[408] have demonstrated that lay magistrates are not statistically representative of their communities in some respects. Despite concerted attempts to represent broader sections of local communities lay magistrates are still perceived as white, middle class, and politically conservative, although data demonstrates that they are increasingly representative in respect of gender and ethnic background.[409]

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[405] Peppers. T.C, Of leakers and legal briefers: The Modern Supreme Court law clerk, Charleston Law Review, 7, 2012, p. 95-110.
[406] Paterson. A Final Judgment: The Last Law Lords and the Supreme Court, Oxford, Hart Publishing 2013.
[407] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012 p 5-36
[408] House of Commons – Home Affairs Committee- Third Report 1996, Judicial Appointments Procedures Vol I Session 1995-96 p1 xi para 205, Seago, Walker ad Wall, The development of the Professional Magistracy in England and Wales Crim LR 2000 p646, P Darbyshire for the New Lord Chancellor- Some causes for concern about magistrates 1997 Crim LR 861 863868, Morgan and Russell, The judiciary in the magistrates courts RDS occasional paper No 66 Home Office 2000
[409] Hood.R, Sentencing the Motoring Offender Heinemann London 1972; D Bartlett and J Walker Inner Circle 1973 24 New Society 139, Wheel of Influence 1975 34 New Society 694; J Baldwin The social composition of the magistracy, 1976 16 B J Crim 171; King M and May C, Black Magistrates Cobden Trust London 1985; Raine J.W, and Wilson M.J, Managing Criminal Justice Harvester Wheatshelf Hemel Hempstead 1993 Home

Prior to 1997, data on the composition and diversity of the magistracy is limited and such data is predominantly derived from the Home Affairs Committee 1995-96.[410] The drive to increase the diversity of lay magistrates gained pace in the 1990s, culminating in the publication in 2003 of a national strategy for the recruitment of lay magistrates. The strategy had three objectives: to recruit and retain magistrates from diverse backgrounds; to raise the magistracy's profile and dispel misconceptions about its composition and entry requirements and to improve the application process. [411] This further led to the 2005 Magistrates national recruitment strategy and the 2007 DCA toolkit for recruitment.[412] 2007 saw the beginning of a decline in recruitment activity[413]. The impact of this burst or recruitment activity between 2003-2007 is unclear. Although there was an initial increase in under 40s applying it also saw a decrease in those in the 40-49 category and recent data shows a continuing trend of increasing applications from those over 60 (over 52%).[414] Arguably the success of this programme is summarised by the following: "There remains a feeling that magistrates are not yet truly reflective of society, especially in terms of class, age and diversity."[415] In 2019 12% of magistrates were BAME. These diversity statistics must also be viewed in light of declining magistrates' numbers because of the reduction in work as discussed above.

Affairs Committee Report para 199 Dignan.J, and Ynee.A, A microcosm of the local community 1997 37 B J Crim 184

[410] Home Affairs Committee Chaired by Chris Mullin 1995-96

[411] The Magistrates' Association http://www.dca.gov.uk/speeches/2004/lc261004.htm
The Lord Chancellor announced a programme of work called "Supporting Magistrates' Courts To Provide Justice", the key areas of which he identifies as ensuring magistrates are respected, valued and their orders obeyed; public confidence increased; connecting courts with their communities – in a sound bite "Connected, Respected, Effective." Regarding recruitment, it is suggested that more should be done to encourage applications for magisterial appointment, in particular from under-represented groups. To achieve this objective, many routes may be followed, notably: raising the public profile of magistrates; encouraging employers through legislation to release employees for the performance of their magisterial duties; making the process of becoming a magistrate easier and less daunting for citizens and speeding up their appointment process; increasing awareness of the role of magistrates in schools and universities; improving the allowance system and offering more incentives (e.g. in the form of daily rates or tax breaks) notably to appeal to lower socio-economic groups; approaching jury members to become magistrates. Equally, more should be done to encourage current magistrates to remain on the bench. Notably, a scheme offering reward or recognition for long service could be created; magistrates could be allowed to use their JP title more liberally with the view to giving them more recognition in society; ending forced retirement at 70 or use magistrates over 70 as mentors or to carry out appraisals; improving the payment of expenses; relieving magistrates of the administrative burdens so that they can concentrate on sittings; and creating a "Diploma in Criminal Law", on completion of which a magistrate could qualify for consideration for appointment as Deputy District Judge.

[412] Gibbs P and Kirkby A, Judged by peers? The diversity of lay magistrates in England and Wales, Howard League What is Justice Working papers 6/2014

[413] Gibbs P and Kirkby A, Judged by peers? The diversity of lay magistrates in England and Wales, Howard League What is Justice Working papers 6/2014

[414] Judicial Diversity Statistics 2019

[415] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012 p 19

What we can draw from the data is that magistrates are not necessarily representative of the general population and even less so of those who offend and come before the courts.[416] There is a recognition that the issue may not lie necessarily in the mechanics of appointment but in the recruitment and identification of a wide and appropriate range of candidates to appoint. Indeed, the diversity and composition of the lay magistracy has been identified as a significant threat to their survival and continued public confidence in the role.[417]

The breaking of links between magistrates and their local community are also demonstrated by the reticence some magistrates exhibit to engage with their local communities. Magistrates appear concerned that in engaging with the community through local meetings and talking to residents that they could compromise their judicial independence. Donoghue has concluded that the magistrates' courts have not fully engaged with the importance of embedding in their structure the notions of community justice. She has argued that magistrate see their role as adjudicator of fact and deliverer off punishment rather than seeing the wide role they need to play in relation to community engagement and problem solving and working in conjunction with community agencies and groups[418].

Finally, there are, of course, good reasons to regard the notion of local justice as conceptually flawed. As has been noted already in this chapter, even if magistrates remain representative of local communities, at the macro scale, diversity of outcomes in similar cases are likely to characterise a system based on 'local justice' resulting in a so-called 'postcode lottery' with regard to justice outcomes. Such justice may be justifiably criticised as "justice by geography". Why ought two people be treated differently in relation to punishment for the same offence, or receive different chances of getting bail, or legal representation merely because of the court culture in that area? [419] Recent research findings have indicated great differences of approach in different areas - or even in adjacent areas.[420] The Home Secretary, speaking at the Justices' Clerks Conference in 2001 referred to figures of 20% sentenced to immediate custody for

[416] Gibbs P and Kirkby A, Judged by peers? The diversity of lay magistrates in England and Wales, Howard League What is Justice Working papers 6/2014
[417] Gibbs P and Kirkby A, Judged by peers? The diversity of lay magistrates in England and Wales, Howard League What is Justice Working papers 6/2014
[418] Donoghue 2011 Anti-Social behaviour Community engagement and the Judicial role in England and Wales Vol 52 May2012 P591-610
[419] Hucklesby.A, "Court Culture: An Explanation of Variations in the Use of Bail by Magistrates' Courts" 36 [1997] Howard Journal of Criminal Justice 129.
[420] See Local Sentencing Patterns in Magistrates' Courts 2000, Justices' Clerks Society, Magistrates' Association, Home Office 2002.

burglary in Teesside compared with 41% in Birmingham, and 3.5% receiving custodial sentences in Reading compared with 48% in Greenwich and Woolwich.[421] the discrepancies between local judicial cultures[422] it enables is an issue that will be brought to the foreground even further as court closures continue. Local judicial areas will have their own shared ways of conducting themselves and understandings on things such as decision making; these may vary between benches, and this can become problematic for the public perception of legitimacy and fairness as different benches may deal with cases differently.

4.13 Conclusion

There is a need, as chapter 2 explored, to ensure as appropriately as is possible that the lay participants who engage do so in ways that do not perpetuate prevailing norms and values of distinct social groups and classes and that they are representative of the communities they are commissioned to serve. These concepts are often thought of as substantive justice which is characterised by open ended standards and cannot be embodied in technical rules. This discussion does not mean that lay individuals have to apply community norms – nor that other criminal justice agencies cannot. It does however demonstrate the inherent tension between lay magistrates and other forms of justice in that lay individuals are less likely to want to be bound by technical rules and desire to reflect their ideas in their performance of the role. Professional judges may of course request advice to engage with community norms or standards, but this may conflict with their experiences and knowledge and demonstrates the inherent tension with members of professionalised roles delivering so called substantive justice. It is of course worth remembering in this discussion that the decisions reached historically by justice of the peace were heavily influenced by the prevailing community norms rather than by a set of technical rules detached from the social framework of the day. As Damaska has stated:

> *"Even if numerous manuals for lay justices are regarded as a variety of technical literature, it is difficult to imagine that the few substantive standards for decision making set out in them exercised a powerful influence on lay potentates whenever such*

[421] Home Office Press Release 119/2002, 7 May 2002.

[422] Flood- Page C and Mackie A 1988 Sentencing Practice: an examination of decisions in magistrates' courts and the Crown Court in the mid-1990s, Home Office Research Study 125, London HMSO, Hedderman C and Moxon D 1992 magistrates courts or crown court? Mode of trial decisions and sentencing, Home office research study no 125 London HMSO, Henham R 1990 Sentencing principles and magistrates sentencing behaviour Avebury Aldershot' Hucklesby A 1997 remand decision makers Criminal law review 269, Jones P 1985 remand decisions at Magistrates courts I Moxton D (ed) managing criminal justice London HMSO; Riley D and Vennard J 1988 triable either way cases: crown court or magistrates courts? Home office research study 98 London HMSO

standards deviated from prevailing notions of fairness, common sense or similar considerations."[423]

What we may therefore see is that magistrates demonstrate more clearly than the lay model of juries a move from an underlying co-ordinate ideal approach to a hybrid model engaging with more hierarchical ideals of justice. Given that the majority of criminal cases remain in the magistrates courts they can be seen as the gatekeepers of the criminal justice system and symbolically have a key role in the public perception of the system. It is perhaps not surprising therefore that traditionally this was the domain of JPs and embodied arguably in the purest sense the coordinate ideal. The increasing centralization of the system has seen the hierarchical ideal develop a more prominent and robust role in this arena and therefore we are arguably (as discussed in Chapter One) at a crossroads in respect of lay involvement and the future of the coordinate ideal in the system.

The threats posed in Chapter Four further reinforce the increasing prominence of the hierarchical as opposed to coordinate ideal in this field. In the view of this author, this development has occurred because of the increasingly managerialist concerns applied to the criminal justice system. The foundational basis of our lay system is rooted in the notion of the co-ordinate ideal and before this basis is entirely replaced by a more centralised and bureaucratic hierarchical approach. Thought needs to be given as to the impact this has on not just the public and community perception of the criminal justice system, but on the character of the criminal justice system itself. What is clear is that there is precedent to underscore the importance of the role of lay magistrates as community focused justices in the criminal justice system and preserve the localism and democratic principles at the centre of the magistracy. Magistrates have the unique ability to act as an ambassadorial role for the legal foundation of society though community focused magistrates linking people with the law and demystifying the process as a result.

The role of the lay magistrate has evolved significantly since its inception and will need to continue to do so to maintain its place as the lay gatekeeper to the criminal justice system. The threat posed to magistrates by budget cuts and increasingly managerialist concerns is only

[423] Damaska. M R, The Faces of Justice and State Authority, A comparative approach to the legal process, Yale University Press, New Haven and London 1989 p 41

increasing especially in light of the new challenges that have been presented to a criminal justice system already buckling. This thesis will now move on to look at whether community courts provide a viable alternative to the current court system which preserved the importance of local community involvement to the dispensation of justice.

Chapter 5 – Could Community Justice Centres provide an alternative forum to ensure the criminal justice system is still rooted in the communities it serves?

This chapter considers whether, should popular involvement in the criminal justice system through juries and lay magistrates be reduced significantly, there are alternative structures which could offer viable methods of ensuring the criminal justice system remains linked to the communities it serves. In particular, it will address whether encouraging community involvement in the criminal justice system through community courts could offer this connection.

This chapter therefore builds upon the analysis conducted in previous chapters. Chapter Three examined how the jury system has evolved to *inter alia* facilitate lay involvement in the criminal justice process and how, latterly, the involvement of juries has been limited to the decision-making – an albeit – key stage of the process. The chapter also outlined how a number of reforms and changed processes are seeing the use of juries being squeezed out of the system. At the same time, as argued in Chapter Four, the lay magistrate mechanism is being gradually side-lined in favour of the use of District Judges and other 'swift justice' mechanisms, developments which constitute a potential threat to the notion of localised 'community justice.'

On this theme, the present chapter will discuss the variance in success between two centres which employed a community-focused approach to justice which were established in the United States and UK, respectively: the Red Hook Centre in New York (hereinafter Red Hook), and the North Liverpool Community Justice Centre (NLCJC), itself inspired by Red Hook.[1] Parallels between the sites of the centres will be drawn: Red Hook in Brooklyn and Kirkdale in Liverpool. Each area was characterised by high levels of youth unemployment, crime, recidivism and reduced life chances. Distinctions between the two centres will also be discussed: for example, Red Hook was established and run by a not-for-profit Centre for Court Innovation in ways that would not be possible in the NLCJC context.

The analysis therefore additionally explores the impact of the political context on these initiatives particularly in the context of the pressure the NLCJC was under to demonstrate its

[1] "The inspiration for this idea came from the Red Hook Community Justice Centre in Brooklyn, New York which had opened for business in June 2002, and which was visited by members of the British government." See Mair G and Millings M, 'Doing justice locally: The North Liverpool Community Justice Centre' Centre for Crime and Justice Studies (February 2011) p.7

success in increasing efficiencies. Moreover, as will be explained, existing criminal justice power structures reacted decisively to undermine the NLCJC; one of the key oppositional voices to the NLCJC was the Magistrates Association.

The lack of community involvement in collective decision-making and devolved power structures remains a deep-seated problem in the United Kingdom. In spite of recent efforts to increase the powers of local authorities, a decade of austerity has led to increased centralisation of many bureaucracies and cost rationalisations imposed across government provision of services. As detailed in previous chapters, this has extended to the justice system. A casualty of these policies has been the spirit of community justice exemplified in the failure of the NLCJC. What could have been a success story about embedding power and decision-making in Liverpool, as Red Hook was in Brooklyn, instead became a court controlled from the centre, with demands placed on it to evidence impact quickly and to have to prove its economic value. Unlike at Red Hook, the role of the community was not fully understood at the inception of the NLCJC and with the attention on trying to secure operational legitimacy within the eyes of criminal justice policy-makers and practitioners there was never the scope to evolve this aspect of what it means to be a community justice centre, reflective of the community it was designed to represent. As this chapter will outline, what should have been about 'community' justice turned into a much richer form of 'professionalised' justice and a very expensive way of operating which undermined its legitimacy in the eyes of the relevant authorities and of the local community.

Although the introduction of the NLCJC evidenced a brief recognition of the crisis of legitimacy and authority in the court system, pushing UK politicians to embrace imported policy ideas and to feel particularly attracted to ideas that were about more visible forms of localised justice, it was not supported fully by either local or national institutional structures. The factors involved in its failure were varied; nevertheless, some of the difficulties it experienced were analogous to those at Red Hook and provide key insights to the viability of the community justice centre paradigm. The background to the NLCJC therefore provides a useful counterpoint to the perceived success of the American project. Moreover, understanding the roots of its failure will provide insights into how local justice mechanisms may be introduced in the UK in future.

Ultimately, these case studies will be used to provide insight concerning the operations and

potential viability of Community Justice Centre Initiatives in the UK. Although a viable theoretical idea and one that was arguably very successful in the US at centres such as Red Hook, in reality these centres may suffer in this jurisdiction from insurmountable obstacles to successful integration. An analysis of the NLCJC provides evidence that their cost and complex structure, together with the difficulty of ascertaining relevant criteria of success or failure may discourage their use as models for community involvement in criminal processes. The chapter provides the basis for proposals in the concluding chapter, namely by offering a possible alternative model, whereby whole court operations are located more firmly within a particular community.[2] It will be argued that there are strong reasons to believe that community involvement in such court systems could provide a valuable source of interaction between criminal processes and the citizenry, thus providing a degree of perceived ownership of, and wider democratic involvement in, the criminal justice system.

5.1 'Community Justice': A Primer

Conceptually, 'Community Justice' refers to all forms of crime prevention and justice activities that explicitly include the community in their processes and set the enhancement of community quality of life as a goal. Under the umbrella of community justice come initiatives such as community crime prevention[3] , community policing, [4] community courts[5] and restorative justice sanctioning systems[6] as well as community prosecution[7] and defence.[8] Although varying in form, common factors amongst them underpin their core missions. They all have as

[2] Lee.C. G, Cheesman II.F, Rottman. D, Swaner.R, Lambson.S, Rempel M and Curtis. R A community court grows in Brooklyn: A comprehensive evaluation of the Red Hook Community Justice Centre; Nov 2013 NCSC ;, Centre for Court Innovation website (2012), Red Hook Community justice Centre, www.courtinnovation.org/project/red-hook-community-justice-center. By whole court it is meant a court which also houses probation services, social services, and provides judicial supervision for community-based drug and alcohol treatment as well as providing alternative community programs. A Community court grows in Brooklyn: A Comprehensive evaluation of the Red Hook Community Justice Centre; Nov 2013 NCSC; Lee C.G, Cheesman II. F, Rottman D.B, Swaner.R, Lambson.S, Rempel. M and Curtis.R, Centre for Court Innovation website (2012), Red Hook Community justice Centre, www.courtinnovation.org/project/red-hook-community-justice-center

[3] Karp D. R and Clear T.R, Community Justice: A conceptual Framework, Boundary Changes in Criminal Justice Organizations P324-330

[4] Goldstein H 1990, Problem oriented policing. New York: McGraw- Hill

[5] Rottman, D B, 1996. Community Courts: Prospects and limits. National Institute of Justice Journal 231 P46-51

[6] Bazemore, G 1998.The "community" in community justice: Issues, themes and questions for the new neighbourhood sanctioning models. In community justice: An emerging field edited by D R Karp, Lanham, Maryland: Rowman & Littlefield

[7] Boland B 1998. Community prosecution: Portlands experience. In community justice: An emerging field edited by D R Karp, Lanham, Maryland: Rowman & Littlefield

[8] Stone C National Institute of Justice Journal Issue: 231 August 1996 Pages: 41-45

their aim community level outcomes which focus on short- and long-term problem solving, restoring victims and communities, as well as strengthening normative standards and reintegrating offenders back into the community.[9] Together these disparate initiatives can be seen as a new and emerging view of justice performed at a community level. It has been argued by Karp and Clear that:

> *"The concept of community justice can be seen as a challenge to traditional criminal justice practices and concepts that draw distinct boundaries between the role of the State and the role of communities in the justice process... In a community justice model, priority is given to the community, enhancing its responsibility for social control while building its capacity to achieve this and other outcomes relevant to the quality of community life."*[10]

The inception of community justice centres focused on dealing with individuals accused of crimes rather than those individuals being processed by remote, centralised bureaucracies. Increasingly these Centres have focused on victims, processes, outcomes and how the system applies to those individuals producing justice.[11] In a community justice model these aims are important but considered subservient to the key objective of improving the quality of community life; the aim of crime-related processes is to strengthen the capacity of communities to self-regulate and produce collective efficacy, as well as change the circumstances of offenders and victims.[12] The key difference between the traditional and community justice ideals is therefore that the latter is concerned with the collective everyday experience.[13]

The purpose here is to examine how these initiatives work in practice and, in the light of this evidence, their viability as an alternative to lay involvement in the decision-making stage of the process. Some sceptics argue that the reason community justice initiatives have largely

[9] Karp D. R and Clear T.R, Community Justice: A conceptual Framework, Boundary Changes in Criminal Justice Organizations P324-330
[10] Karp D. R and Clear T.R, Community Justice: A conceptual Framework, Boundary Changes in Criminal Justice Organizations P325-326
[11] Berman G and Fox. A Lasting change or passing Fad? Problem solving Justice in England and Wales, and Lanni. A, The Future of Community Justice, Harvard Civil rights – Civil liberties Law Review Vol 40 2005
[12] Bursik, Robert j and Harold G Grasmick 1993 Neighbourhoods and crime: The dimensions of effective community control New York Lexington Books and Sampson R. J. Raudenbush S and Earls F 1997 Neighbourhoods and violent crime: A multilevel study of collective efficacy. Science 277:P918-924
[13] Kelling G. L and Coles C.M 1996 Fixing Broken Windows. New York: Free Press

failed is due to the fact that many areas lack "genuine community"[14]. This is arguably because the definition of 'community' is too imprecise; for example, traditionally community has been associated with geographic location[15], an idea which has drawn strong criticism as:

> *"Even where genuine community does coincide with place, the socio- political constructions of that community may differ greatly from one culture to another. There is most likely not one unified community, but a number of fairly distinct communities, perhaps at odds with one another, including those on the proverbial "other side of the tracks.""*[16]

Community can be alternatively defined as a feeling of "connectedness to individuals and a group[17]". This definition does not impose a geographic perspective on community. On that view when a "sense of community" is called into play, what is in question is the presence or absence of meaningful interrelationships between citizens and whether they feel a sense of belonging to or common interest[18]. Braithwaite and Moore argue community now manifests itself in society as individualism and indeed that excessive individualism breeds selfishness/ and a lack of empathy which lays the groundwork for crime.[19] Many academics feel that although individualism[20] is important, modern society places too much value on individual rights and undervalues collective responsibility.[21] It is because of this increasing public

[14] McCold P, Wachtel B; Community is not a place: A new look at Community Justice Initiatives, paper at the International Conference on Justice without Violence: Views from Peace-making Criminology and restorative justice Albany New York June 5-7, 1997

[15] McCold P, Wachtel B; Community is not a place: A new look at Community Justice Initiatives, paper at the International Conference on Justice without Violence: Views from Peace-making Criminology and restorative justice Albany New York June 5-7, 1997

[16] McCold P, Wachtel B; Community is not a place: A new look at Community Justice Initiatives, paper at the International Conference on Justice without Violence: Views from Peace-making Criminology and restorative justice Albany New York June 5-7, 1997

[17] McCold P, Wachtel B; Community is not a place: A new look at Community Justice Initiatives, paper at the International Conference on Justice without Violence: Views from Peace-making Criminology and restorative justice Albany New York June 5-7, 1997; Kurki L, Restorative and Community Justice in the United States Crime and Justice, Vol. 27 (2000), pp. 235-303

[18] Braithwaite J 1989. Crime, Shame and Reintegration. New York: Cambridge University press; Moore D B (1997) Pride, shame and empathy in peer relations: New theory and practice in education and juvenile justice. In K Rigby and P Slee (eds) Children's peer relations. London UK Routledge

[19] Braithwaite J 1989. Crime, Shame and Reintegration. New York: Cambridge University press; Moore D B (1997) Pride, shame and empathy in peer relations: New theory and practice in education and juvenile justice. In Rigby K and Slee P (eds) Children's peer relations. London UK Routledge.

[20]Individualism focuses on the idea that individuals are motivated by their own preferences, needs, and rights, with priority placed on personal goals. Individualism & collectivism. New directions in social psychology. Triandis, Charalambos. H, Boulder, CO, US: Westview Press. (1995). xv P259

[21] McCold P, Wachtel B; Community is not a place: A new look at Community Justice Initiatives, paper at the International Conference on Justice without Violence: Views from Peacemaking Criminology and restorative justice Albany New York June 5-7, 1997

scepticism of individualism and aversion against perceived declining community life that initiatives empowering the community and community bonds which help to curtail crime have become increasingly popular.[22]

However, because notions of community are amorphous, an absence of due consideration of the nature of 'community' can result in community justice initiatives being indistinguishable from existing traditional justice practices. This is because such limitations fail to address the weakened community caused by both the crime itself, by its collateral harm and a sense of disconnection between communities and the dispensation of justice.[23] In order to address this issue, meaningful roles for community members in both judicial interventions and the justice system must be found, with informal social control playing a pivotal role.[24] Informal social control in this context is the ability of community groups through norm enforcement to deter criminal activity and promote civil order and norm affirmation. Norm affirmation[25] occurs when communities responding to criminal incidents seek to restore credibility to the community's conception of moral order by reaffirming the idea that individuals are responsible and accountable for their actions and their impact on community life[26]. This symbolically re-affirms for the entire community, the community norms thereby providing not only the behavioural standards expected in that community but also their rationale.[27]

5.1.1 Community Justice in Practice

Braithwaite argues that offenders stigmatized by the justice system are drawn together to form their own subcultures which have a strong sense of belonging and connection. These subcultures become communities unsympathetic to the norms of conduct and morality of the larger community which has ramifications for informal social control[28]. Therefore, a core

[22] Kay. P 1996 A state initiative toward restorative justice: The Minnesota experience. In Restorative justice: International perspectives edited by Galaway B and J Hudson. J, Monsey, New York: criminal Justice Press. p10

[23] The harm caused to the neighbourhood and the community by the crimes committed and the ramifications of those crimes for both victims and offenders

[24] Braithwaite J 1989. Crime, Shame and Reintegration. New York: Cambridge University press

[25] After Crime and Punishment: Pathways to Offender Reintegration edited by S. Maruna.S and Immarigeon. R, Chapter 2 and Transitional Justice and Development, P De Greiff, R Duthie - Making the Connections, New York: 2009 - developmentideas.info

[26] See Chapter 1 for discussion of the historical and philosophical underpinnings of adversarialism.

[27] Karp D. R and Clear T.R, Community Justice: A conceptual Framework, Boundary Changes in Criminal Justice Organizations Criminal Justice 2000 Vol 2 Us Department of Justice Office of Programs P324-330

[28] Braithwaite J 1989. Crime, Shame and Reintegration. New York: Cambridge University press

principle for community justice has to be mobilising the informal social control mechanism and encouraging healthy interdependencies to ensure greater perceptions of connectedness to individuals and groups thus influencing not only crime itself but how the criminal justice system tackles crime.[29]

Whilst features of the English justice system such as juries and magistrates can reflect these norms to a degree, they are not entirely representative of local communities and, in the case of magistrates, still operate with a degree of detachment from the communities they serve. As noted earlier in the thesis, there is sometimes incoherence between the intent behind the principles of criminal justice systems and the form(s) of procedural justice which prevail. A key question for discussion in this context is therefore whether problem-solving approaches should adopt what are termed either a 'community problem solving' approach or an 'administrative and efficiency' stance. The theoretical bases laid earlier in the thesis are reflected in these terms: the first emphasises the notion that criminal justice systems ought to be directed at ensuring that democratic legitimacy – particularly through involving lay persons in the dispensation of justice – is paramount. Moreover, under 'community problem-solving', crime is not a contest to be won but a series of problems to be solved. Problem-solving approaches rely on the underlying principles of enhanced information, deliberation and mutual interest to find resolutions rather different from the adversarial paradigm.[30] Under this ideal the underlying assumption is that citizens share sets of values and concerns and that with sufficient information and order, these can be addressed. The latter approach, which focuses on administrative efficiency, instead posits that a criminal justice system which is predictable, resource-managed and invokes professional expertise is preferable.

5.2 The Red Hook Community Justice Initiative

5.2.1 Background

Red Hook was established in June 2000 as America's first multi-jurisdictional community court. It is located in a refurbished Catholic school in the heart of an isolated neighbourhood in

[29] Braithwaite J 1989. Crime, Shame and Reintegration. New York: Cambridge University press and McCold and Watchel 1997, In Pursuit of Paradigm: A Theory of Restorative Justice, International institute for Restorative Practices

[30] Lasting change or passing Fad? Problem solving Justice in England and Wales, G Berman and A fox and The Future of Community Justice, Lanni. A Harvard Civil rights – Civil liberties Law Review Vol 40 2005

southwest Brooklyn. Its aims were to address and provide solutions to neighbourhood problems by using a "coordinated response", namely, to create a court that "would both respond constructively when crime occurs and work to prevent crime before it takes place"[31] halting the "revolving door" of the traditional criminal justice system and grounding the court firmly in the community it serves: "By bringing justice back to neighbourhoods and by playing a variety of non-traditional roles[32]," Justice Centre planners asserted, "community courts foster stronger relationships between courts and communities and restore public confidence in the justice system."[33]

Red Hook was chosen as a location because of the decline in the social and economic fabric of the area which was compounded by a systemic lack of confidence in the effectiveness of the local criminal justice system.[34] Red Hook had historically been a thriving industrial area of Brooklyn, but sank into such poverty that by 1990, unemployment levels were 21.6% of the local community, with over 30% of young men out of work. Red Hook also exhibited the highest poverty and youth unemployment levels of any neighbourhood in the Brooklyn area. More than 78% of children lived either in single-parent households or in foster care, and 70% of the housing in the area was provided by social services.[35]

In 1997, a study by the Centre for Court Innovation found that the police had just 15 per cent approval ratings in the Red Hook district; perhaps as significantly the local district attorney and courts had approval ratings of 12 per cent each.[36] Indeed Red Hook had been labelled one

[31] Lee. C, Cheesman II. F, Rottman. D, Swaner. R, Lambson. S, Rempel.M and Curtis. R A Community court grows in Brooklyn: A Comprehensive evaluation of the Red Hook Community Justice Centre; Nov 2013 NCSC; Centre for Court Innovation website (2012), Red Hook Community justice Centre, www.courtinnovation.org/project/red-hook-community-justice-center

[32] Lee. C, Cheesman II. F, Rottman. D, Swaner. R, Lambson. S, Rempel.M and Curtis. R A Community court grows in Brooklyn: A Comprehensive evaluation of the Red Hook Community Justice Centre; Nov 2013 NCSC; Centre for Court Innovation website (2012), Red Hook Community justice Centre, www.courtinnovation.org/project/red-hook-community-justice-center

[33] Lee. C, Cheesman II. F, Rottman. D, Swaner. R, Lambson. S, Rempel.M and Curtis. R A Community court grows in Brooklyn: A Comprehensive evaluation of the Red Hook Community Justice center Nov 2013 NCSC.

[34] Berman and Fox 2005 Justice in Red Hook, Justice System Journal: Vol. 26, No. 1, pp. 77-90; Berman and Feinblatt Good Courts: The Case for Problem Solving Justice, New York: New York Press 2005; Sviridoff, M, Rottman D, Ostrom B, and Curtis R. 2000. Dispensing Justice Locally: The Implementation and Effects of the Midtown Community Court. Harwood Academic Publishers, Amsterdam.

[35] Dyer. F, what can we learn in Scotland from the Red Hook Community Court? Centre for Youth and Criminal Justice (June 2016) at https://strathprints.strath.ac.uk/68188/1/Dyer_CYCJ_2016_what_can_we_learn_in_Scotland_from_the_red_hook_community_court.pdf last accessed 1/8/22

[36] Centre for Court Innovation website (2012), Red Hook Community justice Centre, www.courtinnovation.org/project/red-hook-community-justice-center last accessed 2/9/22

of the most "crack infested" neighbourhoods in the United States by Life Magazine.[37] Following the shooting to death of a local high-school principal, the District Attorney and the Center for Court Innovation argued that a new approach to criminal justice had to be adopted, and the Red Hook Center was conceived.

5.2.2 Procedural forms and approaches at Red Hook

The 'community justice model' embodied at Red Hook is aimed at relocating the production of justice from large, centralised courts (traditional criminal justice) to the local community. The principal manifestation of the co-ordinated response in operation at Red Hook is through a single judge hearing cases from three police precincts (covering 200,000 people) which would otherwise be heard in civil, family, or criminal courts.[38]

The atmosphere and procedures at Red Hook were also designed to reduce levels of formality where appropriate and to ensure that defendants and other court users could avail themselves of auxiliary services. Red Hook features an on-site clinic staffed by social service professionals who use psychological trauma and evidence-informed approaches[39] to assess and connect individuals to appropriate services to try to solve future issues in addition to dealing with the ramifications of any crimes committed. It also connects court-involved youth to strengths-based programming,[40] including art projects and peer education programs, helping to ground the court and its operation in the community it serves. These help to increase the community's involvement and trust in the Centre and therefore in the criminal justice system.[41] Having resources within the same building also greatly assisted the judge(s), who could point people

[37] Berman G and Fox A, Lasting Change or Passing Fad, Problem Solving Justice in England and Wales, Policy Exchange 2009.
[38] A Community court grows in Brooklyn: A Comprehensive evaluation of the Red Hook Community Justice centre, Centre for Court Innovation website (2012), Red Hook Community justice Centre, www.courtinnovation.org/project/red-hook-community-justice-center.
And Kersley, H. (2011), "Diary from New York – Community Justice in Red Hook", New Economics Foundation, 1 November
[39] Centre for Court Innovation website (2012), Red Hook Community justice Centre, www.courtinnovation.org/project/red-hook-community-justice-center.
[40] Strengths- based programming is designed to support youths working through life challenges, while promoting empowerment and resiliency. The idea behind strengths-based programming was to encourage them to make choices other than crime. Smarter Crime Control: A Guide to a Safer Future for Citizens, Communities, Irvin Waller Rowman and Littlefield.
[41] Jackson. J, Hough M, Bradford.B, Myhill A, Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions British Journal of Criminology February 2012 52(6):1051-1071, Morenoff, J, Sampson J, and Raudenbush J. 2001. "Neighbourhood." Criminology 39: 517-560, Herrschaft, New York City Community Cleanup: The Impact of a Program for Low-level Offenders
January 2012, Centre for Court Innovation.

in the right direction and seek advice from teachers or counsellors when required.

One of the most striking facets of the Red Hook setup was the physical layout of the court Rather than the judge being placed in a lofty position in the court room, he/she sits directly opposite the accused across a table, in order to encourage dialogue. Further evidence of the less formal procedural approach taken during Red Hook hearings could be found in the way that the judge concerned addressed the defendants, who were regarded as equals, rather than people to be 'talked down to':

> *"The judge openly spoke to all defendants, from asking them which day suited them best to return, to shaking their hands upon completion of an Order, or to telling them that they need to do better and asking them what could he do to help. Many were asked to approach the bench and there was a lot of what might be termed 'motivational speaking', which I have never witnessed in a UK Court…The judge in Red Hook also took a personalised and individualised approach by having a personal interest in many cases, asking how family members were doing, as if he knew them, which I have no doubt he actually made it his business to do."* [42]

The objective of the centre was to involve the local community in all aspects of the criminal justice process rather than merely at the decision-making stage. Such involvement arguably offers citizens a more prominent and embedded role in the criminal justice system in comparison to their current, limited and sporadic participation at the decision-making stage of the process (the most notable example of this form of involvement in the contemporary justice system is, of course, the jury). The initiative enables the community to tackle the causes of crime in particular communities and provides opportunities for the reflection of community values at a stage earlier than is provided by verdict participation. This also has the potential to reduce the incidence of juries returning a 'nullified' verdict that indicates disapproval of a prosecution in court proceedings. The community court initiative in the United States at least provides a forum which can cope with changes in the culture of the process by working on the causes of crime not just the punishment of the crime itself.

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[42] Dyer F, What can we learn in Scotland from the Red Hook Community Court? Centre for Youth and Criminal Justice (June 2016) at https://strathprints.strath.ac.uk/68188/1/Dyer_CYCJ_2016_what_can_we_learn_in_Scotland_from_the_red_hook_community_court.pdf last accessed 1/7/22

Two key influences on the development of the community court model behind Red Hook are firstly, the "broken windows" theory of crime[43] and secondly, a focus on community policing.[44] In accordance with the broken windows theory, Red Hook attempted to focus on cleaning up minor "quality of life" crimes[45] such as graffiti, turnstile jumping, prostitution, and public intoxication on the assumption this would lead to reductions in other types of crime.[46] The community policing model adopted at Red Hook[47] sought to remove police officers from their patrol cars and integrate them into the fabric of local circles, where they could better exercise both formal and informal control over conditions of disorder.[48]

Naturally, one of the key underpinnings of the community justice approach is a commitment to reducing the incidence of crime. Red Hook is therefore an example of an approach to crime which is preventative rather than remedial. Tackling the causes of crime at source and addressing the underlying issues such as drugs and alcohol dependence, it was hoped, would cause crime levels to decrease. As the Centre for Court Innovation made clear in 2012, Red Hook "actively seeks to resolve local problems before they become court cases."[49] To achieve this, the court ran numerous initiatives designed to reduce the community's propensity to commit crime and increase community involvement in the local criminal justice system, thus increasing the public's perceived ownership of the system.

The Red Hook initiative also attempted to address the three key interrelated issues of

[43] This theory addresses the visible conditions of disorder in a neighbourhood, such as broken windows that are never repaired or misdemeanours that go unprosecuted which are seen as a signal that the community does not enforce social norms, inviting further misdemeanour activity that eventually leads to more serious crimes.
[44] Community policing has many variations in both definition and practice. Underlying all these approaches is the strategy of problem solving and community involvement which aims to identify and resolve the causes of criminal incidents, thus moving from a detached professional model to an involved community model.
[45] Crime, Fear of Crime and Quality of Life Identifying and Responding to Problems, Research Report 35
[46] The term "quality-of-life" offenses is used to describe conduct that demoralizes community residents' business. It involves acts that create physical disorder or reflect social decay.
[47] Peak K and Glensor R, Community Policing and Problem Solving: Strategies and Practices, Prentice Hall Education Career & Technology 1996, P68; Goldstein, Herman. 1990. Problem Oriented Policing. Philadelphia, PA: Temple University Press. Skolnick and Bayley Community Policing: Issues and Practices around the world, National Institute of Justice issues and Practices, US Department of Justice May 1988; Bayley, D 1994. Police for the Future. New York, NY: Oxford University Press; Skogan, Wesley G., and Susan M. Hartnett. 1997. Community Policing: Chicago Style. New York, NY: Oxford University Press

[48] Manning 1984, 208; Sviridoff, M, Rottman D, Ostrom B, and Curtis R. 2000. Dispensing Justice Locally: The Implementation and Effects of the Midtown Community Court. Harwood Academic Publishers, Amsterdam.14.
[49] Centre for Court Innovation website (2012), Red Hook Community justice Centre, www.courtinnovation.org/project/red-hook-community-justice-center. Last accessed 1/7/22

deterrence[50], intervention[51] and legitimacy, both procedurally[52] and in the eye(s) of the local community.[53] Legitimacy quickly established itself as the key bulwark of the centre and consequently shaped the implementation of the other two aims at Red Hook. The perceived certainty of meaningful punishment provided – including follow-up sanctions in response to defendant's noncompliance with original court orders[54] - was designed to deter criminal behaviour.[55] For juveniles and a small proportion of adult defendants, the Justice Centre provided judicial supervision for community-based treatment of drug abuse and other underlying criminogenic needs to reduce the likelihood of future offending. Finally, and most importantly, Red Hook sought to secure voluntary compliance with the law by enhancing the perceived legitimacy of the justice system. It achieved this through embedding procedural justice norms in judicial decision-making as well as the cultivation of close ties to the

[50] Deterrence theory is based on the assumption that people make a rational choice about engaging in criminal behaviour, weighing the gain from the crime against the expected cost of punishment. The expectation of punishment includes the likelihood of being caught and punished and the severity of the expected punishment. To design an effective deterrent, policymakers must consider three factors: the severity of the punishment, the certainty of punishment, and the speed with which the punishment is imposed (Marlowe, D. B., & Kirby, K. C. (1999). Effective use of sanctions in drug courts: Lessons from behavioural research. National Drug Court Institute Review, 2, P1-32. 1999; Marlowe D and Festinger P Perceived deterrence and outcomes in drug court, March 2005, Behavioural Sciences & the Law 23(2):P183-98; ; Paternoster, R., & Piquero, A. (1995). Reconceptualizing deterrence: An empirical test of personal and vicarious experiences. Journal of Research in Crime and Delinquency, *32*(3), P251–286

[51] The intervention component of the Red Hook program aims to provide participants with the resources and support that they need to make positive changes in their behaviour, thereby theoretically reducing crime in Red Hook. Intervention services available at Red Hook include long-term treatment for drug-addicted offenders, court mandates to short-term educational programs, and walk-in services for community members without active court cases.

[52] "[t]he procedural justice argument is that, on the general level, the key concerns people have about the police and the courts centre around whether these authorities treat people fairly, recognize Citizen rights, treat people with dignity, and care about people's concerns" (Tyler, 2001, 216).

[53] The procedural justice perspective is supported by the group value theory and other identity-based theories holding that people actively seek to identify themselves with groups (Tyler et al. 1997, P184-188

[54] Deterrence theory is founded on the assumption people make a rational choice to engage in criminal behaviour, they weigh the gain they expect to realize from the crime against the expected cost of punishment. The expectation of punishment encompasses the likelihood of being caught and punished as well as the expected severity of the punishment. To design an effective deterrent, policymakers must consider: the severity of the punishment, the certainty of punishment, and the speed with which the punishment is imposed (Marlowe, D. B., & Kirby, K. C. (1999). Effective use of sanctions in drug courts: Lessons from behavioural research. National Drug Court Institute Review, 2, P1-32. 1999; Marlowe D and Festinger P Perceived deterrence and outcomes in drug court, March 2005, Behavioural Sciences & the Law 23(2):P183-98; ; Paternoster, R., & Piquero, A. (1995). Reconceptualizing deterrence: An empirical test of personal and vicarious experiences. Journal of Research in Crime and Delinquency, *32*(3), P251–286

[55] Sherman L;Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction, Journal of Research in Crime and Delinquency November 1993 vol. 30 no. 4 445-473 and Why do People Comply with the Law?: Legitimacy and the Influence of Legal Institutions British Journal of Criminology November 1, 2012 52: 1051-1071; Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science The Prison Journal September 1, 2011 91: 48S-65S; Morgan PM Deterrence: A conceptual analysis - 1983 - Sage Publications; Robinson P H ,Distributive Principles of Criminal Law: Who Should Be Punished How Much? - 2008 - Oxford University Press on Demand

community and improved trust and faith in public authorities.[56]

5.2.3 The success of Red Hook

Red Hook is widely perceived as a significant success for community justice courts. It demonstrates viability, in the US at least, of community justice courts in the criminal justice system. The Centre transformed crime rates in the local Red Hook area of Brooklyn. The 76th Precinct of New York, which covers the Red Hook area, has experienced falling crime across all main categories of crime, including more than 75 per cent reductions in homicide, robbery, burglary and felony assault in the two decades to 2011.[57] Although this indicates that falling crime rates might have been independent of Red Hook's introduction, the National Institute of Justice found that the impact on crime and recidivism in the area resulted primarily from Red Hook's ability to project its legitimacy to offenders and the local residential community rather than from strategies of deterrence or intervention.[58]

One of the most cited studies of Red Hook's impact on offending compared its outcomes with those of other criminal courts which handled similar cases. The authors found that Red Hook had inspired substantial reductions in crime rates and recidivism and improved compliance with sentences. Specifically, the study found *inter alia* that between 2000 and 2013:

(i) A person dealt with in the regular court was 15 times more likely to be jailed (1% of Red Hook defendants vs 15% of defendants in other Brooklyn courts);
(ii) Young people dealt with in regular court were 20% more likely to be arrested again within two years of their case being decided;
(iii) Approximately 78% of the guilty defendants received on-going supervision compared to 22% in criminal courts; and
(iv) the re-arrest rate amongst drug offenders who had completed a court-monitored

[56] This description of the RHCJC program theory is the Red Hook research team's reconstruction and is based on interviews, articles, and other documentation of the planning process. It is not an official statement of the program theory by the Justice Center's planners or managers as cited in A community court grows in Brooklyn: A comprehensive evaluation of the Red Hook Community Justice Centre; Nov 2013 NCSC; Lee. C, Cheesman II. F, Rottman D, Swaner. R, Lambson. S, Rempel M and Curtis R
[57] New York City Police Department (2012), CompStat, 76th Precinct, Volume 19, Number 37.
[58] Berman G. and Fox A. (2005), "From the Benches and Trenches: Justice in Red Hook", The Justice System Journal, Volume 26, Number 1

treatment plan was 29% lower than in other settings.[59]

Most significantly in our context, Red Hook increased the perceived legitimacy of the criminal justice system amongst the local community. Since opening in 2000, the court has improved attendance at court and now sentences have average compliance rates of 75 per cent, compared to 50 per cent at comparable (traditional) courts.[60] Similarly, approval ratings for the police, prosecutors and judges increased three-fold between 2000 and 2013, while local surveys in 2012 found that 94 per cent of residents supported the court system, as opposed to 12 per cent before Red Hook's inception.[61]

Research conducted by the National Centre for State Courts into Red Hook in 2011 found that the ethnographic analysis on perceptions of procedural justice, or the fairness of the decision-making process, were higher among offenders whose cases had been processed at the Red Hook than among offenders whose cases are processed in a traditional misdemeanour court in Brooklyn.[62] In contrast, there was no statistically significant difference found by the National Institute of Justice's comprehensive review between Red Hook defendants and other defendants in perceptions of the fairness of the case outcome.[63] The review also found that offenders processed at Red Hook were significantly more likely than defendants in traditional misdemeanour courts to receive meaningful sanctions that were carefully monitored to ensure compliance.[64]

Further evidence suggests that the comprehensive suite of services provided by Red Hook – in contrast to the usual unidimensional approach taken to criminal justice services – has been

[59] Lee. C, Cheesman II. F, Rottman. D, Swaner. R, Lambson.S, Rempel M and Curtis R Community Court grows in Brooklyn: A comprehensive evaluation of the Red Hook Community Justice Centre; Nov 2013 NCSC
[60] Cleveland Police website (2012), The origins of community justice, www.cleveland.police.uk/advice-information/origins-cj.aspx. Accessed July 2012
[61] Cleveland Police website (2012), The origins of community justice, www.cleveland.police.uk/advice-information/origins-cj.aspx. Accessed July 2012.; Nolan J. (2009), Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement
[62] Sviridoff, M., Rottman, D., Weidner, R., Cheesman, F., Curtis, R., Hansen, R., and Ostrom, B. Dispensing Justice Locally: The Impacts, Cost and Benefits of the Midtown Community Court. New York: Center for Court Innovation, 2001 and A Community Court grows in Brooklyn: A comprehensive evaluation of the Red Hook Community Justice Centre; Nov 2013 NCSC; Lee. C, Fred L. Cheesman II. F, Rottman. D, Swaner. R, Lambson. S, Rempel. M and Curtis.R
[63] Lee. C, Cheesman II. F, Rottman. D, Swaner. R, Lambson.S, Rempel M and Curtis R Community Court grows in Brooklyn: A comprehensive evaluation of the Red Hook Community Justice Centre; Nov 2013 NCSC.
[64] Berman G. and Fox A. (2005), "From the Benches and Trenches: Justice in Red Hook", The Justice System Journal, Volume 26, Number 1.; Nolan J. (2009), Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement.; New York City Police Department (2012), CompStat, 76th Precinct, Volume 19, Number 37.

instrumental in its success:

> *"The Red Hook story extends far beyond what happens in the courtroom. The courthouse is the hub for an array of unconventional programs that contribute to reducing fear and improving public trust in government. These include mediation, community service and a youth court where teenagers are trained to resolve actual cases involving their peers. The center also has a housing resource center, which provides support and information to residents with cases in housing court."*[65]

This would appear to suggest that the aim of Red Hook which proved most effective in practice was to generate legitimacy for criminal justice agencies amongst the local community. This stems primarily from the exercise of procedural justice[66] in judicial decision-making, but also from its perceived status as a genuine community institution that shares and upholds the values of local residents and offers services which reintegrate locals into their communities and reduce reoffending.[67] Indeed the legitimacy gained by the court at Red Hook appears to motivate offenders and residents to obey the law voluntarily, rather than out of fear of punishment.[68] In doing so, Red Hook also achieved its deterrence aim – as measured by the Multivariate Cox Survival Models[69] - which provide evidence that Red Hook has indeed reduced recidivism as compared with 'business as usual' processing of misdemeanour cases.

In contrast, there is no evidence to support either the deterrence hypothesis or the community connections hypothesis as operationalized in the full court model.[70] The process evaluation and

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[65] Center for Court Innovation (2014), p1.

[66] Sunshine, J., and T.R. Tyler. "The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing." Law & Society Review 37, no. 3 (2003): 513-547

[67] Cross reference with Chapter 1 and Chapter 4 on the history of adversarialism and trial by jury. Trial by Jury in its original incarnation was the forum for the community to address crime and try and sentence the perpetrators. In the original system as previously discussed the community was at the heart of the criminal justice system and this lay involvement gave the criminal justice system not only legitimacy in the community's eyes but ownership of the system thus enabling the community to guide the development of the CJS and how it dealt with crime.

[68] ; Lee. C, Cheesman II. F, Rottman. D, Swaner. R, Lambson.S, Rempel M and Curtis R National Institute of Justice; A Community Court grows in Brooklyn: A comprehensive evaluation of the Red Hook Community Justice Centre; Nov 2013 NCSC

[69] This model analyses patterns of association connected with survival and identifies the combination of factors which best indicate survival. Multivariate survival analysis using Cox's regression model, Erik Christensen M.D.1,2,

[70] Baker M, Westelius. N The deterrence hypothesis looks at the connection between the level of punishment and the crime rate. Crime, Expectations, and the Deterrence Hypothesis econ.hunter.cuny.edu/wp-content/uploads/.../HunterEconWP425.pdf. The community connections hypothesis suggests that individuals arrested, arraigned and cases heard in the same neighbourhood should be less likely to re-offend, Cloninger,

ethnographic analysis conducted by the National Institute of Justice point to procedural justice as the most plausible alternative explanation for the observed reduction in recidivism among Red Hook defendants.[71] This data suggests that the aim of legitimacy actively permeates the concept of deterrence and intervention and the effectiveness of the legitimacy aim affects how effective the aims of deterrence and intervention are at a particular community justice centre.

5.3 From Red Hook to North Liverpool

One of the messages that can be drawn from Red Hook is how fundamental the inclusion of the community from its original inception was in its success. The local community was regarded as a vital element of criminal justice reform with the police and courts forming but a thin layer in the foundational basis of institutions and practice that contribute to social order.[72]

5.3.1 North Liverpool

The literature on the NLCJC explains that Liverpool was chosen as the location for the community justice centre on the basis of its rate of recorded crime. Like Red Hook, North Liverpool has suffered from decades of unemployment, crime and anti-social behaviour. In 2004-05, just prior to the establishment of the NLCJC, North Liverpool had a rate of 183.7 crimes per 1000 population compared to 77.2 per 1000 nationally.[73] Furthermore statistics showed that Liverpool had greater levels of lower-level anti- social crime – as in the Red Hook area – otherwise known as "quality of life crime".[74]

Dale O. 1975. "The Deterrent Effect of Law Enforcement: An Evaluation of Recent Findings and Some New Evidence," American Journal of Economics and Sociology 34(3): 323-35.; Levitt, Steven D. 1998b. "Why do Increased Arrest Rates Appear to Reduce Crime?
Deterrence, Incapacitation, or Measurement Error?" Economic Inquiry 36(3): 353-72.

[71]; Lee. C, Cheesman II. F, Rottman. D, Swaner. R, Lambson. S, Rempel M and Curtis R National Institute of Justice; A Community court grows in Brooklyn: A Comprehensive evaluation of the Red Hook Community Justice Center; Nov 2013 NCSC.

[72] S Murray and H Blagg Reconceptualising community justice centre evaluations- lessons from the North Liverpool Experience Griffith Law Review 2018 Vol 27 No 2 254-269

[73] McKenna. K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North
Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

[74] McKenna. K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North
Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

In deciding which area of Liverpool would be chosen the National Community Justice Programme team assessed levels of deprivation, truancy, crime and permanent exclusion rates as well as trying to look for a culture of community initiatives. The chosen areas were Anfield, Everton, County and Kirkdale authority wards which covered a population of 80,000 people. In contrast to Red Hook, only 4.2% of local residents came from black and minority ethnic groups. Unemployment rates were up to 70%.[75] It was also stated that Liverpool was perceived as having a strong sense of "community spirit" which it was believed would be beneficial for the pilot project.[76] The area chosen for the centre therefore appeared to be somewhat analogous to Red Hook and thus a locality which could benefit in the same way from a community justice centre-based approach.

5.3.2 The North Liverpool Community Justice Centre

The NLCJC opened in September 2005. As noted above, it was directly inspired by the Red Hook model. Its underlying aim was to move the justice system away from a standardised, mechanistic focus on purely processing cases to placing the emphasis on solving local safety problems, changing offenders' behaviour and enabling local communities to have a greater voice in the process of "doing justice."[77] As part of this approach the NLCJC had the six central aims, which were to:

(i) reduce low level offending and anti- social behaviour;
(ii) reduce fear of crime and increase public confidence in the criminal justice system;
(iii) increase compliance with community sentences;
(iv) increase victims' and witnesses' satisfaction with the CJS;
(v) increase the involvement of the community in the CJS ; and

[75]McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

[76] McKenna. K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

[77] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

(vi) reduce the time from arrest to sentence.[78]

Like Red Hook, the NLCJC was operated from an established premises known to locals; the centre was located in a former school building situated on Boundary Street in Kirkdale, North Liverpool. It contained the Centre courtroom, holding cells, interview rooms, a public waiting area/toilet and a series of office spaces that facilitate group conferencing and staff training exercises. The ground floor had a large open plan office which brought together the criminal justice agencies of probation, the youth offending service, Crown Prosecution Service as well as the Centre's in-house court administration team. On the first floor a large, shared office hosted those agencies identified as the 'Community Resource Team' including; Victim support, Liverpool Housing Trust, the City Council's Anti-Social Behaviour Team and the Citizen's Advice Bureau.[79] This office space also hosted the Centre's community engagement team, police staff and the Centre manager.

The co-location of a range of service providers and the consistency provided by a single judge were designed to cut down on unnecessary delay and bureaucracy. Daily pre-court meetings of the on-site multi-agency staff, enabled information to be shared by agencies to ensure efficient use of court time and the adoption of a coordinated approach[80] to case management.[81] It also enabled plans to be set in motion more quickly than in ordinary courts to process defendants and address any emergent underlying issues they might present. The pre-court meeting and booking in of clients at the start of the court session allowed for the identification of those defendants who had failed to present and could potentially be located and collected by the on-site centre police officers. The ability of the centre to mobilise officers in advance of, and even during court proceedings, appeared to help ensure the smooth operation of the court.

[78] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011and Booth L, Altoft A, Dubourg R, Gonclaves M and Mirrlees- Blak C, North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processes Analytical Services, Ministry of Justice Ministry of Justice Research Series 10/12 July 2012

[79] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

[80] In attendance at the meetings were: the legal adviser, police, YOT, Probation Service, CPS and Centre Manager

[81] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

In addition, the ability of the judge to check matters such as the validity of the addresses used by defendants when bail was posted, enhanced the robustness of the court's operation and avoided unnecessary complications and delays.[82]

At NLCJC the Judge had the ability to sit as a Crown Court Judge as well as a District Judge even though the building itself was not set up to host both types of trial and so had insufficient space to accommodate juries. In practice this meant that if a defendant pled guilty the Centre would host the proceedings. Otherwise, the same judge could preside over a trial though the proceedings would take place elsewhere. The judge had the ability to hear magistrates', youth, civil and Crown Court cases and presided over the review court hearings.[83] The single judge model was designed to bring about a consistency of service provision and ensure greater robustness and accountability in monitoring the progress of offenders during their sentence. Where the hearings took place in the Centre's courtroom it was important that the geography of courtroom was slightly different to that of more mainstream, traditional court provision. The Judge sat on a partly raised bench, but he was positioned much closer to the defendant and the close-knit positioning of court staff meant defendants appeared from academic observations to be much more engaged in the process.[84]

5.3.3 The approach taken to justice proceedings at NLCJC

As at Red Hook, the NLCJC operated from a problem-solving perspective and tried to deliver a holistic approach overseen by a single judge. The legal jurisdiction of the centre was determined after a community-needs assessment produced in consultation with the local community. This consultation enabled individuals of all ages from the local population to explain which offences they felt the court should prioritise. As noted, offences affecting quality

[82] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

[83] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

[84] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

of life were the community's primary focus.[85] The NLCJC therefore drew up a list of offences it would deal with; this list included certain civil matters such as Anti- Social Behaviour Orders and injunctions and the closure of crack houses.[86]

In keeping with the Red Hook model, the NLCJC judge was encouraged to use a broad range of non-incarcerative tools such as drug treatment orders and community restitution orders which it was hoped would help to address the causes of crime. One way in which the NLCJC attempted to address its stated goals was by holding regular progress reports on its activities.[87] It also focused on ensuring attendance by offenders and engagement with the court to increase compliance with the orders made, including using ancillary services in preference to more formal sanctions. For example, if an offender pled guilty or was found guilty but the Judge felt there were underlying problems behind the offending, he could adjourn the case for a problem –solving meeting to be held.[88] These meetings aimed to identify these underlying issues (which could include drug or alcohol addiction or housing / debt issues) allowing the agencies involved to clarify the problems and develop options for sentencing aimed at effectively addressing the underlying causes of the behaviour. At these meetings (chaired normally by a probation officer) the offender, his solicitor and a friend or family member were present, as well as the relevant service-providers needed to address the relevant behaviour. Thus, the accused was placed at the heart of the process – in contrast to the traditional justice system – which arguably provides some concurrence with the operation of Red Hook, providing community members with a stake in the operation of the criminal justice system. There was also some limited evidence from the

[85] Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

[86] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

[87] These involved a daily pre court meetings of the on- site multi staff agency group (probation, police, court staff) to ensure CPS disclosure had been made and reviewed and plans could be put in place to efficiently deal with defendants' cases and any underlying issues they may have. Furthermore, primarily defendants who plead guilty were also subject to individual problem-solving meetings which were designed to provide an opportunity to further identify underlying issues which could be contributing to the criminal behaviour such as drug or/and alcohol abuse and financial problems. The problems highlighted at these meetings were brought to the attention of the judge and fed into sentencing. The offender and his counsel were included in the informal relaxed problem-solving meetings to try to ensure the offenders engaged with the process. The aim of the meetings was to provide the judge with through considered advice on the most appropriate sentencing and how to address individual's offending behaviour.

[88] MIS data supplied by Ministry of Justice, March 2007 in McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007

NLCJC that problem solving meetings assisted in offenders' compliance with their sentences.[89] A further example of individual level community problem solving demonstrated at the NLCJC was the judge's innovative approach to his sentencing decisions. In his decisions the judge took into consideration and reflected on the problem-solving focus and its perceived impact in respect of the wider community.[90] A tangible example of this innovation was the issuance of driving disqualifications to kerb crawlers in an attempt to respond to the local desire to address prostitution and prostitution-related crimes in residential streets.[91]

As with Red Hook, the NLCJC attempted to build links with the community by encouraging local residents to report local crime issues or anti- social behaviour hotspots. This enabled the NLCJC to try to work with local partners to reduce damage to the community and to bring charges against offenders. It seems that the crimes most reported could be seen to have a significantly detrimental effect on local resident's quality of life.[92]

5.3.4 The closure of the NLCJC

After only eight years, the Ministry of Justice (MoJ) decided to close the NLCJC, and it ceased to operate on 28th March 2014. Its closure followed a six-week public consultation on the proposal, in which ten of the eighteen responses received were opposed to the closure of the Centre and /or the choice of court[93] selected to receive the court's work.[94]

The central claim of the MoJ was that the Centre, as a single court room was expensive to run, and that it had not provided any clear evidence that it had or would deliver any results in relation

[89] MIS data supplied by Ministry of Justice, March 2007 in McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007
[90] See the normative discourse in Chapter 4 for discussions on the importance of compliance
[91] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011and Booth L, Altoft A, Dubourg R, Gonçalves M and Mirrlees-Black C; North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processes Analytical Services, Ministry of Justice Ministry of Justice Research Series 10/12 July 2012 P4-19
[92] These offences included prostitution, fly tipping, vandalism of vacant properties, graffiti and general anti – social behaviour.
[93] Sefton Magistrates court was chosen to receive the courts workload, located only 2 miles from NLCJC, although this decision draws much criticism in the public consultation documents. Responses to the proposal on the future of North Liverpool Community Justice Centre, published on 22 October 2013 by Ministry of Justice, HM Courts & Tribunal Service
[94] Responses to the proposal on the future of North Liverpool Community Justice Centre, published on 22 October 2013 by Ministry of Justice, HM Courts & Tribunal Service

to re-offending levels. The MoJ calculated that the projected savings between April 2014 and 2017 would be approximately £2 million.[95] It was therefore argued that the NLCJC did not deliver value for money for the taxpayer, concerns the MoJ had raised in their 2012 report.[96] This had been presaged in 2010 when the Coalition Government had assumed power and the 'prohibitive cost' of the centre had been cited.[97]

It is worth, for a moment, analysing the circumstances surrounding the closure of the NLCJC, in particular based upon the contentions of the impact assessment which was undertaken as part of that process. The justification provided for government intervention was that:

> *"The Centre is expensive to run with an operating cost of £980k in 2012/13. There has been no evidence that it has or will deliver results on reoffending levels and it does not deliver value for money for the taxpayer. Therefore Government intervention is necessary on the grounds of efficiency."*

The primary motivation for closing the centre was therefore financial efficiency. The MoJ's conclusion in closing the centre was further expressed in terms of monetary and efficiency considerations:

> *"conventional economic approach to government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way a market operates or if it would like to correct existing institutional distortions. The intervention in relation to the NLCJC was based on efficiency grounds."*[98]

Indeed, the MoJ claimed in the IA that, because the Centre was comparatively expensive to run – the IA claimed three times more expensive than a 'regular' court – the lack of evidence that the Centre reduced offending rates mean that it represented a poor investment for public funds. However, the analysis performed in order to reach this conclusion – both in the IA and the 2012

[95] Impact Assessment on Her Majesty's Courts and Tribunal Service proposals on the proposed closure of North Liverpool Community Justice Centre (NLCJC), MoJ218, Ministry of Justice, 06/09/2013, Final stage.
[96] Booth. L, Atoft A, DuBourg R Goncaves M and Mirrlees- Black C, North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processed, Ministry of Justice Research Series 10/12
[97] Ministry of Justice (2010a), Breaking the Cycle: effective punishment, rehabilitation and sentencing of offenders, London: The Stationery Office. P.81
[98] Impact Assessment on Her Majesty's Courts and Tribunal Service proposals on the proposed closure of North Liverpool Community Justice Centre (NLCJC), MoJ218, Ministry of Justice, 06/09/2013, Final stage

Report that preceded it – is of dubious value.

First, the Report which presaged the closure of the NLCJC did not measure its 'success' based upon the terms under which the Centre was established. The NLCJC was established, according to a later Government Green Paper[99], under the following principles:

(i) Courts connecting to the community;
(ii) Justice seen to be done;
(iii) Cases handled robustly and speedily;
(iv) Strong independent judiciary;
(v) Solving problem and finding solutions;
(vi) Working together;
(vii) Repairing harm and raising confidence; and
(viii) Reintegrating offenders and building communities.[100]

[99] Criminal Justice System, Engaging Communities in Criminal Justice (2009).
[100] This was also referenced by the Lord Chancellor in Parliament in 2006 as he announced an expansion of the NLCJC pilot: "As announced in Delivering Simple, Summary, Speedy Justice, published in July 2006, the Government wish to establish 10 further community justice initiatives. This is to build on the community justice initiatives already under way at the North Liverpool Community Justice Centre and Salford magistrates' court. Community justice makes a key contribution to the Government's Respect Action Plan, which was published in January 2006. It aims to strengthen the links between the courts, the criminal justice system and the local community so that local people's confidence in the work of the courts and the wider criminal justice system increases. In particular we want to build on the work judges and magistrates already carry out to deliver community justice. Magistrates demonstrate a huge commitment to public service and to making their communities better and safer places to live…. The aim of this next phase of community justice work will be to provide further learning and best practice so that in the long term the principles of community justice are applied in the courts and the criminal justice system throughout England and Wales. In doing this, we will give the local areas flexibility to adapt community justice to their needs and circumstances so that the needs of their community are met in the way that works best for them. These initiatives will be founded, however, on the following key principles:

Courts connecting to the community

There should be significant liaison between the courts and the local community so that local people should value the courts as a community resource. Examples of this include holding regular meetings with community representatives, working with local crime and disorder reduction partnerships or police consultative groups and attending community events. The community should also be able to put forward its view on the impact that the crime has had on it so that the court has a view of the wider context of the crime. We will look at how this might be achieved in this new phase of community justice work.

Justice seen to be done

Local people should be better informed about the work of the court and have an opportunity to put forward its views on the way offending is tackled. Compliance with the court's orders or other penalties should be seen and recognised by the community, with their problems addressed. We will look in detail at the involvement of the community in the establishment of the court. Local magistrates, whose contribution to their local communities is already recognised as important, will volunteer to take part in the new schemes, and the community already provides input to the advisory committees that make recommendations on the appointment of magistrates.

Instead, however, the 2012 Report authors tested the NLCJC on the basis of its impact on "efficiency of court processes."[101] In so doing, it paid attention to the following factors:

(i) The use of different types of disposals;

Cases handled robustly and speedily

Community justice should enable swift resolution of cases through rigorous and effective case management as well as harnessing the combined potential of a range of agencies working together. Increasing speed in listing cases, reducing delays created by unnecessary adjournments, ensuring offenders begin sentences promptly and acting swiftly on failures to turn up to court or comply with a sentence will all contribute towards increasing community confidence in the effectiveness of the court. Much of this has been fed into the wider paper Delivering Simple, Speedy, Summary Justice.

Strong independent judiciary

The judiciary carries enormous authority over offenders and criminal justice agencies and thus has a potentially powerful role to play in promoting compliance with court orders and tackling offending behaviour. Community justice should enable the judiciary to direct hearings, lead the problem-solving approach and maintain oversight over offenders' progress post sentence.

Solving problems and finding solutions

Problem solving is at the heart of the community justice approach in the court. In essence, it means making use of a range of available service providers to address and tackle the underlying causes of offending. Problem-solving can operate both at a community level—tackling safety concerns raised by local people—and when dealing with individual offenders at court

Working together

This enables consistency, builds trust and promotes a team approach to decision-making and dealing with offenders. Collaboration ensures that a range of agencies, necessary for problem-solving, are available to the court. In sum it empowers the court to deliver an end-to-end service to offenders, victims and the community.

Repairing harm and raising confidence

Victims and witnesses must be kept fully informed and supported from their first contact with the system until after the case has concluded. The new schemes will seek the views of the community on what projects should be the subject of unpaid work requirements imposed as part of a community punishment order, for example, through newsletters, advertising or by canvassing views at public meetings. These unpaid work projects should then be badged once completed so the community can see what has been achieved.

Reintegrating offenders and building communities

Community justice can play a crucial role in improving social bonds and cohesion within the community. More specifically, this involves developing pathways to support the reintegration of offenders into their community.

I believe these new community justice initiatives will build on the achievements of the north Liverpool and Salford projects. They will demonstrate further how the courts; the wider criminal justice system and the public can be brought closer together to foster new relationships that work to make justice better for everyone."
See Lord Falconer, Parliamentary debate, Community Justice, Hansard Volume 687: debated on Monday 27 November 2006

[101] Booth. L, Atoft A, DuBourg R Goncaves M and Mirrlees- Black C, North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processed, Ministry of Justice Research Series 10/12p.19

(ii) Court processes – time from offence to conviction and number of hearings per case;

(iii) Guilty plea rates;

(iv) Effective, ineffective and cracked trial rates; and

(v) Costs.[102]

On this basis, the 2012 Report concluded that "There is no evidence that the NLCJC is any more effective in reducing re-offending than other courts….There is also no evidence to suggest that offending behaviour generally has improved more in the North Liverpool area than elsewhere."[103]

These findings may be accurate. However, the purpose in establishing the NLCJC was never confined to improving efficiency. Nor was cutting re-offending one of the primary drivers of its introduction (although it was hoped that this would emerge as a by-product of its operation). The authors tacitly acknowledge this in the final paragraph of their Report, noting that:

> *"There are a number of additional outcomes that underpin Community Justice. These include: courts connecting to the community; justice being seen to be done; having a strong independent judiciary; and raising confidence within the community. These outcomes were not explored in this evaluation."*[104]

This shallowness of analysis is arguably a produce of the shift of government priorities which occurred between the establishment of the NLCJC and the political climate which subsisted in 2012, in particular the emphasis placed on cutting spending wherever possible.

Finally, it is extremely important to acknowledge that the IA was a flawed exercise *even on its own terms*. During the exercise, the excessive costs of the Centre were referred to frequently – in particular the claim that the NLCJC 'cost' approximately £980k to run per year. However, the IA acknowledges that almost half of those costs - £422k – were comprised of 'secondee'

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[102] Booth. L, Atoft A, DuBourg R Goncaves M and Mirrlees- Black C, North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processed, Ministry of Justice Research Series 10/12, p19

[103] Booth. L, Atoft A, DuBourg R Goncaves M and Mirrlees- Black C North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processed, Ministry of Justice Research Series 10/12 p28

[104] Booth. L, Atoft A, DuBourg R Goncaves M and Mirrlees- Black C North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processed, Ministry of Justice Research Series 10/12 p.28

costs – in other words, the costs of supplying staff from partner justice agencies, such as the probation service, NHS counselling, and other ancillary support. Indeed, the IA concludes by stating that these secondees "will return to their own organisation" and assume further that "these secondees will be usefully redeployed into other roles and therefore there is no net economic impact."[105] Accordingly, in closing the Centre, the IA recognises that these cost savings will accrue to HMCTS but assume that the secondees to the Centre will be redeployed into other government agencies. The implication of this is that these £422k "savings" are not savings for the public at all: instead, these costs will be absorbed by other government agencies once the relevant secondees are "usefully redeployed" into other government work – most likely, the same work that they were performing at the Centre.

This is not a trivial point. An overarching structural motivation for the establishment of the NLCJC was to co-locate support services in the centre, in keeping with the model employed originally in Red Hook. By setting up the Centre in this way, costs were bound to be higher, because regular courts by definition do not offer such support services to offenders; instead, they are referred to other government agencies. This is not to say that the NLCJC was more efficient than comparable courts, but if those costs are stripped out (as they should be), the Centre was not close to being as inefficient as claimed in the IA.

The combination of a misdirected 2012 assessment and a flawed 2013 costs evaluation were therefore profound. One must speculate whether these exercises were designed deliberately to ignore the non-financial benefits that community justice centres conveyed on their surrounding areas. Very little mention was made, for example, of the impact the NLCJC made on the community it served, or of its effectiveness in ensuring the operation of the criminal justice system engaged community support.[106] The MoJ's estimations of the relative lack of success has been contested by academics such as Mair and Millings, who argue that the evaluations undertaken on re-offending were conducted too early in the life cycle of the centre to produce

[105] Impact Assessment on Her Majesty's Courts and Tribunal Service proposals on the proposed closure of North Liverpool Community Justice Centre (NLCJC), MoJ218, Ministry of Justice, 06/09/2013, Final stage and Booth L, Altoft A, Dubourg R, Gonclaes M and Mirrlees- Black C North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processes Analytical Services, Ministry of Justice Ministry of Justice Research Series 10/12 July 2012 Point 23.

[106] Impact Assessment on Her Majesty's Courts and Tribunal Service proposals on the proposed closure of North Liverpool Community Justice Centre (NLCJC), MoJ218, Ministry of Justice, 06/09/2013, Final stage and Booth L, Altoft A, Dubourg R, Gonclaes M and Mirrlees- Black C North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processes Analytical Services, Ministry of Justice Ministry of Justice Research Series 10/12 July 2012

conclusive results.

This opinion had been voiced by both the Bishop of Liverpool and Mersey Care NHS Trust during the consultation exercise.[107] Moreover, the greatest objection to the closure came from those concerned about the impact on 'Local Justice.' This may be divined from the responses to the proposal to close the NLCJC:

> *"The Citizens' Advice Bureau, which has had a presence in the Centre since its inception, had observed a growth in community engagement. It was felt that the closure of the Centre would be a substantial loss to the local community and possibly lead to an increase in disaffection with Police and a rise in some types of crime."*

> *"A law firm stated: 'The NLCJC was set up to serve the community of North Liverpool with the ethos very much centred upon local justice, it is ironic that consideration is now being given to moving this work from Liverpool and into Sefton which will equate to a loss of local justice."*

> *"The CPS commented that moving work to Sefton Magistrates Court was sensible, but that consideration needs to be made whether a special court should be set up to deal with the problem-solving and mental health work…"*

"On respondent was of the view that "NLCJC is embedded in the community it serves and it has strong links to housing, education and welfare matters in its community justice role. Its removal from [the local] community may leave a significant gap…. [Moreover] the proposals would weaken relationships between the Police team and other agencies on site…"[108]

[107] Impact Assessment on Her Majesty's Courts and Tribunal Service proposals on the proposed closure of North Liverpool Community Justice Centre (NLCJC), MoJ218, Ministry of Justice, 06/09/2013, Final stage and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011and Booth L, Altoft A, Dubourg R, Gonclaes M and Mirrlees- Black C, North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processes Analytical Services, Ministry of Justice Ministry of Justice Research Series 10/12 July 2012 P 21-29

[108] Ministry of Justice, Response to the proposal on the future of North Liverpool Community Justice Centre' 22 October 2013 p.17

5.4 The effectiveness of the NLCJC as a Community Justice Initiative

In evaluating why Red Hook has succeeded and the NLCJC failed, it is striking to note the similarities of the areas concerned, and the commonalities of the internal approaches and processes taken in each centre. Both Red Hook and the areas of North Liverpool covered by the NLCJC were characterised by similar relative poverty levels, had high youth unemployment and significant levels of petty and serious crime. The approaches taken to the establishment and set up of the two centres were also similar: they were housed in local buildings, co-located with other social services, emphasised the community dimensions of the justice process, and followed procedures which were designed to be less formal than regular court settings. Each centre, for example, in general relied upon one sitting judge, who, by design, was placed closer to counsel and defendants in more informal settings.

Why, then, did the NLCJC fail where Red Hook succeeded? The most convincing explanation appears to be that whilst there was internal consistency between the two concerning processes, attitudes, support and procedures, the external profile(s) of the centres were viewed in very different ways. Part of this can be attributed to the 'ownership' of the two courts: Red Hook was run by a not-for-profit organisation licensed by the local authorities, whereas the other was governed and funded by government directly. However, the distinctions run deeper than this, and go some way to explaining why the NLCJC failed to gain acceptance amongst the community to the same degree that Red Hook achieved.

Examination of the NLCJC's aims suggests that there was an underlying managerialist theme to the rationale for the Centre; in contrast to those espoused by Red Hook, they arguably do not reflect a community justice-based approach.[109] Instead there is conformity to the pattern described in previous chapters which successive governments have applied to the criminal justice system under which a managerialist system is evolving in the UK through the combined effects of a number of independent ad hoc measures changing pre-trial and trial processes.

Community justice operates at both a community and an individual level. At an individual level it can be seen that the co-location of services to support both offenders and the community is vital. It is worth remembering, for example, that both the NLCJC and Red Hook housed in one

[109] Managerialism is defined in Chapter Two.

building support services for victims and witnesses, housing advice, drug and alcohol counselling, mediation, education and vocational advice, debt counselling and mentoring as well as probation and court services. This multi-agency problem solving approach meant that community members could request personal assistance from the centre and have their requests dealt with efficiently rather than having to liaise with each agency separately. In comparison, at the short-lived Salford Criminal Justice initiative, there was no co-location of services as the centre operated at an existing magistrate's court.[110]

There is of course a difference between developing initiatives to address local issues and the administrative streamlining of services (managerialism). Arguably the perception created at the NLCJC, as opposed to at Red Hook, was that administrative problem solving and efficiency constraints were the dominant concerns. For example, at the NLCJC, in contrast to the normal joint working in criminal cases, a multi- agency approach was adopted across the whole court process, which suggests a community problem solving focus.

An alternative explanation is that the co-location of the criminal justice and support agencies in an open place office encourages timely exchange of key documents and minimises the impact of adjournments. From this perspective, more administrative and efficiency ideals emerge. Daily pre court meetings might be regarded as collaborative problem-solving work beneficial for the community. However, they could also be perceived as managerialist in nature and primarily concerned with the efficiency of the system; the daily meetings enabled information to be shared by agencies thus ensuring efficient use of court time and the adoption of a coordinated approach to case management.[111]

The confusion over its aims makes it more difficult to determine how the success or failure of the NLCJC community justice initiative could or should be evaluated. The NLCJC could be evaluated purely against its stated purposes, in which case increased community involvement is not necessarily prioritised against the efficiency criteria which would be employed in relation to other objectives. Alternatively, success might be considered in terms of the principles of

[110] Salford Criminal Justice initiative was established to test how successfully community justice initiatives could be implemented using an established magistrate's court – Brown and Payne 2007, process Evaluation of the Salford community Justice Initiative, London: Ministry of Justice.

[111] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

problem-solving justice[112]; eight principles of Community Justice for England and Wales[113] or finally the Karp and Clear's five core elements of Community Justice.[114] This variety of methods for evaluations demonstrating the difficulty in labelling community justice centres a success or failure and complex array of factors involved in their perceived success.

5.4.1 The Failures of the NLCJC

5.4.1.1 The Importance of Understanding the Nature of Community

As explained above, under a community justice ideal, criminal justice activities are not tied to geographical localities but instead are free to adapt to particular manifestations of community life. This enables community justice initiatives to differentiate themselves from existing justice practices which are based purely on geographic localities and fail to address collateral harm and the weakened sense of community caused by crime.

The justifications for the location of the NLCJC seem to be slightly at odds with the community justice ideal that activities should not be tied to geographic localities. Community involvement is critical to the success of community justice initiatives. The lack of discussions concerning the community allegedly served by the NLCJC as a key issue concerning the location of the centre suggests the NLCJC underestimated the importance of community justice at a

[112] enhanced information; community engagement; collaboration; accountability; outcomes and individualised justice. However, this approach would appear to narrow as problem solving justice was only one aim, albeit an important one of the NLCJC and Community Justice as an initiative. Instead, it would appear more appropriate to use these principles as one element of an evaluation of the NLCJC.

[113] These eight principles were : Courts that connect to the community; that justice is seen to be done; that cases are handled robustly and speedily; that there is a strong independent judiciary; solving problems and finding solutions; Working together; repairing harm and raising confidence and reintegrating offenders and building communities as set out in the 2009 Government green paper and re-affirmed in the Casey Report Engaging Communities in Community Justice, Government Green paper, 2009 and Casey Review, Engaging Communities in Fighting Crime a review by Louise Casey, Cabinet paper.
Karp D. R and Clear T.R, Community Justice: A conceptual Framework, Boundary Changes in Criminal Justice Organizations Criminal Justice 2000 Vol 2 Ministry of Justice Office of Justice programs and Casey and Rottman 2005, 37). Lang 2011, 2-3 and Berman G and Fox A, Lasting Change or Passing Fad, Problem Solving Justice in England and Wales, Policy exchange 2009 and Engaging Communities in Criminal Justice, Green paper 2009

[114] The five core elements being: Neighbourhoods; problem solving; Decentralization of authority and accountability; Community quality of life and citizen participation. The five themes articulated by Karp and Clear would appear to provide a framework for evaluation and analysis that provides the most comprehensive review of the NLCJC as both a community justice initiative and the viability of community court initiatives in England and Wales.

neighbourhood level. By linking the pilot too closely to geographical locations it hampered the ability of the Centre to succeed as literature suggests that a primary goal of community justice is to mobilize communities to be active partners in crime control. Indeed, Rosenbaum argues that genuine "community" does not in fact tend to exist if logical geographic lines are drawn and insufficient attention is paid to underlying community dynamics. The theory of informal social control which underpins the importance of the community's perception of connectedness to an individual or a group is an essential tool in the success of the community justice initiatives.

The NLCJC therefore fell into the trap that has befallen many community justice initiatives, by defining community primarily in terms of physical geography and failing to address the very vibrant sense of community that can exist in personal networks of relationships.[115] This stands in sharp contrast to the Red Hook initiative which built upon the strong sense of community that already existed, albeit a community with deep distrust of the authorities.[116] By defining community in physical geographic terms the NLCJC was, at best, compromised as it became increasingly difficult for the community to police itself, therefore capitalising on informal social control. The NLCJC would arguably have had greater success and had a better chance at achieving community justice at a neighbourhood level[117] if it had addressed micro community principles[118] at play when deciding on its location[119] as was the strategy employed at Red Hook.[120]

[115] as demonstrated by the so called criminal sub-cultures, who appear to have a greater sense of belonging and connection than members of mainstream society.

[116] Community is not a place: A new look at community justice initiatives, McCold P and Watchel B, paper presented to the International Conference on Justice without Violence: Views from Peace-making Criminology and Restorative Justice Albany, New York, June 5-7, 1997.

[118] Community is not a place: A new look at community justice initiatives, McCold P and Watchel B, paper presented to the International Conference on Justice without Violence: Views from Peace-making Criminology and Restorative Justice Albany, New York, June 5-7, 1997 Karp D. R and Clear T.R, Community Justice: A conceptual Framework, Boundary Changes in Criminal Justice Organizations and Casey and Rottman 2005, Lang 2011, 2-3 and Berman G and Fox A, Lasting Change or Passing Fad, Problem Solving Justice in England and Wales, Policy exchange 2009 and Engaging Communities in Criminal Justice, Green paper 2009 Katherine McKenna, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007

[119] Community is not a place: A new look at community justice initiatives, McCold P and Watchel B, paper presented to the International Conference on Justice without Violence: Views from Peace-making Criminology and Restorative Justice Albany, New York, June 5-7 1997 Karp D. R and Clear T.R, Community Justice: A conceptual Framework, Boundary Changes in Criminal Justice Organizations and Casey and Rottman 2005, Lang 2011, 2-3 and Berman G and Fox A, Lasting Change or Passing Fad, Problem Solving Justice in England and Wales, Policy exchange 2009 and Engaging Communities in Criminal Justice, Green paper 2009 McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007

[120] Lee C, Cheesman II F L, Rottman D B, Swaner R, Lambson S, Rempel M and Curtis R , A Community Court grows in Brooklyn: A comprehensive evaluation of the Red Hook Community Justice Centre; Nov 2013 NCSC;

5.4.1.2 The Visibility of the NLCJC

As noted in earlier discussions, Red Hook had a transformative effect on the community it served. This was evidenced through the huge increase in support for and respect of, local law enforcement agencies and the public awareness of the activities of Red Hook, which afforded the community some knowledge of the centre's philosophy and strategic direction. It also involved community representatives at all levels in its external dealings.

Unfortunately, there is no data to quantitatively demonstrate whether the mechanisms used at the NLCJC succeeded in increasing compliance because insufficient time elapsed since the opening of the Centre (2005) and when the evaluations supported by the Ministry of Justice were completed in 2007. There is little evidence on whether the NLCJC gave priority to the community quality of life as it is an issue which has not been addressed in any detail in previous literature on the NLCJC. The limited evidence[121] available is mixed as to whether the Centre increased the community's quality of life by means such as raising public confidence and improving public perceptions of community safety and fear of crime in the area.

However, in surveys completed whilst the Centre was in operation, it is clear that the NLCJC had less impact on the local community than Red Hook achieved over a similar timeframe. Only around half of the respondents who had heard of the NLCJC thought it had made no difference to crime that affected their quality of life. Of those people who had not heard of the NLCJC when polled initially 50 per cent believed it would reduce crime that affected their quality of life a little or a lot. However, this confidence decreased over time, falling to 44 per cent in the third wave (after the court had been in operation for 16 months).[122]

The NLCJC did attempt to establish community engagement activities to increase awareness of its services. These included newsletters and leaflets, public meetings and special events, press coverage, outreach work, work with schools and informing local businesses. However:

[121] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007, Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011and Booth L, Altoft A, Dubourg R, Gonçalves M and Mirrlees-Black C North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processes Analytical Services, Ministry of Justice Ministry of Justice Research Series 10/12 July 2012

[122] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007

> *"the community engagement activity is not yet leading to increased public confidence in the criminal justice system in the area. The community attitude survey has actually demonstrated a slight decrease in confidence over the three waves conducted in the first 16 months the centre was open and the only available data. Of the residents consulted in wave 3, 64 per cent said that they were not very or at all confident that the criminal justice system is effective in bringing people to justice, compared with 62 per cent in wave 1."*[123]

Although these figures cannot be considered in isolation (communities are of course not only influenced by local events but by media portrayal of the criminal justice system nationally),[124] they occurred against national drops in crime rates.[125]

The NLCJC did have some success in relation to the impact of its community information work. The level of knowledge increased, during the 16 months after the centre's inception, from one in five people to one in three.[126] However, this increased awareness did not flow into the wider community who remained relatively ignorant of the work of the NLCJC. The Community Reference Group met bi- monthly or monthly and provided NLCJC staff with feedback about key issues in the local areas, raising concerns and queries. However, the group was made up of one or two representatives from each of the seven neighbourhoods served by the Centre. These individuals were already engaged and active within their communities and were often members of local resident's groups. It may be that the consultation process therefore merely gave a greater platform and voice to already-active residents, rather than engaging those not ordinarily involved in local public affairs.

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[123] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 P58

[124] Owens E G; Media and the Criminal Justice System; Cornell University; June 29, 2010, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632396. The media in the UK were highly critical of the criminal justice system over this period; see for example, http://news.bbc.co.uk/today/hi/today/newsid_8559000/8559135.stm: criminal justice system is in trouble March 2010 and http://www.telegraph.co.uk/news/uknews/crime/9885995/Vicky-Pryce-trial-have-juries-had-their-day-in-court.html and http://www.information-age.com/technology/information-management/123456809/minister-slams-criminal-justice-system-s--terrible-failure--to-use-it; We must reform our criminal justice system: http://www.telegraph.co.uk/comment/telegraph-view/9544686/We-must-reform-our-justice-system.html

[125] Crime in England and Wales 2006/07; Edited by: Sian Nicholas, Chris Kershaw and Alison Walker July 2007 Home Office Statistical Bulletin 11/07 (4th edition) http://webspace.qmul.ac.uk/fcornaglia/crime%20in%20england%20and%20wales.pdf

[126] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 P25-26

However, in order for a community justice initiative to have real effect, it needs to engage those individuals normally detached from these activities so that less familiar voices may be heard. Involvement for members of the public through jury or lay magistrate decision-making takes place at a later stage in the process and may comprise ex post value-judgments on policies adopted earlier. Here there is a chance for lay influence on policy to be exerted, taking account of local priorities, egalitarian principles. It suggests a responsive system rather than a rule-bound coercive one.[127] By engaging the community in the justice process it enables the community to become involved in a process typically controlled by State agents.

There are a variety of roles that exist for citizens in community justice initiatives with every role enabling the capacity of the citizen to influence the local practice of justice. The underlying theory behind this concept is that it will lead to safer communities and produce more responsible community members if successful.[128] The NLCJC is an example of how difficult such a seemingly simple objective is to achieve where there are associated complexities. Even if a community's involvement is extensive, it may also be superficial and unimportant to justice outcomes. For example, if agencies develop community justice initiatives as strategies of public relations rather than as a true commitment to power sharing the results can only ever be superficial. Many academics and commentators have argued that the NLCJC was not given long enough to achieve its aims before it was closed, which begs the question as to why having invested so many resources the Centre was put to an arguably untimely end. The effect of budgetary constraints may well have been the chief concern.[129]

Differing approaches to the funding and structure of the criminal justice systems arguably have

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[127] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007 and Mair G and Millings M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011and Booth L, Altoft A, Dubourg R, Gonclaves M Mirrlees- Black C, North Liverpool Community Justice Centre: Analysis of re-offending rates and efficiency of court processes Analytical Services, Ministry of Justice Ministry of Justice Research Series 10/12 July 2012

[128] Sviridoff, M., Rottman, D., Ostrom, B. and Curtis, R. Dispensing Justice Locally: The Implementation and Effects of the Midtown Community Court. New York: Center for Court Innovation, 2000 and Malkin, V. "Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center." American Criminal Law Review 40 (2003): 1573- 93

[129] Proposal on the future of North Liverpool Community Justice Centre https://consult.justice.gov.uk/digital-communications/north-liverpool-community-justice-centre and Baks C http://www.itv.com/news/granada/2013-10-29/liverpool-mp-blasts-closure-of-community-justice-centre/ Liverpool MP blasts closure of community justice centre and Cost-cutting axe falls on pioneering court 24 October 2013 http://www.lawgazette.co.uk/practice/cost-cutting-axe-falls-on-pioneering-court/5038335.fullarticle. The Salford community justice initiative was closed in

had an impact on the varying success levels of Red Hook and the NLCJC. The closure of the NLCJC suggests that a key problem that would face a community court model in the UK is that there has been a "steady loss of autonomy among key local agencies and the growing influence of the centre in criminal justice is a shift that could be understood largely in terms of the local level agencies dependence on the national state for both its power and resources". [130] Unless there was a wholesale change in how the criminal justice is funded the success of these initiatives would in all probability be limited. Arguably the Community Justice Centre initiative needs a ground up rather than a 'top – down' approach. This would enable the way such Centres themselves operates to be shaped according to local priorities, as well as allowing lay influence on criminal practices.

5.4.1.3 Decentralization of Authority and accountability

Approaches to traditional adversarial criminal justice are very different from that which should be taken to Community Justice: they have different organisational alignments. For example, in a Community Justice approach, staff may report to a citizen group as well as professional superiors. Lateral information sharing and short term, ad hoc problem – solving groups are often dominant.

The NLCJC is a very good example of how community justice decentralizes authority and accountability, NLCJC staff believed that staff across agencies worked together in pursuit of shared objectives rather than the staff across agencies working separately as individual unconnected entities. However, a key problem the NLCJC faced was that staff when asked indicated uncertainty around their reporting responsibilities in terms of task and line management. This became increasingly evident as their jobs evolved through the evolution and development of the centre.[131] This was exacerbated by the fact the centre involved them in additional tasks such as community engagement activities[132] or restorative justice, activities not undertaken at traditional adversarial courts, which blurred the lines in terms of authority.

[130] Raine J and Willson M, Managing Criminal Justice, Harvester Wheatsheaf 1993 P63 and Raine J, Shifting power dependencies in criminal justice: the dual state of centre and locality in England and Wales, Criminal Law Review 2014 P399-415

[131] McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007

[132] Engagement through working groups, public meetings and outreach work made staff more visible to the community. These activities arguably educate the community on the court as well as investigating the community's views and particular issues.

By decentralizing authority and increasing community accountability, projects such as the NLCJC arguably help to articulate local norms of conduct.

Ultimately, the over-riding message from the failure of the UK experiment is that developing models of working that are about devolved power structures and greater community voice will never be successful when operating in a managerialist and efficiency focused setting. The spirit of community justice embodied in the NLCJC should have been about embedding power and decision-making into Kirkdale but instead the court was controlled from the Centre and was required to evidence impact quickly and to have to prove its economic value. The role of the community was not fully understood at the outset, nor properly understood during its existence. With the attention on trying to secure operational legitimacy within the eyes of criminal justice policy-makers and practitioners there was never the scope to evolve this aspect of what it means to be a community justice centre, reflective of the community it represented.

5.4.2 Red Hook and the NLCJC: final thoughts

Although the Liverpool experiment appears to have failed, it is important to note that the UK and the US have very different political structures and criminal justice systems. The US has a split criminal justice system with two systems operating: one at a federal level and another at a state level. The duality of the systems and the political structure underpinning the structures means that the US adopts a bottom- up approach to criminal justice rather than the top- down approach in the UK. The problem-solving approach underpinning Red Hook had taken root across the USA over the two and a half decades before Red Hook's inception, meaning the philosophy underpinning its operation were better understood and there was strong support beyond the concept of community justice. Furthermore, there were several pilots in the US and New York area before Red Hook was established.[133] This difference in inception is a significant - albeit not conclusive - factor in determining the varying successes of Red Hook and NLCJC.

Change as contemplated at the NLCJC approach generally takes a generation to achieve as

[133] Lee. C, Cheesman II. F, Rottman D, Swaner. R, Lambson. S, Rempel M and Curtis R A community court grows in Brooklyn: A comprehensive evaluation of the Red Hook Community Justice Center; Nov 2013 NCSC; Centre for Court Innovation website (2012), Red Hook Community justice Centre, www.courtinnovation.org/project/red-hook-community-justice-center last accessed 1/3/22

supported by findings at Red Hook. The comparative success of Red Hook could be partially attributed to the different political and organisational structures in place in America as opposed to the UK. Although initiatives in the US take longer to come into fruition, the advantage is that the groundwork has already been put into place before the change comes to being. Arguably this gives the operation a stronger foundation and greater likelihood at success. Without the two and a half decades of previous attempts at the community justice centre concept and a growth in public understanding and appreciation for the initiative arguably the success of Red Hook may have been more limited.[134]

In terms of the viability of a community justice centre initiative as an alternative to current lay involvement in the UK it is important to recognise that today in the UK, local criminal justice operates in an increasingly power dependent relationship with the Centre (government). This is a sharp contrast to the US model and its operation at Red Hook. In the UK, central government has more direct control and can shape how the criminal justice system operates. This subjects processes to economic influences, the closure of the NLCJC on efficiency grounds providing a classic example. There has been a clear signal from central government that 'top down' and the unitary organisational form is the best model for greater efficiency, now a primary concern. The Home Office expressed a preference for a single national organisational model.[135]

In the UK central government will always retain control of the criminal justice system, through control of funding, something that is not possible in the US due to the separate state and federal systems. With increasing financial pressure being brought to bear on central institutions in the UK through austerity measures, currently, it would appear that managerialism is here to stay. Thus, the pressure to make economies that appears to be driving the increasing marginalisation

[134]Berman and Feinblatt Good Courts: The Case for Problem Solving Justice, New York: New York Press 2005; Rottman, David, and Pamela Casey. "Therapeutic jurisprudence and the emergence of problem-solving courts." National Institute of Justice Journal 240 (1999): 12-19; Huddleston, W., & Marlowe, D.B. (2011, July). Painting the current picture: A national report on Drug Courts and other Problem-Solving Court programs in the United States. Alexandria, VA: National Drug Court Institute. Available at http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF 37 and Lee. C, Cheesman II. F, Rottman D, Swaner. R, Lambson. S, Rempel M and Curtis R A community court grows in Brooklyn: A comprehensive evaluation of the Red Hook Community Justice Centre; Nov 2013 NCSC; Centre for Court Innovation website (2012), Red Hook Community justice Centre, www.courtinnovation.org/project/red-hook-community-justice-center

[135] Raine J and Willson M, Managing Criminal Justice, Harvester: Wheatsheaf 1993 and Raine J, Shifting power dependencies in criminal justice: the dual state of centre and locality in England and Wales, Criminal Law Review 2014 P399-415

of lay involvement through trial by jury or lay magistrates would seem likely to block any attempt to provide an alternative forum for lay participation through community court justice.[136] Indeed, the NLCJC perfectly demonstrated the managerialist tension at play and highlighted how local projects will never truly flourish. Within the current funding regime any success it had as a method of encouraging community involvement in the criminal justice system was largely overlooked.

5.5 Conclusion

The notion that the community is rooted in the criminal justice system has previously been epitomised through trial by jury; indeed, one only has to look at the history and early foundations of trial by jury to see the importance of community involvement in the operation of the justice system.[137] To a lesser extent the lay magistrates provide a further example of the lay voice in the criminal justice system, albeit one whose role and place is under increasing scrutiny.[138]

Community courts allow members of the public a different, and potentially, a more significant role even than that of reaching a verdict in a contested criminal trial. Agents of criminal justice would tailor their work in the interests of the enhancement of community living.[139] Red Hook and the satisfaction of the New York residents with the justice service they received from the centre demonstrates that the community court provides a viable alternative in principle to lay involvement through trial by jury or lay magistrates.

Community justice centres in the UK were established based upon the eight principles expounded by Lord Falconer, discussed above. In brief, they were to:

(i) Courts connecting to the community;

(ii) Justice seen to be done;

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[136] Impact Assessment on Her Majesty's Courts and Tribunal Service proposals on the proposed closure of North Liverpool Community Justice Centre (NLCJC), MoJ218, Ministry of Justice, 06/09/2013, Final stage

[137] McGowan L; Trial by jury: still a lamp in the dark? 2005 and Damaska MR The Faces of Justice and State Authority, a comparative approach to the legal process: Raine J and Wilson M Managing Criminal Justice, Harvester Wheatsheaf 1993 P70

[138] Donoghue J, Reforming the Role of Magistrates: Implications for Summary Justice in England and Wales, The Modern Law Review, Volume 77, Issue 6, pages 928–963, November 2014

[139] Karp D. R and Clear T.R, Community Justice: A conceptual Framework, Boundary Changes in Criminal Justice Organizations p8-15

(iii) Cases handled robustly and speedily;
(iv) Strong independent judiciary;
(v) Solving problem and finding solutions;
(vi) Working together;
(vii) Repairing harm and raising confidence; and
(viii) Reintegrating offenders and building communities.

Pursuit of this model of justice was designed to invoke localism in the justice system, ensure greater democratic participation and support the legitimacy of the criminal justice system. As discussed in Chapter Two, theories of procedural justice heavily influence such principles. For example, procedural justice theories articulate specific relationships between:

> *"The treatment people receive at the hands of the police and justice officials; the resultant trusts that people have in institutions of justice; the legitimacy people confer, as a consequence of this trust, on institutions of justice; the authority that these institutions can then command when they are regarded as legitimate; and people's consequent preparedness to obey the police, comply with the law and cooperate with justice."*[140]

The model at Red Hook demonstrated that these initiatives could be successful provided that they were assessed by reference to these aims and principles, and not through a rudimentary financial analysis of 'value for money'. The NLCJC no doubt had flaws and did not have the same impact as the centre at Red Hook. However, what it did represent was an evolution in the dispensation and administration of justice, placing localism and democratic participation at the foundation of its operations. Simultaneously, cases were heard not by lay persons, but by a professional judge, supported by a professional staff and volunteers. The community justice centre model which forms the basis for these experiments exhibit hybridity: they attempt to ensure that state legitimacy is secured through embedding operational and structural features which depend upon local input and assessment by reference to criteria which go beyond traditional measures of efficacy.

[140] Hough, M and Jackson, J and Bradford, B and Myhill, A and Quinton, P (2010) Procedural justice, trust and institutional legitimacy. Policing: a journal of policy and practice, 4 (3). p. 203-210.

Notably, the community justice model arguably straddles Damaska's dichotomous categorisation of justice processes. If one recalls from the analysis in Chapter Two, Damaska argued that "an identical social policy can be realized to a degree through very different procedural arrangements and that very different policies can be implemented in similar proceedings."[141] Proceeding from this, he allocated the machinery of justice systems broadly into two categories, with the first centring its processes on resolving conflict, and the second designed to enforce state policy. The conflict-resolving form favours a "contest morphology", whereas policy-enforcing regimes favour "the morphology of inquest."[142] Whilst many jurisdictions – including England and Wales – exhibit policy-enforcement norms, these systems remain hybrids: they retain vestiges both of contest and conflict-resolving procedures. Lay juror participation in trials – in contrast to the employment of career judges – are evidence of these vestiges, whereby lay persons with no prior specialist knowledge of law or the rules of evidence are accorded high levels of influence in criminal justice processes. On the other hand, prosecutions of alleged criminal violations are brought on behalf of, and are carried out, by state agents, overseen (in serious cases) by a state-employed judge.

Damaska's contrast between the 'hierarchical and co-ordinate ideal' also finds succour in the community justice model: the co-ordinate ideal is characterised by less formality in decision-making, and the entrusting of authority to a body of decision-makers sitting in a single level of authority who make decisions according to differing community standards.[143] The Anglo-American models of justice have a strong affinity with a procedural model where only a moderate degree of investigative elements are injected into the criminal prosecutions by judges and other legal professionals.[144]

On this basis, therefore, community justice centres in the UK represent a compromise between the machineries of justice contemplated by Damaska and other theorists concerned with procedural justice. As a model, they embody many of the principal features that might be found in a justice system concerned with lay involvement in the justice system, including: accountability to the local community; involvement of lay persons in decision-making processes; securing legitimacy for state institutions; and solving problems in less formal

[141] Damaska MR The Faces of Justice and State Authority, Yale University Press 1986 P43
[142] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p16 and 181
[143] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p17
[144] Damaska M R The Faces of Justice and State Authority, Yale University Press 1986 p57

surrounds than found in jurisdictions less heavily influenced by the co-ordinate ideal.

In spite of these qualities, however, the evolution of the justice system – like so many public services in the aftermath of the financial crisis – was halted and, indeed, reversed. By judging these centres almost exclusively upon financial efficiency grounds – and failing to give them the required time to demonstrate their utility – government policy undermined their impact and curtailed their capacity to effect meaningful change. The reductionist approach to all forms of public institutional investment was exemplified in the approach taken to the NLCJC (including a flawed Impact Assessment) and represents a collective failure to recognise the value of engaging citizens in both the justice system and initiatives designed to embed a role for the community in general local discourses. Indeed, the evidence suggests that building a justice court centre approach in the UK, despite the success of the model in the US, as an alternative to traditional lay involvement in the criminal justice system is unviable on the terms set out under the NLCJC initiative and in the current efficiency and fiscally responsible driven political climate, even where the pursuit of such narrow efficiencies imposes costs elsewhere.

Chapter 6: Conclusion

6.1 Introduction

This thesis has discussed the evolving landscape of the criminal justice system in England and Wales which has resulted in the current inflection moment with respect to lay involvement in the courts. As has been discussed throughout, the underlying root of this crisis is the attempt to grapple with which of the two competing ideals at play to prioritise: efficiency and costs or the role and importance of lay involvement in the criminal court system. As has been demonstrated in previous chapters, balancing these competing goals has not been straightforward.

The societal importance of the pathway the criminal justice system chooses to follow in relation to this battle was highlighted by former Attorney General Dominic Grieve in 2013:

> *"Many people will go through life without any direct involvement in the criminal justice system. Their information will be gleaned from the media, drama, possibly anecdotes from friends and family. Depending on their generation, it may be Rumpole of the Bailey, This Life or Silks. It seems to me that one way for the system to maintain legitimacy is for people to have a way of genuinely being part of the decision making process. Indeed, it is hard to think of a more serious or important civil duty that virtually any member of the public may be called upon to conduct."*[145]

This thesis has argued, in accordance with Grieve's views, that citizen engagement is a foundational bedrock for any justice system. It provides not only legitimacy for the system but also acts as a conduit between the state and the citizenry in relation to community norms, values and behaviours that shape society. In the context of the jury system, for example, this notion was highlighted by Steyn in claiming that "[t]he jury system is an integral and indispensable part of our constitutional arrangements."[146] Vidmar concurs, arguing that the constitutional importance of features such as the jury in discussions concerning the legitimacy of the system and a "powerful democratic element in the process of delivering justice."[147]

[145] D Grieve Speech on the jury system and the challenges it faces, given as part of Politeia's justice series 2013 https://www.gov.uk/government/speeches/in-defence-of-the-jury-trial accessed 28th February 2022, 3
[146] J Steyn, The role of the Bar, the judge and the jury; winds of change 1999 Public Law 51, P58
[147] N Vidmar World Jury Systems, Oxford University Press reprinted edition 2003 General editors introduction

Future survival of lay participation in the justice system – most notably lay magistrates and juries – is contingent upon them adapting with modern times and retaining the confidence of the public. Some will contend that it is anomalous – having regard to their powers and responsibilities – that they have survived at all. It is arguably even more remarkable considering that we have entered an age when established institutions have been subjected to ever increasing denigration and the amateur has consistently been replaced by the professional.

Yet, lay involvement in the criminal justice system is not a relic, but across distinct jurisdictions and systems is frequently the norm. Indeed, as of 2021, lay participation is used in legal decision making in the majority of countries around the world. When this is analysed further it became evident that lay participation was somewhat more likely to be associated with the common law traditions "73% vs 60% in civil law traditions." Further analysis shows that 25% of countries use two forms of lay participation as opposed to 74% using just a single form of lay participation with varying degrees to the extent these are actually operationalised in the varying countries.[148]

As discussed in Chapter Two, Damaska placed a significant degree of importance on the model of justice adopted and whether it is hierarchical or coordinate in approach. The work by Ivkovic´ and Hans demonstrated that:

> *"[t]he common-law tradition, whether it is the only legal tradition in the country or just one of the legal traditions used in the country, typically leads to only one form of lay participation. About three-quarters (76%) of the countries that rely on the common-law tradition use only one form of lay participation. Whilst countries operating under a common-law tradition, either exclusively or in combination with another legal tradition, account for about 44% of the countries with any lay participation, they account for only 39% of the countries that use two forms of lay participation."*[149]

[148] "125/195 countries use lay persons as legal decision makers in criminal cases." See Ivković, S., & Hans, V. (2021). A Worldwide Perspective on Lay Participation. In S. Ivković, S. Diamond, V. Hans, & N. Marder (Eds.), *Juries, Lay Judges, and Mixed Courts: A Global Perspective* (ASCL Studies in Comparative Law Cambridge: Cambridge University Press. P323-345

[149]125/195 countries use lay persons as legal decision makers in criminal cases." See Ivković, S., & Hans, V. (2021). A Worldwide Perspective on Lay Participation. In S. Ivković, S. Diamond, V. Hans, & N. Marder (Eds.), *Juries, Lay Judges, and Mixed Courts: A Global Perspective* (ASCL Studies in Comparative Law, Cambridge: Cambridge University Press . P 337

Countries that rely on the common-law tradition or customary law are more likely to have lay participation. The civil-law tradition does not have such a uniform effect: the civil-law tradition in a country's legal DNA tends to yield lay participation in countries in Africa, Europe, and Australia and Oceania, but not in Asia and South America. Juries and lay magistrates are used in countries that follow either the common-law tradition or the civil-law tradition. Like juries, magistrates seem to be more concentrated in countries with a common-law tradition (10 countries or 77% of the countries with magistrates).[150] On this basis, the legal systems of close to two-thirds of countries retain some element of lay citizen decision-making.[151] This strong presence of the citizenry may well reflect a political recognition of the legitimising effects of public involvement in law, among other benefits.

6.2 The importance of lay and community involvement in the justice system

Following the Covid 19 pandemic, considerations and decisions made now will impact the future not only for lay participation in the criminal justice system but the very identity the criminal justice system embodies. Even prior to the pandemic, the last decade or more in the UK had witnessed a rapid erosion of some of the fundamental characteristics of public institutions and democracy.[152] Much of this erosion has been deliberate and has often been driven by a laser-focus on the financial implications of particular policy prescriptions, with all other considerations reduced to secondary importance.[153] The justice system has not been immune to this programme of reform. But why is lay participation – in at least some form – in the criminal justice system, desirable? And what does the previous analysis reveal about how it may be retained?

This thesis has been clear that the fundamental principles of citizenship and democracy as well as protection of individual rights necessitates local lay involvement at all levels of justice,

[150] 125/195 countries use lay persons as legal decision makers in criminal cases." See Ivković, S., & Hans, V. (2021). A Worldwide Perspective on Lay Participation. In S. Ivković, S. Diamond, V. Hans, & N. Marder (Eds.), *Juries, Lay Judges, and Mixed Courts: A Global Perspective* (ASCL Studies in Comparative Law, pp. Cambridge: Cambridge University Press P323-345

[151] See Ivković, S., & Hans, V. (2021). A Worldwide Perspective on Lay Participation. In S. Ivković, S. Diamond, V. Hans, & N. Marder (Eds.), Juries, Lay Judges, and Mixed Courts: A Global Perspective (ASCL Studies in Comparative Law, pp. Cambridge: Cambridge University Press P323-345

[152] For example, see George Monbiot, Out of the Wreckage (Verso, 2019).

[153] Mark Blyth, Austerity: The History of a Dangerous Idea (OUP 2013).P 80-120

whether this is achieved by the magistrate courts, a jury, or another form of community participation. As has been outlined in previous chapters – particularly Chapter Two – retaining lay representation in the justice system provides significant benefits, particularly in relation to according legitimacy to the legal system. Including citizens in decision-making processes also supports the inculcation of specific and general behaviours which are desirable from a democratic standpoint: by encouraging participation and involvement in the justice system through 'semi-ownership' of the processes supporting it, respect for the system will increase whilst compliance with its principles ought to widen. This has been the experience at Red Hook and elsewhere, where problem-solving and community-justice ideals have usurped financial considerations as the general metric(s) by which to measure success. As we have seen, the critical underpinning of lay involvement in the criminal justice system is that lay persons to an extent represent and embody the notions of judgment by one's peers, education and involvement of the local community and diffusion of power. Lay involvement enables collective views of a cross section of society to be heard and represented; this concept holds that justice can be dispensed in a more legitimate fashion by lay persons that have garnered public acceptance rather than through the decision of a single professionalised individual from a narrow social class whose experiences are limited.

6.2.1 The Value of lay participation in the criminal process

Throughout this thesis Damaska's work has been used as a lens through which assessments can be drawn on lay participation. Although the analysis of Ivkovic´ and Hans demonstrated there is no longer a purely common law or civil system[154] akin to Damaska's hierarchical and co-ordinate ideals, that does not prevent a conclusion being drawn as to within which ideal the English and Welsh criminal process could fit going forward. Chapters Three and Four explained how policy has impacted lay participation in the form of trial by jury and lay magistrate has taken in the criminal court process over the years. Chapter Five explained how hybrid systems in the form of community justice centres have also been introduced, and how they have fared in contrasting contexts. It further considered the viability of the community justice centre model to supplement lay participation in other justice processes, in particular as a mechanism to preserve trust in the criminal justice system within the communities they serve.

[154] Ivković, S., & Hans, V. (2021). A Worldwide Perspective on Lay Participation. In S. Ivković, S. Diamond, V. Hans, & N. Marder (Eds.), *Juries, Lay Judges, and Mixed Courts: A Global Perspective* (ASCL Studies in Comparative Law, Cambridge: Cambridge University Press. p 323-345

A common constituent to each of these exemplars is the volunteer citizen. Community volunteerism is recognised globally not simply as a valuable source of labour, but "as a means to facilitate individual participation in civic life, foster community, and support democracy."[155] In the UK, for example, the Cameron Government prioritised a system of volunteering – the so-called 'Big Society' which emphasised the potential for voluntary work to improve civic life. The following operational benefits were anticipated from such a programme:

(i) To give communities more powers (localism and devolution);
(ii) To encourage people to take an active role in their communities (volunteerism);
(iii) To transfer power from central to local government;
(iv) To support co-ops, mutuals, charities and social enterprises; and
(v) To publish government data (open/transparent government).[156]

In many ways this approach is reflective of practice across law enforcement agencies. Millie and Wells, for example, identify five behavioural benefits which flow from lay participation in community policing: filling a gap; expanding provision into new areas; altruism; sharing the burden; and demonstrating community engagement.[157] The latter three features of the community policing system are mirrored in the benefits of community justice as embodied in the criminal law system. Accordingly, the principles embodied in lay participation in the justice system are found in other areas of public life which promote citizen engagement.

This is because, as mentioned, in so doing – as Damaska highlights – system legitimacy is promoted through citizen engagement, whilst messages about norm-based behaviour are transmitted back to society, which helps shape general conduct and standards. In respect of lay participation in court-based provision the ordering of these 'benefits' or 'forms' of lay participation has been changed deliberately by policy; the question then becomes how future reforms could recapture some of the legitimacy lost over this period.

[155] Leslie Rebecca Bloom and Deborah Kilgore, The volunteer citizen after welfare reform in the United States: An ethnographic study of volunteerism in action, International Journal of Voluntary and Non-profit Organizations December 2003, Vol 4, P 431,
[156] "David Cameron launches Tories' 'big society' plan". BBC News. 19 July 2010 at https://www.bbc.co.uk/news/uk-10680062 last accessed 1/6/22
[157] Andrew Millie and Helen Wells, 'Introduction: Contemporary policing and non-warranted volunteering' (2019) 29 *Policing and Society* P371.

As was discussed in Chapter Five a fundamental problem with ideas such as problem-solving courts and restorative justice is that they have been imposed from the top down, in contrast to the notion of community-led justice. Policy makers at a national level engaged with administrators rather than judicial office holders who could have advised best on how these developments could have been effectively implemented into the system. This has led to an environment where:

> *"Critics have speculated that there is a lack of understanding, trust, and drive, mainly by English and Welsh politicians (Bowcott, 2016b), which, combined with a climate of austerity, cutbacks, privatisation and centralisation reforms (Bowen and Whitehead, 2013), and a paucity of reliable empirical evidence (Kerr et al, 2011; Matrix Group, 2008), has led to a series of England and Wales PSC closures; most notably the six DC pilots and Liverpool's Community Justice Centre (Robins 2018; Transform Justice, 2014)."*

Unlike in the US and internationally, transformative jurisprudence in the UK has yet to develop beyond an embryonic state within the UK. Instead, UK criminal justice agencies have tended to focus on restorative justice, which is often portrayed as a cheaper and more effective option, highly significant in a post COVID 19 era. As was witnessed in the context of the NLCJC, implementing restorative justice in a hostile financial climate instantly draws attention to a cost benefit analysis. However, as discussed in the previous chapter, data on financial viability of restorative justice is extremely limited.

6.3 Proposals

As we look to the future, we need to address some of the potential methods of maintaining lay involvement in the criminal justice process. One can assess each model based upon the foundational principles of an optimal justice system outlined throughout this thesis, which are themselves influenced by the precepts of Damsaka. The features include but are not limited to: (i) overt lay involvement in the process; (ii) overt professional involvement in the process; (iii) the extent to which parties to the proceedings are volunteers; and (iv) the levels of wider community engagement in the modality concerned. Such features are found in all forms of justice modality, although there remains a spectrum where greater degrees of involvement are encountered depending upon the modality under consideration.

Naturally, each has benefits and drawbacks. However in spite of the clear perceived benefits to the criminal process – and society as a whole – from the pursuit of an idealised criminal justice system, the "central theme of recent reforms in English criminal justice has [simply] been the desire to achieve a more efficient system of criminal justice."[158]

It is not proposed to discuss the features of the modalities mentioned again. Instead, in what remains I highlight how new approaches to criminal justice might be introduced, through reform of existing institutions, or investment in new ones, and comment on the viability of reforming each to reflect competing priorities. As mentioned earlier in the thesis, each of the modalities mentioned is not perfectly aligned with the ideals espoused under Damaska and other theorists on criminal justice systems; instead, each exhibits degrees of hybridity.

6.3.1 Proposal I – Reform to the Existing System

There are undoubted benefits to retaining the predominant procedural forms of justice in England and Wales, namely the magistrates court and the crown court trial by jury. However, given the increased pressures faced by the current system – in particular the crisis of legitimacy that the legal system faces currently – reform should also be countenanced.

In measuring these systems against the precepts of an idealised justice system, it has been noted in this thesis that many of the characteristics of each has been subject to erosion. The expansion in summary forms of justice, for example, has undermined some of the features of the model of justice that the magistrates' represent, in particular the removal of lay adjudication and the marginalisation of community input into criminal justice processes. Moreover, as discussed in Chapter Four, the trait of localism in the magistrates' has itself been progressively undermined through the use of district judges, and a clear preference has developed across criminal justice agencies for the use of so-called cost-effective remedial mechanisms. Interestingly as we have seen in Chapter Four, there has until this point never been the political appetite to fully remove the lay element of the magistracy despite concerted attempts to professionalise of elements of the justice system. Indeed the announcement in January 2022[159] that magistrates sentencing powers were to be increased to enable them to reduce pressure on the Crown courts and speed

[158] I Cram, 'Automatic reporting restrictions in criminal proceedings and Article 10 of the ECHR'(1998) 6 European Human Rights Law Review P742

[159] Press release : Magistrates' Courts given more power to tackle backlog https://www.gov.uk/government/news/magistartes-courts-given-more-power-to-tackle-backlog. Accessed 1 /3/22

up the delays in the justice system would appear to be softening an acceptance by government of the important role magistrates can play in the system.

In the light of this cost-saving approach to justice, there are alternatives to the current lay magistrate system, which preserve localism and prevent case-hardening, but would also offer the potential for financial efficiencies. A promising solution would arguably be to introduce panels to sit in magistrates' courts. This would usually comprise two lay and one professional magistrate. Sanders has argued that this combination of skills would provide the three skill sets he felt necessary to deal with complex cases[160], namely:

(i) Legal (understanding the law in relation to the case and having the ability to apply it to the facts);
(ii) Social (an assessment of character, judgements on their guilt/ innocence/honesty and risk); and
(iii) Administrative/managerial (the ability to manage and organise the court).

It has long been argued that the adoption of such a model would result in increased public knowledge and understanding of the system and improve the legitimacy of the decisions made.[161] This model is more resource heavy than the current system, but Sanders argues that this model would only be used for contested summary cases or sentencing in either way cases. It would therefore a serve as an amalgam of current approaches to justice for minor-to-medium level offences, retaining increased community involvement in the administration of justice. When this concept has been presented to the public there has been a good deal of support demonstrated: a MORI poll in 2000 commissioned for Sanders suggested that "42 percent would feel most confidence in a mixed panel dealing with minor offences and 52 percent would feel most confidence in a mixed panel dealing with more serious offences."[162] Sanders further argues that the financial implications of this model would be limited by the savings made when district judges sat alone for uncontested cases, as legal clerks would not be now needed to advise magistrates on the law.

[160] A Sanders, Community Justice, Modernising the Magistracy in England and Wales Criminal justice forum ippr 2001 p27-34
[161]. A Sanders, Community Justice, Modernising the Magistracy in England and Wales Criminal justice forum ippr 2001 P27-34
[162]A Sanders, Community Justice, Modernising the Magistracy in England and Wales Criminal justice forum ippr 2001. P. 24

There is therefore evidence that this form of criminal justice court might retain public confidence. The model would also match – to an extent – the idealised form of justice that has been considered in this thesis, by including representatives of the local community in the decision-making process and bestowing legitimacy on the court. On this, however, some concerns have been expressed by respondents to polls; namely that a perception exists that the professional stipendiary would dominate proceedings and the lay magistrates would be there for appearance only.[163] This model also has undertones of managerialist concerns as a key element of this model is that greater resources would be allocated to the administration and management of the courts, and attendant to this will likely be greater demands for accountability to central authorities.[164]

Reformers could develop a multi-pronged judicial engagement plan that seeks to integrate magistrates more closely into the development of problem-solving justice. This could include creating a problem-solving advisory board, composed of leading magistrates across the country, charges with overseeing efforts to expand the use of problem-solving techniques across England and Wales. The advisory board would also be charges with reaching out to their colleagues, taking steps such as commissioning a national survey of magistrates' attitudes towards problem solving to determine levels of support for the model. The advisory board could also help craft bench books and training materials for magistrates.[165] A key challenge for problem solving courts will be "in order for the problem-solving agenda to be delivered effectively, magistrates should be trained more extensively in problem – solving principles and how to be a problem-solving judge. The training should be devised nationally and delivered locally, taking into account the needs of individual communities."[166]

On balance, this system of collective decision making is in the eyes of the author beneficial as the members of that panel have to learn to listen to other perspectives and articulate their rationale and reasoning and agree to compromise which should improve public trust and

[163] A Sanders, Community Justice, Modernising the Magistracy in England and Wales Criminal justice forum ippr 2001 p 23-24
[164] A Sanders, Community Justice, Modernising the Magistracy in England and Wales Criminal justice forum ippr 2001 p23-24.
[165] Lasting Change or Passing Fad? Problem solving justice in England and Wales Policy Exchange (2009)
[166] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012 p 33 quoting the Policy Exchange Report 2009 Lasting Change or passing fad Problem solving justice in England and Wales.

confidence in the verdicts delivered. As noted by Lord Justice Fulford: "It provides not only something that is more akin to a jury for the more serious cases but a fantastic training opportunity both for the lay magistrate and the district judge. To sit together and watch each others kills in operation is extremely useful."[167]

This method has the advantage of being able to prevent lone judges become self-reliant and lead to less disparity in decisions and sentencing. There is much to be said for the contention that two or more heads are better than one in determining important questions, such as the issue of guilt or the appropriate sentence, even if the one is a professional judge. Proponents of lay magistrates articulate the wider experience of life that a panel of lay magistrates bring collectively to the task, their independence and the greater chance of their collegiate decision being fair because of the inter-action between them and their relative lack of case-hardening. Glanville Williams was an early protagonist of collegiate decision-making both as to guilt and as to sentence because he saw it as a better protection against "the vagaries of the individual."[168]

6.3.2 Proposal II – Invest in the Community Justice Centre Model

Whilst the first proposal has merit, there are also obvious drawbacks. As has been discussed throughout the thesis, the importance of the restorative justice notion of creating bottom-up – in contrast to top-down – solutions for crime prevention and control is important. The key benefit to such an approach is the role the community can play. The success of the Red Hook court model in the US demonstrates the impact restorative justice and community justice can have on a locality.

It has been argued that the magistrates' court could adapt to this approach (something argued after the NLCJC demise as discussed in Chapter Five); the Magistrates Association supported this approach in their 2012 study, in which they claimed that magistrates could perform fundamental roles when it came to restoration and rehabilitation of offenders.[169] Yet, it is also clear that traditional magistrates courts struggle to deliver the more therapeutic approach to justice exhibited in community justice centres, in particular due to notion that magistrates courts are simply being used as a forum to pay lip-service to this particular ideal:

[167] Q277 as stated In The role of the magistracy House of Commons justice committee Sixth report of session 2016-2017

[168] Glanville Williams, The Proof of Guilt, The Hamlyn Lectures, 7th Series (Stevens, 1955) pp 233 and 273-281

[169] Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012 p 22

> *"The development of problem solving in the magistrates' courts has some of the hallmarks of top-down policy change. For some ground –level practitioners, there is a feeling that problem – solving reform is the flavour of the month being forced upon them from above. This attitude highlights the importance of local buy in – without support at the ground level, even the best ideas can wither and die."*[170]

Accordingly, and in light of the aforementioned limitations on the possible modes of criminal justice that might be viable in England and Wales, it is arguable that a hybrid approach ought to be adopted. This approach would see community justice centres adopted whilst still preserving the traditional lay participation through trial by jury and lay magistrates. It is clear from the previous analysis that a role for the public in the criminal courts might remain a central principle for government but lay participation is continually being chipped away which places further importance on the impact the community justice centres could have. Much of this has been driven by the financial considerations mentioned in earlier chapters but there are also significant managerialist drivers of such changes which are themselves driven by contemporary approaches to public resource management.

The justice system however should enjoy some level of immunity from such developments, yet recognise that the environment for public service delivery in England and Wales has altered, perhaps irrevocably. As has been discussed, the environment in England and Wales has become preoccupied with the efficiency and costs of the system rather than the fairness and legitimacy of the system in the eyes of its citizens. One casualty of this changed approach has been widespread lay participation in justice processes which, whilst not abandoned, have been in steady decline. In carving out a special status for the justice system, therefore, one must ask: what are the hallmarks of an idealised criminal justice system? The answer(s), as has been explained in this thesis are that it should:

(i) Ensure that justice is done and that society is aware of this;
(ii) Ensure legitimacy, preferably through local community involvement;
(iii) Reduce recidivism; and

[170] B Ullman, 'Lasting Change or Passing Fad? Problem Solving Justice in England and Wales', Policy Exchange, 20 August 2009

(iv) Deliver value for money.

The only 'tried-and-tested' model discussed in this thesis which meets all four criteria is the community justice centre. Any salient discussion on this topic must therefore focus on why certain experiments of this nature (notably Red Hook) have been successful, whereas others have failed. It is the contention of this thesis that in light of the increasing managerialist approach to criminal justice, that the potential for the reintroduction of community justice centres – although not at the expense of current lay involvement in the system – ought to be prioritised. Such an imitative would not necessarily exclude the reforms to the existing court system discussed above. Under the current system, the subtle changes that a community court approach adopt through problem-solving and communication with defendants may save time in the long run if it gets them to comply with court orders, but judges are instead measured by how many cases they get through in a single day. However, understanding the transformative effect of successful community justice centres, which have succeeded on wider terms than their so-called 'efficiency' yields insights into how the criminal justice system can be meaningfully transformed whilst maintaining legitimacy amongst citizens.

The NLCJC experiment demonstrated how changing a culture that has been embedded for centuries takes more than training on different approaches to criminal justice: as Rotman notes, "Under the press of business and time constraints, it's easy to revert back to previous ways of doing things."[171] Courts that are serious about procedural justice need to build in systems to maintain momentum, something that was not present in the NLCJC model, in particular because its very existence began to be questioned only a few years after it was introduced. The data collected on North Liverpool demonstrates the re alignment of thinking that was necessary to make the centre a success. Instead of a focus on outcomes the focus should have been on process. This however requires the system to consider justice not only in terms of punishment but on the root causes of crime and what can be down to help the individuals before the courts. Red Hook has demonstrated how - with sustained and appropriate funding – procedural justice through community involvement and ownership can repair relationships between the criminal justice system and the community and, in doing so, reduce crime.

[171] As quoted in Tina Rosenberg, 'The simple idea that could transform US criminal justice', The Guardian, 23 June 2015, https://www.theguardian.com/us-news/2015/jun/23/procedural-justice-transform-us-criminal-courts accessed 2/3/22

6.4 Conclusion

This thesis has demonstrated that lay participation in a country is not fixed in stone; lay participation is being advanced, reinforced, or replaced in countries around the world today. These shifting responses to lay participation suggest the prime importance of stepping back in England and Wales and learning from the history and foundations upon which trial by jury and lay magistrates were built to ensure that the very essence of the criminal justice system is not irretrievably damaged. What this thesis has demonstrated is that the administration of justice is a continually developing process. The future is likely to be a projection of both the past and present. Financial support for ideas is critical if they are to be given the time to develop and thrive. At the same time, realism must abound. Financial restrictions are arguably likely to continue to be in place for some time to come, so any project has to be able to justify the financial expenditure it imposes on the exchequer.

However, as has been seen over the preceding pandemic-riven two years, it is debatable whether focusing on cost efficiencies and all the impacts these have – including increased managerialism, reduced local input and decreasing democratic legitimacy – that this is the optimal approach to designing a legitimate justice system. Perhaps Covid provided the platform for the criminal justice system to examine its approach to criminal justice in a fresh, more holistic manner. On this basis the time is ripe to consider the benefits community justice centres can bring to the system (whilst maintaining extant forms of lay involvement in the criminal justice system) to further enhance lay understanding, trust and participation in the system at a time of enhancement public distrust in centralised government and agencies.

Could we now see more support for a holistic approach, akin to the NLCJC, to criminal justice which demonstrates a desire for local communities to have more importance and voice? Ought we use this point in history to consider what justice means; to give succour to the view that efficiencies are not as important as fundamental rights to liberty and fair judgment? These are some of the questions with which future legislators, lawyers and criminal justice experts must grapple and in the context of the criminal justice system, they could not be more important.

Bibliography

Active, Accessible, Engaged- The Magistracy in the 21st Century, Magistrates Association May 2012

Alugo, C, Richards. J, Wise. G and Raine. J the magistrates court and the community 1966 160 jp

Are juries fair? Editorial Criminal Law Review 2010

Ashworth A and Redmayne M 2005 The criminal process third edition Oxford, Oxford university Press Chapter 2

Asquith G, Criminal Procedure: jury deliberations- jury irregularities- use of internet, Coventry Law Journal 2011

Auld LJ, Review of the Criminal Courts of England and Wales, Lord Chancellor's Department 2001

Auld, Review of the Criminal Courts of England and Wales https://www.criminal-courts-review.org.uk/auldconts.htm

Baldwin. J, The social composition of the magistracy, 1976 16 B J Crim 171.

Balmer. N, Summary Findings of Wave 2 of the English and Welsh Civil and Social Justice Panel Survey (London: Legal Services Commission 2013).

Bartlett D and Walker J, Inner Circle 1973 24 New Society 139, Wheel of Influence 1975 34 New Society 694.

Bayley D, The Future of Policing, Law and Society Review Vol 30 No 3 1996 pp585 -606 Bayley, D 1994. Police for the Future. New York, NY: Oxford University Press.

Bennett S F 1998, Community organizations and crime in community Justice: An emerging field, edited by D R Karp, Lanham, Maryland: Rowman & Littlefield

Berman and Feinblatt Good Courts: The Case for Problem Solving Justice, New York: New York Press 2005.

Berman and Fox 2005 Justice in Red Hook, Justice System Journal: Vol. 26, No. 1, pp. 77-90

Berman G and Feinblatt J The case for problem solving justice New York: New York Press 2005.

Berman G and Fox A, Lasting Change or Passing Fad, Problem Solving Justice in England and Wales, Policy exchange 2009

Berman G. and Fox A. (2005), "From the Benches and Trenches: Justice in Red Hook", The Justice System Journal, Volume 26, Number 1.; Nolan J. (2009)

Bevir. M and O'Brien D, New Labour and the Public Sector in Britain, P.A.R Vol 61, Issue 5, 2001

Bisgrove .M, Judges as tribunals of fact: to what extent do the provisions for a defendant to be tried on indictment by a judge sitting without a jury conflict with the defendants right to a fair trial where issues of PII are present? Criminal Law Review 2010

Blackstone W, Commentaries, Vol. I 1776, p349

Bohlander M, take it from me – the roles of the judge and lay assessors in deciding questions of law on appeals to the Crown Court, The Journal of Criminal Law, Vol 69 Issue 5, 2005

Boland B Community prosecution: Portlands experience. In community justice: An emerging field edited by D R karp, Lanham, Maryland: Rowman & Littlefield 1998

Booth L, Altoft A, Dubourg D, Gonçalves M and Mirrlees C, Analysis of re-offending rates and efficiency of court processes -Black Analytical Services, Ministry of Justice Ministry of Justice Research Series 10/12 July 2012

Bornstein B H and Greene E, The Jury Under Fire Myth, Controversy and Reform, Oxford University Press 2017

Bottoms, A. E. (1995) 'The Philosophy and Politics of Punishment and Sentencing' in Clarkson, C. and Morgan, R. (eds.) The Politics of Sentencing Reform. Oxford: Clarendon Press

Bowcott. O and Duncan. P, Half of magistrates Courts in England and Wales closed since 2010, The Guardian, Sun 27 Jan 2019

Braithwaite J 1989. Crime, Shame and Reintegration. New York: Cambridge University press.

Broadbent. J and Laughlin.R, "The Private Finance Initiative: Clarification of a Future Research Agenda" (1999) 15(2) Financial Accountability and Management 95.

Brodie. S. QC, The Cost to Justice Government Policy and the Magistrates' Courts, Policy Series no. 75 (2011)

Brownlee, New Labour- New Penology? Punitive rhetoric and the limits of managerialism in Criminal Justice Policy, Journal of Law and Society, Vol.25, Issue 3 p313-335, 1998

Buck, A., Pleasence, P. and Balmer, N.J. (2008) "Do Citizens Know How to Deal with Legal Issues?" (2008) 37(4) Journal of Social Policy 661

Bursik, R. J. and Harold G Grasmick 1993 Neighbourhoods and crime: The dimensions of effective community control New York Lexington Books

Campbell L, The prosecution of organised crime: removing the jury, The International Journal of Evidence & Proof (2014) 18 E&P 83-100

Carter. P, Managing Offenders; Reducing Crime: A New Approach, Report for the Government Strategy Unit, Cabinet Office (London: TSO, 2003)

Casper J, Benedict K and Perry J, Juror Decision Making, attitudes and the Hindsight Bias.

Centre for Court Innovation website (2012), Red Hook Community justice Centre, www.courtinnovation.org/project/red-hook-community-justice-center.

Cheliotis, Penal managerialism from within: implications for theory and research, Int. J Law Psychiatry Sept- Oct 2006; 29(5):397-404

Chelotis, The Perils of non-adversarialism, commentary on Freiberg, European Journal of Criminology, 2010 8(1) 108-112

Chiavario M, 'Some Considerations on the Faces of Justice by a 'Non – Specialist' (2008) 6 Journal of International Criminal Justice 69

Clarke, J, Gewirtz, S and McLaughlin, E (eds) New Managerialism, New Welfare? (London: The Open University 2000).

Cleveland Police website (2012), The origins of community justice, www.cleveland.police.uk/advice-information/origins-cj.aspx. Accessed July 2012

Cloninger D O, The Deterrent Effect of Law Enforcement: An Evaluation of Recent Findings and Some New Evidence," American Journal of Economics and Sociology 34(3): 323-35

Coen and Heffernan, Juror comprehension of expert evidence: a Reform agenda, Criminal Law Review 2010 3 195-211

Cohen S 1985 Visions of Social Control, Cambridge Polity Chapter 2

Colson, R. Field S, The Transformation of Criminal Justice – comparing France with England and Wales, Harmattan 2011

Constituency data: Magistrates' court closures published Wednesday 13 May 2020 https://commonslibrary.parliament.uk/constituency0data0magistrates-court-closures/

Constitutionality of removals of magistrates in the Commonwealth Caribbean

Courts Service, Courts Service Annual Report 2011 (Courts Service: Dublin, 2012. 31)

Criminal Juries in the 21st Century Contemporary Issues, Psychological Science and Law edited by C J Najdowski and M C Stevenson, Oxford University Press 2019

Criminal Justice (Mode of Trial) (No. 2) Bill, House of Lords, 28 September 2000, Hansard, HL,

Criminal Justice Act 2003

Criminal Justice Joint Inspectorates (CJJI) (2011) Exercising Discretion: The Gateway to Justice. London: Criminal Justice Joint Inspectorates, p.19. Available at: https://www.justiceinspectorates.gov.uk/hmicfrs/media/exercising-discretion-the-gateway-to-justice-20110609.pdf

Criminal Justice Joint Inspectorates (CJJI) (2011) Exercising Discretion: The Gateway to Justice. London: Criminal Justice Joint Inspectorates. Available at: https://www.justiceinspectorates.gov.uk/hmicfrs/media/exercising-discretion-the-gateway-to-justice-20110609.pdf

Crosby K. Controlling Devlin's jury: what the jury thinks and what the jury sees online, Criminal Law Review 2012 Vol 1 P15-19

Cynthia G. Lee, Fred L. Cheesman, II, David B. Rottman, Rachel Swaner, Suvi Lambson, Mike Rempel, and Ric Curtis A Community Court grows in Brooklyn: A comprehensive evaluation of the Red Hook Community Justice Center.; Nov 2013 NCSC

Dadomo, C., & Bell, B. (2006). Magistrates' Courts and the 2003 Reforms of the Criminal Justice System, European Journal of Crime, Criminal Law and Criminal Justice, 14(4), 339-365 https://doi.org/10.1163/157181706780132869

Damaska R M, The faces of Justice and State Authority, a comparative approach to the legal process, Yale University Press, 1988

Darbyshire P, The lamp that shows freedom lives- is it worth the candle? Criminal law Review, 1991 Oct 740- 752

Darbyshire P, What can the English legal system learn from jury research published up to 2001, Faculty of Business, Kingston Business School/Kingston Law School, Occasional Paper Series 49, ISBN No 1-872058-33-7, February 2002

Darbyshire P, What can we learn from Published Jury Research? Findings for the Criminal courts Review 2001 (2001) Crim LR 970

Darbyshire. P. For the New Lord Chancellor- Some causes for concern about magistrates 1997 Crim LR 861 863868,

Davies. M, A new training initiative for the lay magistracy I England and Wales – a further step towards professionalisation? International journal of the legal profession vol 12 No 1 March 2005, Routledge

Davis, M, A new training initiative for the lay magistracy in England and Wales – a further step towards professionalisation? 2005, International Journal of the Legal Profession, 12:1, 93-119,

Dawson.J. P, A history of lay judges Harvard university press Cambridge 1960 p 145

De Greiff. P, Duthie. R, Transitional Justice and Development - Making the Connections, New York: …, 2009 - developmentideas.info

Denyer R L, The Changing role of the judge in the criminal process, International Journal of Evidence and Proof, Vol 14 Issue 2 2010

Department for Constitutional Affairs (2005) North Liverpool Community Justice Centre: central briefing pack and data from Liverpool City council.

Devlin, Lord (1976) "Trial by Jury" London, Stevens &Sons

Dillane v Ireland 1980 ILRM 167

Dobinson I and Johns F, 'Qualitative Legal Research' in McConville. M and Chong Hui. W(eds), *Research Methods for Law* (Edinburgh University Press, 2007) 19-20.

Donoghue.J, 2011 Anti-Social behaviour Community engagement and the Judicial role in England and Wales, British Journal of Criminology Vol 52 Issue 3 P591-610

Donoghue, J, The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice, 80 Modern Law Review (2017) 1016.

Donoghue. J, Reforming the Role of Magistrates: Implications for Summary Justice in England and Wales, The Modern Law Review, Volume 77, Issue 6, pages 928–963, November 2014

Donoghue. J. C, Reforming the role of magistrates: implications for Summary justice in England and Wales The Modern Law Review Vol 77 NO 6 November 2014 pp 928-963

Doolin. K, Child. J, Raine. J. W and Beech. A (eds), Whose Criminal Justice? Centre or Locality? (Winchester: Waterside Press, 2011).

Doran and Jackson, The Judicial Role in Criminal Proceedings, Bloomsbury Publishing, 2000

Easton. J, Where to Draw the Line? Is Efficiency Encroaching on a Fair Justice System? The Political Quarterly, Vol. 89, No. 2, April–June 2018

Elrod J W, Whither the Jury? Diminishing role of the Jury Trial in our Legal System, Eighth Annual Lewis F. Powell, Jr. Distinguished Lecture, https://law2.wlu.edu/deptimages/Law%20Review/68-1ElrodPowellLecture.pdf

Engaging Communities in Criminal Justice Presented to Parliament by The Lord Chancellor and Secretary of State for Justice, The Secretary of State for the Home Department and the Attorney General by Command of Her Majesty April 2009
European Convention on Human Rights, Art 6 and Art 14

Faulkner D, The Magistracy at the Crossroads, edited by D Faulkner, assisted by S Dickinson, Waterside Press 2012

Faulkner D and Burnett R, Where Next for Criminal Justice? (Bristol: The Policy Press, 2012

Ferguson P R, The criminal jury in England and Scotland: the confidentiality principle and the investigation of impropriety, The International evidence of Journal and Proof, Vol 10 Issue 3 2006

Fielding N, Braun S, Hieke G, Chelsea Mainwaring Video Enabled Justice Evaluation Final Report (May 2020), Sussex Police and Crime Commissioner, https://www.sussex-pcc.gov.uk/media/4862/vej-final-report-ver-12.pdf

Findlay M, Duff P, The Jury under attack, Butterworths, London 1988

Fitzpatrick B, Seago P, Walker C and Wall D, "New Courts Management and the Professionalism of Summary Justice in England and Wales" (2000) 11 Criminal Law Forum 1

Fix. H, Fierro Courts, Justice and Efficiency, A socio legal study of economic rationality Hart Publishing; 1st edition Jan. (2004)

Flexible Court Pilots- Law Gazette https://www.lawgazette.co.uk/news/flexible-court-hours-pilot-to-cost-13m/5101699.article

Flexible court pilots: information and advice October 2012 Document https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/260703/process-evaluation-cjs-pilots.pdf

Flood- Page C and Mackie A 1988 Sentencing Practice: an examination of decisions in magistrates' courts and the Crown Court in the mid-1990s, Home Office Research Study 125, London HMSO,

Frase R, 'Sentencing and Comparative law Theory in J Jackson, M Langer and P Tillers (eds) Crime, Procedure and Evidence in a Comparative and International context: essays in Honour of Professor Mirjan Damaska Oxford: Hart 2008 351

Gastill J, Pierre E, Deess, P, Weiser J, Simmons C, the jury and Democracy: How jury deliberation promotes civil engagement and political participation, Oxford University Press 2010

Gelsthorpe, L. (2002, forthcoming) `Critical Decisions and Processes in the Criminal Courts', in E. McLaughlin and J. Muncie (eds) Controlling Crime, 2nd edn. London: Sage/Open University

Genn. H, Paths to Justice: What People Do and Think about Going to Law, National Centre for Social Research.

Gibb F, Threat to the courts system as barristers google jurors then alter speeches to win sympathy –Sat 19th Jan 2013 The Times, Transform Justice, Court Closures Briefing, February 2018 http://www.transformjustice.org.uk/wp-content/uploads/2018/02/Court-Closures-Briefing-Final.pdf

Transform Justice, Written evidence to the role of the magistracy, follow-up inquiry, House of Commons Justice Committee, February 2019, retrieved 12 October 2019, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-role-of-the-magistracy-followup/written/96494.html

Gibbs. P and Kirkby. A, Judged by peers? The diversity of lay magistrates in England and Wales, Howard League What is Justice Working papers 6/2014

Gibbs.P, Justice Denied: Unrepresented Defendants in the Criminal Courts (London: Transform Justice, 2016).

Gibson. C, Out of Court Disposals: A review of policy, operation and research evidence, The Sentencing Academy, February 2021

Gillespie A; Weare S, The English Legal System (Oxford University Press 2017)

Glenn. H, Judging Civil Justice, Cambridge University Press, 2010,

Goldbach, T.S., Hans, V.P. (2014). Juries, Lay Judges, and Trials. Cornell Law Faculty Working Papers No. 122.

Goldstein A “Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure, 26 Stanford L Rev.,1009, 1017-19 (1974)

Goldstein H 1990, Problem oriented policing. New York: McGraw- Hill

Goldstein, Herman. 1990. Problem Oriented Policing. Philadelphia, PA: Temple University Press. Skolnick and Bayley Community Policing: Issues and Practices around the world, National Institute of Justice issues and Practices, US Department of Justice May 1988.

Goldstock. R and Jacobs. J, “Blockbuster Trial: Catch it All on Tape” (1998-1999) 13 Criminal Justice 1.

Gonzalez C M and Tyler M R 2007, Why do people care about procedural fairness? The importance of membership monitoring in K Tornblom and R Vermunt (eds) Distributive and procedural justice; research and social applications pp91-110 Hampshire England Ashgate Publishing limited,

Goodhart, C (1975). "Problems of Monetary Management: The U.K. Experience". Papers in Monetary Economics. 1. Sydney: Reserve Bank of Australia.

Grimshaw. R and Mills. H, with Silvestri. A Silberhorn-Armantrading. F, Magistrates’ courts’ and Crown Court expenditure, 1999–2009, Centre for Crime and Justice Studies, September 2010

Hans. V and Vidmar. N, Judging the Jury, Plenum Press: NY 1986 24

Hardin R, A way with words Interview with Rusty Hardin 2012

Harman. H and Griffith. J, Justice deserted, The subversion of the Jury, National Council for Civil Liberties, 1979

Hart. W.G, “Dispute resolution: Civil justice and its alternatives 1993 56 MLR 277-470 May issue.

Hedderman C and Moxon D 1992 magistrates courts or crown court? Mode of trial decisions and sentencing, Home office research study no 125 London HMSO,

Henham R 1990 Sentencing principles and magistrates sentencing behaviour Avebury Aldershot'

Herrschaft, New York City Community Cleanup: The Impact of a Program for Low-level Offenders

HM Court Service, Supporting Magistrates' Courts to Provide Justice, Presented to Parliament by the Secretary of State for Constitutional Affairs and Lord Chancellor by Command of Her Majesty (November 2005)

HM Courts and Tribunals Service, 'Courts and tribunals data on audio and video technology during coronavirus outbreak', HM Courts and Tribunals Service, 30 April 2020, retrieved 15 October 2021, www.gov.uk/guidance/courts-and-tribunals-data-on-audio-and-video-technology-use-during-coronavirus-outbreak

HM Courts and Tribunals Service, 'HMCTS weekly management information during coronavirus – March to August 2020', 10 September 2020, retrieved 15 October 2020, www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-august-2020

HM Inspectorate of Constabulary/ HM Inspectorate of the CPS (2011) Exercising Discretion: The Gateway to Justice, London: Criminal Justice Joint Inspection

Madge.N, Summing up – A judges' perspective – Criminal Law review 2006 817-827

Hodgson J, Constructing the Pre-Trial Role of the Defence in French Criminal Procedure: An Adversarial Outsider in an Inquisitorial Process, 6 INT'L J. EVIDENCE & PROOF 1, 2 (2002).

Hodgson J, French Criminal Justice 21, 111-12, 243 (2005)

Hodgson J, The future of Adversarial Criminal Justice in 21st Century Britain, North Carolina Journal of International law and Commercial Regulation Vol 35 Number 2, Winter 2010 Art 3

Holler. M.J, Leroch. M.A, Jury on Stage: a common law play, European Journal Law and Economics 2010 Vol 30 Issue 2 89-110

Holvast. N, 'The Power of the Judicial Assistant/Law Clerk: Looking behind the Scenes at Courts in the United States, England and Wales, and the Netherlands' (2016) 7 IJCA 10

Home Affairs Committee Chaired by Chris Mullin 1995-96

Home Affairs Committee Report para 11 Hansard H L Debs Vol 573 col 1122 June 27, 1998, Lord Irvine.

Home Affairs Committee Report para 199 J Dignan and A Ynee A microcosm of the local community 1997 37 B J Crim 184

Home Office Press Release 119/2002, 7 May 2002.

Home Office, Magistrates' Courts: Report of a Scrutiny (The le Vay Report) (London: HMSO, 1989)

Home Office, Reforms to the adult out of court disposals framework in the Police, Crime, Sentencing & Courts Bill: Equalities Impact Assessment, Policy Paper July 2021.

Hood C, A Public Management for all seasons? Public Administration Volume 69, Issue 1, pages 3–19, March 1991

Hood C, The "new public management" in the 1980s: Variations on a theme Christopher Hood accounting organizations and Society Vol. 20, No. U3, pp. 93-109, 1995 Ekvicr Science Ltd Printed in Great Britain

Hood. R Sentencing the Motoring Offender Heinemann London 1972.

Hood.C, "A Public Management for all Seasons?" (1991) 69(1) Public Administration 3

Hostettler J, Historical Perspectives, in The Magistracy at the Crossroads edited by D Faulker, Waterside Press 2012

Hostettler J, The Criminal Jury Old and New: Jury Power from Early Times to the Present Day. (Winchester: Waterside Press 2004)

Hough, M and Jackson, J and Bradford, B and Myhill, A and Quinton, P (2010) Procedural justice, trust and institutional legitimacy. Policing: a journal of policy and practice, 4 (3). pp. 203-210

House of Commons – Home Affairs Committee- Third Report 1996, Judicial Appointments Procedures Vol I Session 1995-96 p1 xi para 205

Jeffries. S How Justice gets done – Politics, Managerialism, Consumerism and Therapeutic Jurisprudence, Current Issues in Criminal Justice, 17(2)

http://www.bbc.co.uk/news/uk-england-merseyside-24638951 , Community justice centre in Liverpool to be closed, 23 October 2013.

http://www.justice.org.uk/images/pdfs/fraudtrialswithoutajuryMarch07.pdf

[1]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/370053/out-of-court-disposals-response-to-consultation.pdf assessed 1st July 2020

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987892/criminal-justice-statistics-dec-2020.pdf

https://www.gov.uk/government/publications/adult-out-of-court-disposal-pilot-evaluation-final-report

https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2020

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987892/criminal-justice-statistics-dec-2020.pdf

https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/list-of-members-of-the-judiciary/dj-mags-ct-list/

https://www.lawgazette.co.uk/news/mps-sound-alarm-over-mojs-meagre-ambition-to-reducecourtbacklog/5111781.article?utm_source=gazette_newsletter&utm_medium=email&utm_campaign=MoJ%27s+%27meagre+ambition%27+to+cut+court+backlog+%7c+Struckoff+solicitor+sentenced+%7c+Client+selection%3a+the+next+frontier_03%2f09%2f2022

Hucklesby A 1997 Remand decision makers Criminal law review 269

Hucklesby A, "Court Culture: An Explanation of Variations in the Use of Bail by Magistrates' Courts" 36 [1997] Howard Journal of Criminal Justice 129.

Huo Y J 2002 Trust in the law: encouraging public cooperation with the police and courts New York Russel Sage foundation

Impact Assessment on Her Majesty's Courts and Tribunal Service proposals on the proposed closure of North Liverpool Community Justice Centre (NLCJC), MoJ218, Ministry of Justice, 06/09/2013, Final stage.

Institute for Government Performance Tracker 2019, available at https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts

Institute for Government, Performance Tracker: Criminal Courts, (2019) https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts

Irish Constitution Art 40

Irvin Waller Rowman and Littlefield, Smarter Crime Control: A Guide to a Safer Future for Citizens, Communities, Rowman and Littlefield 2013

Jackson and Doran, Judge without Jury: Diplock trials in the Adversary System, Clarendon Press Oxford 1995

Jackson. J, Hough M, Bradford.B, Myhill A, Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions British Journal of Criminology February 2012 52(6):1051-1071,

Jagger G, JP MAG007 as cited in The Role of the Magistracy House of Commons Justice Committee Sixth report of session 2016-17 HC 165 Published 19 October 2016

James A and Raine J W, The New Politics of Criminal Justice (London: Addison, Wesley Longman, 1998) Faulkner

Faulkner. D, Crime, State and Citizen: A Field Full of Folk Waterside Press 2001

January 2012, Centre for Court Innovation. https://www.courtinnovation.org/sites/default/files/documents/Better%20Courts.pdf

Japan re-launches trials by jury: BBC News, 2009/08/03 http://news.bbc.co.uk/1/hi/world/asia-pacific/8181225.stm

Jeffries S, Transforming the criminal courts; Politics, managerialsim, Consumerism, Therapeutic Jurisprudence and change – Technical Report Criminology Research Council Funded Research Report, Australian Institute of Criminology, Australian Institute of Criminology. 2002

Jones P 1985 remand decisions at Magistrates courts I Moxton D (ed) managing criminal justice London HMSO.

Judge or Jury? Case Comment 2010 Communications Law

Judicial Diversity Statistics 2019

Juries in Criminal Trials part one: Law commission of NZ.

Justice Organisation, Fraud (trials without a jury) Bill briefing for House of Lords Second Reading, March 2007

Justice R F Julian, Judicial Perspectives on the Conduct of Serious Fraud Trials, Crim LR 751–68, October 2007

Karp D and Clear T.R. Community Justice: A conceptual Framework; Boundary changes in criminal justice organizations, Criminal Justice 2000, Vol 2

Kastrati, A. 'Civil Society from Historical to Contemporary Perspectives' (2016) *European Journal of Multidisciplinary Studies*, 1, no. 1.

Keep M and Ward M, 'Balanced budget rule', House of Commons Library Debate Pack Number CDP-2019-0007, 18 January 2019, at https://researchbriefings.files.parliament.uk/documents/CDP-2019-0007/CDP-2019-0007.pdf

Kelling and Wilson Broken Windows Atlantic monthly 249 (3) 29-38, 1982

Kelling G L and Catherine M Coles 1996 Fixing Broken Windows. New York: Free Press

Kerr N.R, "Trial Participants' behaviours and Jury verdicts: an exploratory field study in Konecki. V.J, and Ebbeson.E. B, The criminal justice system: a socio- psychological analysis 1982 NCJ 87097 p261-290

Kersley, H. (2011), "Diary from New York – Community Justice in Red Hook", New Economics Foundation, 1 November

Kierzenkowski, R., et al. (2016), "The Economic Consequences of Brexit: A Taxing Decision", OECD Economic Policy Papers, No. 16, OECD Publishing, Paris, https://doi.org/10.1787/5jm0lsvdkf6k-en.

King M and May. C, Black Magistrates Cobden Trust London 1985.

Knittel, E and Siler D. (1972) "The merits of Trial by Jury", Cambridge Law Journal

Kuzelewski D, The Non-Professional Judge as a Component of Civic Culture in Poland, Studies in Logic, Grammar and Rhetoric 65 (78) 2020

Langbein J H, The Criminal Trial before lawyers 45 U Chi L Rev 1978

Langbein, J H. The origins of Adversary Criminal Trial – Oxford University Press 2005

Lanni A, The Future of Community Justice, Harvard Civil rights – Civil liberties Law Review Vol 40 2005

Law Commission Consultation Paper 207

Law Commission Consultation Paper No 158, Prosecution Appeals against Judges' Rulings, 2000

Law Commission Consultation Paper No 190, The admissibility of expert evidence in criminal proceedings in England and Wales, a new approach to the determination of Evidentiary Reliability,

Lawrence B Solum, 'Procedural Justice' (2004) 78 S Cal L Rev 181

LCD Consultation Paper para 15 E Burney, J.P. Magistrate, Court and Community (Hutchinson, London 1979)

LE Vay report; Court service, Corporate plan HMSO 1995 p4

Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement.; New York City Police Department (2012), CompStat, 76th Precinct, Volume 19, Number 37.

Leo, Case management: drawing from the Singapore Experience, Civil Justice Quarterly 2011

Leveson Inquiry https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press ,

Levitt, Steven D. 1998b. "Why do Increased Arrest Rates Appear to Reduce Crime? Deterrence, Incapacitation, or Measurement Error?" Economic Inquiry 36(3): 353-72.

Lloyd- Bostock, The Jubilee line Jurors: does their experience strengthen the argument for judge only trials in long and complex fraud cases? Criminal Law Review April 2007

Local Sentencing Patterns in Magistrates' Courts 2000, Justices' Clerks Society, Magistrates' Association, Home Office 2002.

Lord Chancellor's Department Working Party, The role of the Stipendiary Magistrates London 1996

Lord Chancellor's Department, Cm 1829 (London: HMSO 1992).

Lord Falconer Doing Law Differently: Strengthening Powers to tackle Anti-Social Behaviour Home Office 2006b

Lord Justice Leveson Public Lecture Centre for Crime and Justice Studies, Kings College London 2007

Lord Patel of Bradford House Lords debate to ask HM Government what plans they have for developing the role of the magistracy in the Big Society 2 November 2011

Lowndes. V and Pratchett. L, "Local Government Under the Coalition Government: Austerity, Localism and the Big Society" (2012) 38(1) Local Government Studies 21.

MA Chair John Bache on need for scrutiny panels, 20 January 2020, https://www.magistrates-association.org.uk/News-and-Comments/ma-chair-john-bache-on-need-for-scrutiny-panels

Magistrates Association letter in The Times 14 August 2007 as quoted in R Morgan Summary Justice Fast – but fair? Centre for Crime and Justice Studies August 2008 p 20

Magistrates Association, Statistics published on diversity in the magistracy, 29 September 2020, https://www.magistrates-association.org.uk/News-and-Comments/statistics-published-on-diversity-in-the-magistracy

Magistrates Courts: Repot of a Scrutiny HMSO London 1989 the

Mair G, and Millings. M, Doing justice locally: The North Liverpool Community Justice Centre, Centre for Crime and Justice Studies, Bowland Charitable Trust, February 2011

Malkin, V. “Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center.” American Criminal Law Review 40 (2003): 1573- 93

Malsch M, Democracy in the courts: lay participation in European criminal justice systems (Ashgate, Farnham: 2009)

Managerialism and Beyond: the case of Raine v Wilson

Markovits A, ‘Playing the Opposite Game: on Mirjan Damaska’s the two faces of Justice and State authority’ (1998-1999) 41 Stanford Law Review 1315

Marlowe D and Festinger P Perceived deterrence and outcomes in drug court, March 2005, Behavioural Sciences & the Law 23(2):183-98.

Marlowe, D. B., & Kirby, K. C. (1999). Effective use of sanctions in drug courts: Lessons from behavioural research. National Drug Court Institute Review, 2, 1-32. 1999.

Maruna S, Immarigeon R, After Crime and Punishment: Pathways to Offender Reintegration chapter 2, Willian January 2004

May 2021 Policy paper : Reforms to the adult out of court disposals framework in the Police, Crime Sentencing and Courts Bill: Equalities Impact Assessment https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-equality-statements/reforms-to-the-adult-out-of-court-disposals-framework-in-the-police-crime-sentencing-courts-bill-equalities-impact-assessment assessed 30th June 2021

McCabe. S and Purves. R, The Shadow Jury at Work, Oxford: Blackwell 1974.

McCold P. ‘Wachtel B; Community is not a place: A new look at Community Justice Initiatives, paper at the International Conference on Justice without Violence: Views from Peace-making Criminology and restorative justice Albany New York June 5-7, 1997

McCold. P and Watchel. B, Community is not a place: A new look at community justice initiatives, paper presented to the International Conference on Justice without Violence:

Views from Peace-making Criminology and Restorative Justice Albany, New York, June 5-7, 1997

McEwan J, Evidence, Jury Trials and witness protection – The Auld Review International Journal of Evidence and Proof, Vol 6 issue 3 2002

McEwan J, The Verdict of the Court: Passing Judgment in Law and Psychology, Hart Publishing, 2003

McEwan J. From Adversarialism to Managerialism: Criminal Justice in transition- Legal Studies, Volume 31, Issue 4 December 2011 pp519-546

McGowan L, Trial by Jury: still a lamp in the dark? The Journal of Criminal Law, Vol 69, Issue 6, 2005

McInerney. P.A, do we need a jury? Composition and function of the jury and the trend away from jury trials in serious criminal cases I.C.L.J 2009 19(1), 9-14

McKenna K, Evaluation of the North Liverpool Community Justice Centre, Ministry of Justice Research Series 12/07 October 2007
Ministry of Justice, Criminal Statistics 2011, Vol. 3 Part 8

Ministry of Justice, Modernising the Criminal Justice System: The CJS Efficiency Programme, 21 December 2011.

Ministry of Justice, Modernising the Criminal Justice System: The CJS Efficiency Programme, 21 December 2011.

Ministry of Justice, Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System (London: Ministry of Justice, 2013).

Moore D B (1997) Pride, shame and empathy in peer relations: New theory and practice in education and juvenile justice. In K Rigby and P Slee (eds) Children's peer relations. London UK Routledge.

Moorhead R and Pleasance P, After Universalism Re-engineering Access to justice – Blackwell Publishing 2003

Morenoff, J, Sampson J, and Raudenbush J. 2001. "Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence." Criminology 39: 517-560,

Morgan and Russell, The judiciary in the magistrates' courts RDS occasional paper No 66 Home Office 2000

Morgan. P.M, Deterrence: A conceptual analysis - 1983 - Sage Publications.

Morgan. R and Russell. N, The Judiciary in the Magistrates court https://webarchive.nationalarchives.gov.uk/20110218143303/http://rds.homeoffice.gov.uk/rds/pdfs/occ-judiciary.pdf accessed June 2021

Morgan. R, Summary Justice Fast – but fair? Centre for Crime and Justice Studies August 2008

Christensen. E, Multivariate survival analysis using Cox's regression model, M.D.1,2, Article first published online: 7 DEC 2005, DOI: 10.1002/hep.1840070628

N. Padfield, 'The Right to Self-Representation in English Criminal Law' (2012) 83 Revue internationale de droit penal 357.

Narey. P, Review if the Delay in the Criminal Justice system http://www.homeoffoce.gov.uk/cpd/pvu/crimrev.htm,1997

National Audit Office, HM Courts & Tribunals Service: Transforming courts and tribunals – a progress update HC 2638 SESSION 2017–2019 13 SEPTEMBER 2019.

New York City Police Department (2012), CompStat, 76th Precinct, Volume 19, Number 37.

Nolan J. Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement Princeton: Princeton University 2009

Orr. N.W, No reasonable jury, Scots Law Times 2011

P. Dunleavy and C. Hood, "From Old Public Administration to New Public Management" (1994) 14(3) Public Money & Management 9.

Painter D, "Managing Criminal Justice: Public Service Reform Writ Small? (2005) 25(5) Public Money & Management 306

Parry. R, Jury Service for All? Anaylsing lawyers as jurors Journal of criminal Law 70(2) 163-179 April 2006

Paternoster, R., & Piquero, A. (1995). Reconceptualizing deterrence: An empirical test of personal and vicarious experiences. Journal of Research in Crime and Delinquency, *32*(3), 251–286

Paterson A, Final Judgment: The Last Law Lords and the Supreme Court, Oxford, Hart Publishing 2013

Pattenden R, The proof rules of pre- verdict judicial fact finding in criminal trials by jury, UEA LAW Working Paper Series No. 2009-RP-1, Law Quarterly Review, Vol. 12, pp. 79-110, 2009

Peak K and Glensor R, Community Policing and Problem Solving: Strategies and Practices, Prentice Hall Education Career & Technology 1996, P68.

People (DPP) v Conroy 1986 IR460

Peppers. T.C, Of leakers and legal briefers: The Modern Supreme Court law clerk, Charleston Law Review, 7, 2012, pp. 95-110.

Philips. M. V. Pryce Trial – Daily Mail article 20.2.2013

Phillips A, (Lord Sudbury, Liberal Democratic peer), “We must hold on to local justice”, (2 December 2000), The Observer.

Pleasence, P., Balmer, N.J., Patel, A., Cleary, A., Huskinson, T. and Cotton, T. Civil Justice in England and Wales 2010: Report of the First Wave of the English and Welsh Civil and Social Justice Panel Survey (London: Legal Services Commission 2011).

Pound R, The Spirit of the Common Law 1921 University of Nebraska, College of Law, Faculty Publications

Practice Direction (Justices: Clerk to Court); 2 Oct 2000.

Pranis K. 1996 A state initiative toward restorative justice: The Minnesota experience. In Restorative justice: International perspectives edited by Galaway. B and Hudson.J, Monsey, New York: criminal Justice Press.

Pratchett, "Local Autonomy, Local Democracy and the 'New Localism'" (2004) 52(2) Political Studies 358.

Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science the Prison Journal September 1, 2011, 91: 48S-65S

Quinn. K, Jury Bias and the ECHR: a well-kept secret? Criminal Law Review, Dec 2004 998-1014

Quinn. R, E, Beyond Rationale Management: Mastering the Paradoxes and competing demands of high performance, Jossey – Bass Publishers 1991

Quirk H, The significance of culture in criminal procedure review; why the revised disclosure scheme cannot work, The International Journal of Evidence and Proof, Vol 10 Issue 1 2006

R v Guthrie 2011 EWCA Crim 1338

R v Twomey 2009 EWCA Crim 1035, 2010 1 WLR 630

Raine J, W, and Wilson M, J, Managing Criminal Justice Harvester Wheatshelf Hemel Hempstead 1993

Raine, J W, Shifting power dependencies in criminal justice: the dual state of centre and locality in England and Wales, Criminal Law Review 2014

Raine. J.W, Local Justice, Ideals and Realities Edinburgh J&J Clark 1998

Raine. J.W, Shifting power dependencies in criminal justice: the dual state of centre and locality in England and Wales, Criminal Law Review 2014

Ranson. S, Jones. G and Walsh. K, Between Centre and Locality (London: George Allen & Unwin, 1985).

Raver, J, The Law gazette –Re- offenders should lose right to jury trial – published on 18/3/2013

Reducing the backlog in criminal courts, Forty-Third Report of Session 2021–22, https://committees.parliament.uk/publications/9159/documents/159649/default/

Report of the Committee on the Distribution of Criminal Business between the Crown Court and Magistrates Courts, Cmnd 6323 HMSO 1975

Report of the Departmental Committee on Jury Service, (The Morris Report) Cmnd 2627 HMSO, 1965

Report of the Interdepartmental Committee on Magistrates Courts in London (Cmnd 1606, 1962) (the Aarvold Committee) Home Affairs Committee Report para 198

Report of the Le Vay Efficiency Scrutiny of Magistrates' Courts (HMSO, 1989)

Report of the Royal Commission on Criminal Justice (1982) Cm 2263, p2

Responses to the proposal on the future of North Liverpool Community Justice Centre, published on 22 October 2013 by Ministry of Justice, HM Courts & Tribunal Service

Responses to the Report of Lord Justice Auld's Review of the Criminal Justice System, https: doi.org/10.1177/002580240200201, Papers presented at seminar Law Society 113 Chancery Lane 29 October 2001

Rhodes. R. A. W, Control and Power in Central-Local Government Relations, 2nd edn (Aldershot: Ashgate, 1999).

Riley D and Vennard J 1988 triable either way cases: crown court or magistrates courts? Home office research study 98 London HMSO

Robinson. P.H, Distributive Principles of Criminal Law: Who Should Be Punished How Much? - 2008 - Oxford University Press on Demand

Rottman David B 1996. Community Courts: Prospects and limits. National Institute of Justice Journal 231 :46-51

Royal Commission on the Justices of the Peace London HMSO 1948

Rozenberg J. The Pryce of a jury's failure –21st Feb 2013 The Guardian Newspaper

Rubeinstein A.M, Verdicts of Conscience – Nullification and Modern Jury Trial, Columbia Law Review, Vol. 106, No. 4 (May 2006), pp. 959-993 (35 pages) W R Cornish and G de N Clark (1989), Law and Society in England: 1750-1950, London: Sweet and Maxwell

Sampson. R J, Raudenbush. S. W and Earls. F 1997 Neighbourhoods and violent crime: A multilevel study of collective efficacy. Science 277:918-924

Sanders A, Community Justice Modernising the magistracy in England and Wales, IPPR,

Sanders. A Core Values, the Magistracy, and the Auld Report (2002) 29 Journal of Law and Society 324-341.

Schramm J M, Testimony and Advocacy in Victorian Law, Literature and Theology, , Cambridge University Press 2000

Seago, Walker and Wall, The development of the Professional Magistracy in England and Wales Crim LR 2000 p646

Seagoe P, Walker C and Wall D, The Development of the Professional Magistracy in England and Wales, [2000] Crim LR 631, pp 633-4

Sealy P, Another look at social psychological aspects of juror bias – Law *and Human Behavior* Volume: 5 Issue: 2/3 Dated: special issue (1981) Pages: 187-200

Severance L and Loftus E, Improving the ability of jurors to comprehend and apply criminal jury instructions; Law & Society Review, Vol. 17, No. 1 (1982), pp. 153-198 , Wiley Publishing

Sherman L W, Gottfredson D, MacKenzie D, Eck J, Reuter P and Bushway S, Family based crime prevention in Preventing crime: what works and what doesn't, what's promising: A report to the United States Congress edited by research report NCJ 165366. Washington Dc US department of Justice, National Institute of Justice.

Sherman L W, Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction, Journal of Research in Crime and Delinquency November 1993 vol. 30 no. 4 445-473 and Why do People Comply with the Law? Legitimacy and the Influence of Legal Institutions British Journal of Criminology November 1, 2012 52: 1051-1071

Simard L S An empirical study of Amici Curiae in Federal Courts: A fine balance of Access, Efficiency and Adversarialism, Review of Litigation Vol 27p669 2008, Sussex University Law School research paper No 07-34

Sir Leveson, A judiciary for the 21st Century, Caroline Weatherill Lecture, Isle of Man, 9 October 2015, Judiciary of England and Wales

Skogan, W.G. and Hartnett. S 1997. Community Policing: Chicago Style. New York, NY: Oxford University Press

Skogan. W, Measuring what matters: Crime, disorder and Fear New York: Oxford University press 1997

Skolnick and Bayley Community Policing: Issues and Practices around the world, National Institute of Justice issues and Practices, US Department of Justice May 1988.

Skyrme. T The Changing face of the Magistracy, Macmillan Press LTD 1979

Slapper G, The desirable dozen, Journal of Criminal law, Vol 36 Part 2 April 2012 P99-103

Slapper. G, How the Law Works, 3rd edition, Routledge, 2014

Smith, J, "Is ignorance Bliss? Could jury trial survive investigation? 1988 38 Journal of Medicine Science and law 98

Sosa K, Proceed with Caution: Use of Out-of-Court Disposals in England & Wales, Policy Exchange, July 2012

Spencer J.R, Jackson's Machinery of Justice, Cambridge University Press, Cambridge, 1989

Spoon L, An essay on the Trial by Jury, The Echo Library 2006

Stobbs N, The nature of Juristic Paradigms: exploring the theoretical and conceptual relationships between adversarialism and therapeutic jurisprudence, Washington University Jurisprudence Review, Vol 4 Issue 1, 2011

Stoker L G, "New Localism, Progressive Politics and Democracy" (2004) 75 The Political Quarterly 117

Sunshine, J, and Tyler. T.R, "The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing." Law & Society Review 37, no. 3 (2003): 513-547

Sviridoff M, D Rottman B Ostrom and R Curtis 2000 Dispensing Justice locally: the implementation and effects of the midtown community court Harwood academic publishers Amsterdam

Taylor R B and Adele v Harrell 1996 Physical environment and crime. Research report, NCJ 157311 Washington Dc US department of Justice, National institute of Justice and Sherman, L W 1997.

Taylor. N, R v S: judge alone- jury discharged because of jury tampering Case Comment, Criminal Law Review 2010

The Community Legal Service: Access for All? (1999), https://www.legislation.gov.uk/ukpga/1999/22/notes/division/3/1/1

The costs of case management: what should be done post Jackson- Higgins 2010 https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf

The House of Commons Home Affairs Committee 2015

The Law Society, Court closures, 20 May 2020, https://www.lawsociety.org.uk/en/campaigns/court-reform/whats-changing/court-closures

The Layfield Committee HL Deb 19 May 1976 vol 370 cc1415-22, https://api.parliament.uk/historic-hansard/lords/1976/may/19/the-layfield-report-1

The magistracy in the 21st Century active, accessible engaged – the magistracy in the 21st Century – Magistrates Association, Published May 2012

The role of Magistracy report, sixth report of the session 2016-17, House of Commons Justice Committee Hc165, Published on 19 October 2016 by authority of the House of Commons.

The Strengths and skills of the judiciary in the magistrates' courts Ministry of Justice Research Series 9/11 November 2011

The Venne Report; Lord Chancellor's Department Creation of a Unified Stipendiary Branch http:www.open.gov.uk'lcd/cpmsult/general/stipecon.htm,1998 LCD Consultation paper,

Thomas C, Are Juries Fair? Ministry of Justice Research Series 1/10 Feb 2010

Thomas C, Exposing the Myths of jury service- Criminal Law Review 2008

Thornton P, Trial by Jury: 50 years of change, Criminal law Review, 2004

Trial: jury tampering – Criminal Justice Act 2003 s46 (3), Archbold Review

Tyler M R 1990 Why People obey the law: procedural justice, legitimacy and compliance, New Haven, CT Yale University Press, 2003

Tyler. M.R, Procedural justice legitimacy and the effective rule of law in Tonry. M (ed) Crime and Justice p283-357 Chicago The university Chicago Press

Vidmar N, The Continuing Decline of the English Jury Chapter from World Jury Systems.

Vincent-Jones. P, "Values and Purpose in Government: Central-Local Relations in Regulatory Perspective" (2002) 29 Journal of Law and Society 27

Warner. D, Using jurors to explore public attitudes to sentencing, British Journal of Criminology 2012

Wasik. M, Gibbons T, and Redmayne M, *Criminal Justice. Text and Materials* (Longman, 1998)

Webster D, "Fighting the Threat to Local Justice", (May 2002) The Magistrate 140

White Paper, Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System (London: Ministry of Justice, 2012), Cm.8388.

Wise G and Raine. J, The Magistrates Court and the Community 1966

Yin, R.K. The Case Study as a Serious Research Strategy, The Case Study Institute, Inc.—Washington, D.C.

York E and B Cornwell B, Status on Trial: Social Characteristics and Influence in the Jury Room: *Social Forces*, Volume 85, Issue 1, September 2006, Pages 455–477

Zagrel. C.H.E, The Social Composition of Magistracy 1971 11 Journal of British Studies 113

Zander M and Henderson P, The Royal Commission on Criminal Justice, Research Study No 19, (1993)