University of Leeds **Centre for Criminal Justice Studies**
Justice in the Criminal Courts in the 21st Century

What are criminal courts for?

Nicky Padfield wonders aloud (do contact me on nmp21@cam.ac.uk)

VERY VERY DRAFT

Introduction

I am taking the opportunity as the first speaker at this conference to raise some big and/or broad questions. The paper is not as developed as I would like: I shall dig more into history, theory, law and practice in due course. But, in essence, my argument is that this big picture allows us to remember important principles. Many of the speakers who follow will focus on individual aspects of the trial process, often presenting original empirical research. Here I go back to basics. What is a trial? A public process which compels defendants to answer a charge of criminal wrongdoing. The outcome is often a serious sanction. Obviously, trials have to be fair. That does not simply mean they should not be unfair. Should we focus on ways in which public courts can promote fairness and justice, and indeed social cohesion? Swift justice has merits, but does not necessarily achieve just outcomes. Non-public 'diversion' is equally dangerous. I will briefly raise some of the criminological literature on compliance, legitimacy and desistance – but speak up also for human rights and the rule of law - a big agenda!

History

For the purpose of this paper, I took as my starting point a series of riot trials, at three different moments in English history. Serendipitously, when the riots of 2011 were still recent, I happened upon a book called the *Report of the Trials for Rioting at Ely and Littleport, 1816* (Warren, ed, 1997*)*. So this is my first historical snapshot. The riots appear to have been committed by local people intimidating their wealthier neighbors with demands for money, both stealing and destroying property. It was a pretty difficult time: the book starts with a sympathetic account of the "public poverty" of the rioters, commenting on: "the stagnation of our manufactories, the depressed state of commerce ….where distress is, there must and will be dissatisfaction. The number of men thus thrown upon the country, without the means of employment, and consequently without the means of subsistence, was a material aggravation to the distress of the times" (at page i).

The speed of the trials was extraordinary. At one o'clock on Monday 17 June 1816, after a service at Ely Cathedral, a Grand Jury was sworn. There had been about 300 rioters, and 82 people were charged with offences resulting from it. Most had been remanded in custody; only 9 were on bail. The trials started on Tuesday, and by Friday, 23 men and one woman had been convicted, largely of robbery, burglary, forcible entry and other theft-related offences. Others were acquitted, or "allowed to traverse until the next assizes". On the Friday, the prosecution announced that "it has been the anxious wish of his Majesty's Government not to call for judgment in more

cases than were necessary" – about 20 to 30 prisoners at the bar then entered into recognizances to be of good behaviour. On the Saturday, the 24 convicted defendants were sentenced: five to death (and they were hanged on Friday 28 June), ten to 12 months in Ely Gaol; and nine to be transported, for periods between seven years and life.

Who were the judges? Edward Christian[1], the first Downing Professor of the Laws of England at the University of Cambridge, had been appointed Chief Justice of the Isle of Ely in 1800 by the Bishop of Ely[2]. The Chief Justice could have tried the rioters alone. But the Home Secretary, Lord Sidmouth, at the request of the local magistrates, appointed a Special Commission, consisting of Mr Christian, sitting with Mr Justice Abbott and Mr Justice Burrough, to try the defendants[3]. It would appear from the reports that I have read so far, that the judges relationship with the jury[4] was not that different to the relationship of judge and jury today – except, of course, for the speed of the hearing of the evidence, and of the summing up and of the verdict.

My second 'snapshot' concerns the trials after the riots in HMP Strangeways and other prisons in April 1990. The riot in Stangeways lasted 25 days; one prisoner was killed, 147 prison officers and 47 prisoners were injured. At the time of the riot, 1,647 prisoners were held in Strangeways, which was intended to accommodate only 970. Conditions were poor (see Woolf, 1991). There were also serious protests in other prisons. These trials did not happen nearly so swiftly as those in Ely in 1816. The first prosecutions started in Manchester Crown Court on 14 January 1992, nearly two years after the riots. This trial involved nine defendants, and the complicated trial (the indictment included a murder charge, but no-one was convicted of murder) ended on 16 April 1993. On the riot charge, one of the nine pleaded guilty, four were convicted and four acquitted. They were sentenced to periods of imprisonment from 4 to 10 years. The second trial did not begin until 5 October 1992, with 14 defendants (Jameson and Allison, 1995 for a full account). On 7 December two defendants escaped from the van taking them to court; another six of the defendants then escaped from court on 17 February 1993. On 1 March eleven of the 14 were sentenced to lengthy periods of imprisonment. The five month trial was said to have cost £2 million. Following this trial, the CPS accepted plea bargains with a further 25 defendants, and there was one further trial of one defendant in September 1993. (The story doesn't end there as the six who escaped were eventually captured and tried in March 1994)[5].

---

[1] He was the older brother of Fletcher Christian, leader of the Mutiny on the Bounty: see *Christian v The Queen* [2006] UKPC 47; [2007] 2 A.C. 400

[2] The Isle of Ely had prescriptive regalian rights which included the appointment of a judge (latterly called the chief justice) with the same jurisdiction (I think) as the assizes. The appointment belonged to the bishop. This was ended in 1837.

[3] Can this be true? Wikipedia (which I acknowledge as a useful source here) cites the Times of 4 June 1816, p 3, which I haven't yet checked. Professor Sir John Baker shares my doubts: a special commission of oyer and terminer and gaol delivery would have been under the great seal and therefore authorised by the Lord Chancellor. I am not sure whether the Home Secretary had any statutory powers in that connection, but they would have had to be statutory. My thanks to Sir John Baker.

[4] I'm troubled by the use of the term Grand Jury in the 1816 book: the grand jury decided whether the indictment was to be proceeded upon - a sort of preliminary hearing - but could not convict. That required a trial jury of 12. They were usually of a different social class.

[5] There were also several trials arising out of the riots at other prisons, notably HMP Pucklechurch. For example, Sallis (see (1994) 15 Cr. App. R. (S.) 281) pleaded guilty to riot on September 30, 1991,

These trials were clearly protracted, both in the sense that they took a long time to come to trial, but also in terms of the lengths of the trial themselves. It is clearly possible to distinguish these riots from the Ely riots: these men were all in custody (until of course some of them escaped) so perhaps the immediate deterrent message was not perceived to be so urgent. But the cases provide a stark contrast with the speed of the 1816 trials.

Finally, let us move to our third example, the riots that took place in London, Birmingham and elsewhere between 6 and 11 August 2011. By 10 August 2012, 3,103 people had appeared before the courts for offences related to these 'riots' (see Ministry of Justice, 2012b for the statistics in this paragraph, and for further details). 85% of these cases had reached a conclusion within a year: 2,138 (69%) had been convicted and been sentenced, and 16% of the cases had been dismissed or acquitted. Of the 2,138 who were sentenced, 35% were sentenced in the magistrates' court and 65% in the Crown Court. The average custodial sentence length was significantly longer than for similar offences in 2010: the average sentence length for offences sentenced in the magistrates' court was 6.6. months (compared to 2.5 months for similar offences in 2010; in the Crown Court the average sentence length was 19.6 months, compared to an average of 11.3 months for offenders sentenced to similar offences in 2010.

The most famous case arising from these trials is *Blackshaw at al* [2011] EWCA Crim 2312, in which the Court of Appeal considered ten appeals which had reached the Court of Appeal amazingly swiftly: the judgment of the Court of Appeal was given on 18 October 2011, giving out a loud message that severe sentences were necessary to punish and deter those involved in offences committed in the context of rioting[6]. Judge Gilbart QC, the Recorder of Manchester, sitting in Manchester Crown Court had dealt with four of the cases on 16 August 2011. Like other judges and magistrates courts, his court had 'processed' the cases brought before it with remarkable speed. Let us take one example: on 10 August 2011 Gillespie-Doyle (one of the appellants in *Blackshaw*) pleaded guilty to burglary at Manchester City Magistrates Court. He was committed to the Crown Court for sentence, and on 16 August, he was sentenced by the Recorder of Manchester to 2 years detention in a Young Offender Institution. He had been arrested after entering a Sainsbury's store which had been broken open several hours earlier and attempting to steal cigarettes and alcohol. He said that he was on his way home and that he only did what he did because everyone else was doing it. He had not been in 'the first wave' of rioters, those who had broken into the store. He was 19, had previous convictions for dishonesty, and the Court of Appeal upheld the two year sentence.

---

and on January 30, 1992, after a 17-day trial, his co-accuseds were convicted, one of riot and the other, of violent disorder. On 27 July 1993 the Court of Appeal reduced their sentences to four-and-a-half years (from 5 and a half), 5 years (from 6 years) and three years' detention in a young offender institution.

[6] And which was subject to a host of academic criticisms: see Mitchell [2011] 10 *Archbold Review* 4, and Ashworth [2012] Crim LR 81 whose "strong criticisms" of the LCJ's approach (p. 92) included the statement that "the judgement is significantly flawed by its failure to justify its conclusions on these appeals by reference to the applicable legislation, to relevant guidelines, or to the giving of adequate reasons" (p. 95).

As we have noted, some of the trials arising from these riots were still happening more than a year later. Not only *Blackshaw* progressed on to the Court of Appeal. For example, the defendant in *Shirley* [2012] EWCA Crim 2953 had changed his plea from not guilty to guilty on 14 June 2012 at Inner London Crown Court in respect of four counts of burglary. On 9 July 2012 he was sentenced to concurrent terms of 30 months' imprisonment. The Court of Appeal rejected his appeal against sentence on 16 November 2012. In *Suleimanov* [2013] EWCA Crim 32, the defendant had pleaded guilty to burglary of a bottle of water and was sentenced to 15 months imprisonment on 4 October 2012. The Court of Appeal again upheld this sentence stating that since he was part of a large number of lawless people abroad in the city centre of Birmingham who decided to take advantage of the situation, his personal culpability must be seen in the context of the wider situation. It would, the Court said, be wholly wrong to look at his actions in isolation from everything else that was happening (para 12).

Clearly the riots of 2011 resembled the riots of Ely in 1816 more closely on their facts than they resembled the prison riots of 1990. Although interpretations of the causes vary (see Morell et al (2011) for one interesting analysis), it would appear that in both cases the 'powers that be' saw the need for a swift public message that rioters would be dealt with swiftly and severely. Perhaps the 'powers that be' in 1990 felt that a swift deterrent message wasn't needed as the rioters were already in custody? There are debates to be had about the supposed deterrent value of disproportionate sentences. But, for present purposes, I wish simply to point out the obvious: justice can be swift or slow. We are horrified that some of the rioters in Ely in 1816 were tried in perhaps an hour and hung within the week. Was that 'justice'? But were the trials of the Strangeways rioters too slow? How can we decide? Certainly, the decision to 'fast-track' many of the prosecutions in 2011 had some perverse consequences. I was sitting as a Recorder in East Anglia in September 2011 hearing trials of 'ordinary' burglars, who had been arrested some months earlier, watching with curiosity what was going on in Manchester and London. We are well used to the concept of the 'decision to prosecute', but we need to think much more about the discretion to prosecute quickly or slowly; the discretion to decide how many and what charges to put on the indictment. In Ely in 1816, the prosecution chose to drop prosecutions after it had dealt with perceived ring-leaders; and the same thinking seems to have provoked the plea bargains after the first Strangeways trials in 1992/3. The press has been full, this last week, of the fact that there are currently 57,000 people on police bail – who is researching the decisions being taken (or not being taken) in these cases? It is time to look at some legal theory before returning to empirical research.

Theory

I am a practical lawyer, not primarily a theorist, but I found the three volumes of Duff, et al's *The Trial on Trial* tantalising, and wrote two separate reviews in the *Howard Journal* (see 2007) 46 *Howard Journal* 209-211 and (2010) 49 *Howard Journal* 92-94). It was a normative theory of the trial developed over several years by a team of legal philosophers. In brief, the theory is that the criminal trial is a process through which defendants are called to answer a charge of criminal wrongdoing and, if they are proved to have committed the offence, to answer for their conduct. The trial is a communicative forum which involves mutual relations of responsibility

between the participants. This communicative theory, the authors argue, best serves the important ends of protection and participation in a liberal democratic society. The trial must address the defendant as a responsible citizen (Vol 3; p. 129): we are responsible to our fellow citizens for our public wrongs (defined simply as wrongs for which we must answer to our fellow citizens?). Clearly our current trial processes fail badly when it comes to most measures of participation. There is a wonderful quotation from a French observer of the English criminal justice system in 1822: the lack of the accused's involvement in proceedings meant "his hat stuck on a pole might without convenience be his substitute at the trial" (Cottu (1822), quoted at Vol 3, p. 44). This could be said of the trial process today: the defendant stuck in a glass box at the back of the court, apparently incompetent to address the court except through his lawyer[7]. The court should surely be a forum for debate – but it has become a very stylized debate, and you can't debate with a person in a glass box who can't easily follow proceedings. The communication, too, has become somewhat random: people rarely attend the majority of proceedings, unlike in my youth, before day time television took over. I have become somewhat addicted to the so-called 'sentencing remarks' (increasingly?) available at www.judiciary.gov.uk/media/judgments/2013. These judges know that they have a real chance at communication and their remarks are crying out for serious academic analysis.

If the trial is a communicative process, it is also a ritual. The importance of ritual has been explored in different ways in socio-legal scholarship. Hodgson, in Duff et al (2004) points out that the accused is often a novice in the trial ritual, a novice who does not wear a gown and may appear directly from police custody unshaven and without clean clothes. She suggests that 'the "lawyerisation" of criminal justice in England and Wales has all but silenced the accused completely' (at p 237). Were the defendants in Ely in 1816 more or less visible than the defendant today? Their "voluntary confession" at the gallows is printed verbatim in the book. It is tempting to say that defendants have become significantly more invisible. Maruna (2011) reviews the sociological and anthropological literature on rituals, focusing in particular on the role of status degradation ceremonies in criminal justice work. Drawing on this literature, he seeks to identify what would be needed to counteract these degradation effects. This seems to me an important message – trials are full of negative rituals. They do not offer an opportunity for redemption or re-integration. Duff et al (2007) argue that "state power must be justified to the defendant through the appropriate kind of communicative process, treating him as a responsible agent" (p. 227). There is a lot there that needs to be unpicked, but I would like to suggest more judicial involvement in 'rituals of reintegration'.

Law

Is it clear what trials are for, in law? The purposes of punishment have been outlined in statutory form since the enactment of s. 142 of the Criminal Justice Act 2003 (though most judges would say this was simply a restatement of the blindingly

[7] Cottu also commented that during the examination and cross-examination of witnesses, the judge "remains almost a stranger to what is going on" (quoted in Langbein, 1978, at p 307). That is less evident in Warren's account of the 1816 trials, where Mr Justice Abbott in particular plays a central role.

obvious or, at the least, the common law), but it was not until the creation of the Criminal Procedure Rules in 2005 that we had a more 'legalistic' explanation of the purposes and priorities of the trial process[8]. These Rules, developed on the recommendation of Lord Justice Auld's *Review of the Criminal Courts* (2001), have encouraged much stronger judicial 'case management', which has had a significant impact on our supposedly adversarial trial system. Auld recommended a single procedural code for the criminal courts. Section 69 of the Courts Act 2003 authorised the creation of rules of court to govern "the practice and procedure to be followed in criminal courts". Under s. 69(4),

> Any power to make Criminal Procedure Rules is to be exercised with a view to securing that–
> (a) the criminal justice system is accessible, fair and efficient, and
> (b) the rules are both simple and simply expressed.

Judges (and magistrates) are getting more 'robust' in forcing lawyers to follow the Rules and in trying to speed up trials, and to speed the progress of a case through the criminal courts. I have concerns that this judicial 'case management' has gone too far. It may well be that the changing culture is merely reflected in the Rules, and is not a result of them. Speed is only indirectly addressed in the Rules themselves. Rule 1 lays down the "overriding objective":

> Rule 1.1.—(1) The overriding objective of this new code is that criminal cases be dealt with justly.
> (2) Dealing with a criminal case justly includes—
> (a) acquitting the innocent and convicting the guilty;
> (b) dealing with the prosecution and the defence fairly;
> (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
> (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
> (e) dealing with the case efficiently and expeditiously;
> (f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
> (g) dealing with the case in ways that take into account—
> (i) the gravity of the offence alleged,
> (ii) the complexity of what is in issue,
> (iii) the severity of the consequences for the defendant and others affected, and
> (iv) the needs of other cases.
> ….
> Rule 3.2 The court must further the overriding objective by actively managing cases.
> (2) Active case management includes:
> (a) the early identification of the real issues;
> (b) the early identification of the needs of witnesses;
> (c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;
> (d) monitoring the progress of the case and compliance with directions;
> (e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
> (f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;
> (g) encouraging the participants to co-operate in the progression of the case; and
> (h) making use of technology.
> (3) The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible.

[8] Interestingly, changes to the Rules are consolidated every October, which means we have an up-to-date version every year. What a contrast to the mess which is sentencing law, where the law is in a hotch potch of statutes. The huge changes introduced by the Legal Aid Sentencing and Punishment of Offenders Act 2012 were all amendments to an array of earlier statutes. How much more sensible it would be to have a code of sentencing law so that we could locate the law in a single source. The latest version of the Criminal Procedure Rules (CPR), the CPR 2012, are to be found in SI 2012/1726

So, the overriding objective of the criminal trial is that cases should be dealt with 'justly'. Even before the Rules came into force there was clearly a much more activist Court of Appeal, doubtless encouraged by Auld LJ. The winds of change were clear in *Gleeson* [2003] EWCA Crim 3357. In dismissing the appeal, Auld LJ cited paragraph 154 of Chapter 10 of his *Review* (2001):

> To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified by the defence statement, it is understandable why as a matter of tactics a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. 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 (at para 36).

In *Jisl* [2004] EWCA Crim 696, Judge LJ, as he then was, said (at para 114-115):

> The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. 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 time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody, and the witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.

The Court of Appeal frequently cites the Rules to highlight the fact that 'trial by ambush' is now a thing of the past. Thus in *Clarke and Morabir* [2013] EWCA Crim 162 the Court of Appeal accused counsel of

> this game of shadow boxing [which] did no credit to either of these two most experienced criminal trial practitioners. The Criminal Procedure Rules 2010 which were in force at the time of this trial provided, by Part 1.2 , that each participant in the trial must prepare and conduct the case in accordance with the "overriding objective", as set out in Part 1.1 . That objective is to deal with criminal cases justly and, in particular, to deal with the case efficiently and expeditiously. In our judgment those obligations mean that if one side intended to challenge the expertise of an expert witness of the other side, then written notice, together with the reasons for the challenge, should have been given as soon as possible so that the other side could consider what it would do. Even if that were not done, it should have been obvious to the defence once it had seen the note of the medical conference of 20 January 2011 that there was a strong possibility that the expertise of Professor Freemont would be challenged. Defence counsel should have taken the initiative immediately and asked the prosecution whether it was going to challenge the professor's expertise (at para 75, Aikens LJ).

Here the appellants' convictions for murder were upheld despite the 'shadow boxing' mentioned, which concerned the admissibility of a defence expert's evidence at trial.

The Rules have led to a much greater focus on pre-trial 'management' stages: disclosure, case defence statements and Plea and Case Management Hearings (PCMH). In *R (Firth) v Epping Magistrates' Court* [2011] EWHC 388 (Admin) the High Court went so far as to hold that admissions made in relation to pre-trial hearings were admissible as evidence at trial. Commenting on this, Edwards (2011) pointed out that, as the Crown had to prove its case without the help of a defendant, if

information given to assist in case management is admissible in evidence, defence solicitors would be well advised to ensure that appropriate parts of the form were merely completed with the word 'privileged'. Perhaps influenced by this, in *Newell* [2012] EWCA Crim 650, the Court of Appeal took a step back. N was charged with for possession of cocaine with intent to supply. At the PCMH no defence case statement had been served. In response to a question in the PCMH form asking what were the real issues, N's advocate, who did not represent him at trial, had written 'no possession'. A defence statement was served on the first day of the trial which stated that he accepted possession of cocaine but denied intent to supply. A second count of simple possession was added to which he pleaded guilty. The Crown was allowed to cross-examine him on the statement in the PCMH form on the basis that it was inconsistent with his defence and plea to possession. However, the Court of Appeal quashed his conviction. The Court summarized the law in this way:

i) It is and remains the task of the Crown to establish a *prima facie* case and then to prove its case.

ii) The Criminal Procedure Rules require a "cards on the table" approach and give to the PCMH a central role as an integral part of the trial process. The PCMH is not a formality. A rigorous examination of each case in which there is no guilty plea is required to ensure that the trial can be fairly and expeditiously conducted in the interests of justice.

iii) The defendant is therefore required at the PCMH through his trial advocate who must be present in person (or through a nominee whose informed decisions will bind the defence at trial) to identify the issues which will arise at trial. The trial advocate will also identify which part of the Crown's case will be challenged and which witnesses are required, the detailed timetable set for speeches, examination and cross-examination of witnesses. The trial advocate must also provide all the other information required in the PCMH Form.

iv) If an issue is not identified and subsequently raised, the Court has ample powers including giving the Crown time to deal with that issue: see *R (DPP) v Chorley Justices and Forrest [2006] EWHC 1795 (Admin)* and *R v Penner [2010] Crim LR 936* .

v) In the Crown Court the defence statement provided for by s.5 of the Criminal Procedure and Investigations Act 1996 (CPIA) will set out the nature of the defendant's defence. Although it is good practice for this to be signed by the defendant, a defendant does not have to sign it but a judge can require a defendant where a statement is unsigned to satisfy him that the document really is his statement.

vi) S.11 of the CPIA sets out the nature of the breaches of requirement that can attract a sanction (such as the failure to serve a statement or serve it within time or setting out inconsistent defences). The sanctions are that the court or any other party may comment and the court or jury may draw such inferences as appear proper.

The Court concluded that the appellant's counsel had by the time of the trial produced a defence statement which made the case clear and admitted possession. The sanction provided for in the CPIA was sufficient. The statement on the PCMH Form had been put to the appellant in the witness box without any warning to the appellant's counsel. The Crown were then seeking to say that his previous position as recorded on the form was a lie and to rely on that lie as evidence of his guilt. The way in which it was done was unfair to the defence. The judge should have used his powers under s.78 of PACE 1984 to refuse the admission of the statement.

The role that s.78 plays at trial is extraordinary. It is often the judge's main (ultimate) tool to ensure fair play. It provides:

> In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

It is very frequently raised in court, and difficult to apply in practice. The many changes to criminal procedure of the last decade (more hearsay evidence, anonymous

witnesses, more bad character evidence etc) have been tolerated because the judge has a formal 'trump card' and can ultimately disallow evidence under s. 78. Would that there was more empirical evidence analysing its use at trial.

There are many examples of the Court of Appeal's increasing exasperation with defence counsel who raise points late in the trial, and with 'trial by ambush' more generally. In *Penner* [2010] EWCA Crim 1155, the appellant was convicted of ten counts of making indecent photographs of children. He gave a no comment interview in the police station and gave no evidence at trial. After the close of the prosecution case, the defence submitted that there was no case to answer on the basis that there was no evidence that it was the defendant who made the photographs, and secondly, that the Crown had failed to prove they were made in the UK. The Court of Appeal (Thomas LJ) in rejecting the appeal, was clear that the appellant should not even have been given leave to appeal:

> It was an obvious inference, in the absence of any evidence that the computer had been taken out of the UK, that the images had been made in the UK. Leave to appeal was therefore granted by this court, it is now apparent, on a wholly false premise, namely there was evidence that the computer may have been used in Canada (at para 15).
>
> …this case is an ample demonstration of why it is essential that counsel at the PCMH stage carefully examine and identify the issues. As counsel in this case failed to do so, when the point, as he tells us, occurred to him in the course of cross-examination, it was then his duty to have identified it to the judge, before going any further with his cross-examination. He should not have left the matter for half time. He should have told the judge that there was a new issue and asked the judge how this matter should be dealt with. That would have enabled counsel for the Crown to take the opportunity of looking at the law and the presumptions and provisions of the Sex Offenders Act to which we have referred. It is no longer possible to have cases conducted in the way in which this case was conducted by counsel for the appellant, where points occur to someone and then an attempt is made to ambush the prosecution by a submission of no case to answer. … It is no longer permissible for the ambush of the type that it might be suggested happened in this case, to be performed in the future (at paras 18-19).

Clearly it is still the task of the Crown to establish a prima facie case and then to prove its case. Many have welcomed this more robust case management. Writing of the decision of the Divisional Court in *R. (D.P.P.)* v. *Chorley Justices and Forrest* [2006] EWHC 1795 (Admin), Spencer (2007) wrote

> Until now, one aspect of our criminal justice system has been what might be called the "penalty shoot-out theory" of the trial. To win the match, the prosecution are allowed one shot at goal; and if their striker misses, however unluckily, they do not get another chance. Traditionally, this has been so even where the reason the prosecution fail to score is that the defence, having carefully "kept its powder dry" until the trial, points out some technical deficiency in the procedure which, if noticed earlier, could easily have been corrected. When in consequence of this some obviously guilty person goes unmeritoriously free, lay people traditionally complain and say "We thought criminal justice was about acquitting the innocent and convicting the guilty". To this complaint, common lawyers traditionally reply that it is based on a misunderstanding of the adversarial tradition, which, unlike the inquisitorial tradition, is not concerned with establishing what continental lawyers call "material truth".

Spencer is delighted that the 'penalty shoot-out theory' is now dead. But it is not only trial by ambush which is being prevented. There have been many other dramatic uses of the Rules. For example, recently in *Love* [2013] EWCA Crim 257, the Court of Appeal allowed an indictment to be amended even after the defendant had pleaded guilty: Richard LJ concludes that

> No statutory provision or principle of law has been identified which prohibits a court from vacating a defendant's plea where it is appropriate to do so in the interests of justice, and the judge's approach was consistent with the overriding objective of the Criminal Procedure Rules (at para 18).

An interesting example of the application of the rules in the magistrates' court arose in *R. (Drinkwater) v Solihull Magistrates' Court* [2012] EWHC 765 (Admin). In this case, the magistrates were doubtless deeply frustrated. An assault case listed for a day's hearing was clearly going to overrun and so was adjourned, at the end of the prosecution case, for 6 weeks. On that day it had to be adjourned again as a co-defendant was in hospital. Six weeks later it was again adjourned because of the defendant's illness, and when the court convened a month later, they refused to adjourn again. The Divisional Court decided that the magistrates had erred in deciding to proceed with the trial in the absence of defendants, but again they thought the answer lay with better and earlier case management. The President of the QBD commented that

> It is self-evident that proceedings in the Magistrates' Courts ought to be simple, speedy and summary. That requires close attention to the Criminal Procedure Rules and active case management before and during the trial.

This reflects the language of the Government's report Delivering *Simple, Speedy, Summary* Justice (2006), which focused on:

- improving the speed and effectiveness of the magistrates' courts;
- improving performance in the Crown Court;
- focusing on the management of very high cost cases in the Crown Court;
- implementing measures to improve the compliance and enforcement of court orders;
- extending the community justice approach to ten new areas; and
- moving more low-level offences out of the magistrates' courts.

Not much has changed in the most recent White Paper, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (Ministry of Justice, 2012a) and I am glad that we will be hearing from Steve Cammiss who suggests that these proposals are unworkable. It is hugely important that we hear more about the dangers of efficiency drives, and indeed the limits of judicial case management. In fact, I would go further and castigate the judiciary for failing to speak out more about what is going on. Constitutional basics such as the rule of law, the separation of powers and the independence of the judiciary do not mean the that the 'weakest and least dangerous department of Government'[9], the judiciary, should not speak out for 'justice'.

Criminology

It makes little sense to worry about what courts are for unless one has a certain realism about what they might achieve. Criminologists and legal scholars have much to contribute. The literatures on legitimacy, compliance and desistance are all particularly relevant and well known to all of us here today. Perhaps it is appropriate here to pay tribute to the contributors to the book, published at the end of last year, *Legitimacy and compliance in criminal justice*, and to its editors Crawford and Hucklesby. It has long been understood that for people to respect the law, they must find it to be 'legitimate' (hence the need for procedural as well as substantive justice). Jackson et al's work on 'legitimacy' and 'compliance' was particularly thought provoking. They wrote that

[9] The title of a fascinating paper by Lord Steyn (1997): He concludes that "I am not willing to countenance the thought that the legal profession might be too absorbed with self-interest to care about the integrity and well-being of our constitution" (at page 95). I share his concern today.

> …the British police can employ different processes and instruments of influence depending on the authority relationship that an individual has with the police. If people base the authority relationship on the fear of punishment, then demonstrations of deterrence and power will be most effective. If people base it on compliance with rules and authority, then social influence and demonstrations of authority will be critical. If people base it on common moral values, then demonstrations of shared purpose will be key …. A legitimacy that suppresses individual's moral judgement of the character of the police directives flattens normativity, minimising the active role citizens can play in judging those that govern them. If most people are concerned about justice and morality, then legitimacy is given a sounder normative basis (p. 35).

I would also single out Doreen McBarnett's powerful plea for 'a new legal integrity'. People are more likely to obey laws which are accessible, and applied in ways which they trust. And then there's Anthea Hucklesby's emphasis on the complexity of desistance, in particular the role of family and friends in both desistance and compliance. She questions the effect of privatisation, where value for money (encouraging staff to spend as little time as possible fitting equipment, for example) gets priority over changing practices to improve compliance. Again, I suspect that we all agree. Most offenders would like to desist, non-compliance is not always planned[10]. Of course, as Hucklesby argues, many offenders need multi-dimensional and individualised support to help them develop the life skills to comply[11].

The current Legal Aid consultation is particularly depressing for its failure to refer in any way to empirical evidence, and its failure to consider the effect of legal aid cuts on the wider criminal justice process. And as for the Government's attempts to 'reform rehabilitation' in the Offender Rehabilitation Bill 2013, which as you know has already reached Committee Stage in the House of Lords, many of us here doubtless think that it is both unworkable and deeply dangerous.

Weaving the threads together

It is time to pull together the lessons of history, of theory and of practice in a way which may focus discussions at this conference. My excuse for doing so only briefly is that those who follow me will address many vital topics such as the right to unconditional bail, special measures, mode of trial, sentencing, the use of special advocates[12], legal aid and other crucial topics, which will help focus my own thoughts. My ambition has been to encourage an overarching concern for 'justice' and 'fairness'. Let's not forget that the trial is there to protect citizens against the arbitrary exercise of state power. That Ely trial in 1816 is shocking because it is not clear to us that justice was truly achieved so summarily, so swiftly. But even my liberal eyes wonder whether the lengthy 1992/1993 trials could really be justified. Of course we have to get a grip on costs, on time, on waste.

I haven't even considered the nature of the 'trial'. I am confident that we are right to maintain a strict separation between the trial of questions of guilt, from the sentencing

[10] My empirical study with recalled offenders has plenty of examples of this: see Padfield, N *Understanding Recall 2011* (2013) at papers.ssrn.com/sol3/papers.cfm?abstract_id=2201039

[11] At this conference she will address the crisis created by the current treatment of foreign nationals. I hope she includes discussion of the due process rights of those facing extradition: there are some shocking examples of unrepresented defendants challenging their extradition by video link from prison….. A crisis of legitimacy?

[12] Perhaps Clive Walker's comments on "the unacceptability of categorical exclusion of [certain] disputes from judicial scrutiny" could be a theme running through all our papers?

stage of the trial. I still find the French system deeply troubling (see Padfield, 2011b). But when does the trial begin and end? We have to think of the whole process: I am currently putting the finishing touches to an article which argues that it may be more useful to see sentencing as a process which continues, very often, for years after any custodial or community sentence has long finished. It is certainly not a one off act which finishes at trial[13].

It is fashionable to knock the European Convention of Human Rights. Even the judiciary has been keen to take on the European Court of Human Rights, which can be deeply troubling: see the decision of the Supreme Court in *Horncastle* [2009] UKSC 14 and its battle with the European Court of Human Rights (*Al-Khawaja v UK* (2012) 54 EHRR 23) for one very obvious example. But this is not the only recent high profile case which affronts my (and your?) sense of justice: let's take *Maxwell* [2010] UKSC 48 where the Supreme Court decided (by a majority of 3 to 2) that the Court of Appeal had not been wrong to order a retrial in murder case in which it had quashed the conviction on grounds of really gross prosecutorial misconduct or *Warren v AG for Jersey* [2011] UKPC 10 where the Privy Council unanimously upheld a conviction despite flagrant breach of French and Dutch rules of criminal evidence[14]. The European Convention has been remarkably effective if we see it just as a lowest common denominator of rights. Let's not seek to re-invent the wheel. Indeed, perhaps I shouldn't use my glance at the big picture without mentioning the hugely dangerous game the Government is currently playing in doubting its commitment to EU criminal justice policies.

I also believe that we need to do a lot more to make criminal justice processes open and accountable. I wrote in the *Oxford Handbook on Criminology* with Rod Morgan and Mike Maguire about how the 'system' for determining sanctions has, almost by stealth, been stretched:

> key elements of decision-making have been moved upstream and downstream of the courts, thereby falling largely outside judicial control. On the one hand, a significant number and proportion of criminal sanctions (mainly, but not exclusively, financial penalties) are today imposed out-of-court, administratively, by the police, the Crown Prosecution Service (CPS) and many other bodies. At the other end of the spectrum, decisions about whether and when to release the fast growing numbers of prisoners serving indeterminate custodial sentences lie in the hands of the Parole Board (at page 955).

The system is actually much worse than that – housing authorities wield quasi-criminal powers[15], and the Parole Board is squeezed out of the decision-making process by an ever more powerful executive. Am I right to believe that the constitution demands that the judiciary should supervise all trials and indeed the management and implementation of all sentences? It doesn't happen in practice. I

[13] I am glad that this conference appears to take a wide definition of the 'trial' with important empirical contributions on sentencing law and practice.

[14] Perhaps we might also consider at this conference the House of Commons' Home Affairs Committee's recent inquiry into undercover policing, after what was learnt of the role of PC Mark Kennedy in *Barkshire* [2011] EWCA Crim 1885 and about the use of dead babies' identities. They conclude that the "current legal framework is ambiguous to such an extent that it fails adequately to safeguard the fundamental rights of the individuals affected. … there is a compelling case for a fundamental review of the legislative framework governing undercover policing, including the RIPA 2000…" Hear, hear. Vicky Kemp's paper will raise some crucial questions and answers.

[15] Who has noticed that the Prevention of Social Housing Fraud Act 2013 makes it an offence punishable with 2 years and unlimited fine various forms of breach of contract in relation to social housing? See also www.fairplayforchildren.org/pdf/1337828432.pdf

also think there is value in juries and in lay magistrates, a real value in localism and in public justice[16]. I think that courts should be made more public, and put the defendant centre stage. There should be court hearings which monitor and speak out for successes as well as failures. But these are difficult issues. For the moment, I will sink back to my comfort zone of the law. It has become far too complicated. It should be accessible and comprehensive; consistent; certain. I take these three headings from the Introduction to the *Draft Criminal Code* produced by the Law Commission in 1989, but generally forgotten. Lawyers, socio-legal scholars and criminologists should work together to consider the future of the criminal courts, to explore how they can be used better to promote justice, in the widest sense of the word.

References

Abel-Smith, B and Stevens, R (1967) *Lawyers and the Courts: A sociological Study of the English Legal System 1750-1965* London, Heinemann

Auld, Lord Justice (2001) *Review of the Criminal Courts*

Crawford, A and Hucklesby, A (eds) (2013) *Legitimacy and Compliance in Criminal Justice* Routledge

Department of Constitutional Affairs (2006) *Delivering Simple, Speedy, Summary Justice*

Emsley, C (2005) *Crime and Society in England 1750-1900* Longman, 3rd ed

Duff, A, Farmer, L, Marshall, S and Tadros, V (eds) (2004) *The Trial on Trial: Volume One: Truth and Due Process* Oxford: Hart Publishing

Duff, A, Farmer, L, Marshall, S and Tadros, V (eds) (2006) *The Trial on Trial: Volume Two: Judgment and Calling to Account* Oxford: Hart Publishing

Duff, A, Farmer, L, Marshall, S and Tadros, V (eds) (2007) *The Trial on Trial: Volume Three: Towards a Normative Theory of the criminal trial* Oxford: Hart Publishing

Hostettler, J (1991) *The Politics of the Criminal Law: Reform in the 19th Century* Chichester: Barry Rose Publishers

Jameson, N and Allison, E (1995) *Strangeways 1990: A Serious Disturbance*. Larkin Publications

Langbein, J (1978) The criminal trial before the lawyers 45 *University of Chicago Law Review* 263

Langbein, J (2003) *The Origins of Adversary Criminal Trial* (Oxford UP)

Light, R (1987) Habitual drunkenness offenders 151 *Justice of the Peace* 56

Maruna, S (2011) Reentry as a rite of passage, 13 *Punishment & Society* 3-28

Ministry of Justice (2012a) *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System*. London: Ministry of Justice.

Ministry of Justice (2012b) *Statistical bulletin on the public disorder of 6th – 9th August 2011 – September 2012 update*. London: Ministry of Justice Statistics Bulletin.

Morrell, G, Scott, S, McNeish, D, Webster, S (2011) *The August riots in England:*

[16] Twenty five years ago, Light (1987) bemoaned the fact that drunks are now "processed through the revolving door of the cautioning system with the prospect of any alternative facilities receding further and further into the distance". The problems continue to be effectively swept under the carpet. I am deeply sceptical about PCCs, neighbourhood justice panels and look forward very much to hearing Jane Donoghue on the changing role of the lay magistracy, and how this impacts upon the delivery of justice.

understanding the involvement of young people London: NatCen
Padfield, N (2011a) 'Intoxication as a sentencing factor: Mitigation or Aggravation?' in Roberts, J.V. (ed.) *Aggravation and Mitigation at Sentencing* Cambridge University Press, pp 81-101
Padfield, N (2011b) 'An Entente Cordiale in Sentencing?' 175 *Criminal Law and Justice Weekly* 239, 256, 271 and 290: available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2239618
Padfield, N (forthcoming) 'Exploring or Measuring the Success of Sentencing Guidelines' in A. Ashworth and J. Roberts (eds) *Sentencing Guidelines: Exploring the English Model* Oxford: OUP
Padfield, N, Morgan, R and Maguire, M (2012) Out of court, out of sight? Criminal sanctions and non-judicial decision-making' in Maguire, M., Morgan, R. and Reiner, R. (eds) *The Oxford Handbook of Criminology* (5th ed.), Oxford: Oxford University Press, pp 955-985
Player, E and Jenkins, M (1993) *Prisons After Woolf: Reform Through Riot*. Routledge
Radzinowicz, L and Hood, R (1990) *The Emergence of Penal Policy in Victorian and Edwardian England* (Clarendon Press)
Spencer, J R (2007) Acquitting the innocent and convicting the guilty - whatever will they think of next! 66 Camb. L.J. 27-30
Stevenson, J (1992) *Popular Disturbances in England 1700-1870* (London, Longman)
Steyn, Lord (1997) The weakest and least dangerous department of government *Public Law* 84
Warren, P (1997), *Report of the trials for rioting at Ely and Littleport 1816:Originally printed c.1816 by Hatfield and Twigg, England*
Wise, E (1848) *The Law relating to Riots; and a summary of the law as to actions against hundred* (London, Shaw and Sons)
Woolf, Lord (1991) *Prison Disturbances April 1990: Report of an Inquiry* by the Rt Hon Lord Woolf (Part I and II) and His Honour Judge Stephen Tumim (Part II) Cm 1456, London HMSO