chapter 1

Actors and Responsibilities in the Criminal Justice System

1.1 Introduction

In order to understand how a particular justice system works, it is imperative that we understand the roles and responsibilities of the various actors within the process. This chapter will provide you with an introduction to the people and authorities that make the criminal justice process of England and Wales work: the police, the prosecutor, the defence lawyer, magistrates and judges. We will briefly analyse their responsibilities and how they make the system function. The system is not perfect, and there is much room for improvement at every stage and with every actor in the process. This chapter should give you a flavour of why and how each component part exists in England and Wales. By understanding the roles and process, you will be able to further critique the myriad issues involving each actor as you move through your studies.

1.2 The police

The genesis of the police force in England and Wales can be traced back to the early 19th century. Prior to this period, a 'team of justices' was used to enforce the law in rural areas.[1] However, owing to political protests and a rising crime rate, the team of local justices was not sufficient to enforce the law in more urban areas. If we think of an image to describe a police officer in the early part of the 20th century, we may envisage a picture of a 'bobby on the beat'; here, an officer walking around, patrolling an area whilst whistling and occasionally stopping for a chat with local residents. McLaughlin suggests that this 'bobby' has been culturally constituted through a set of popular fictional storylines.[2]

When the Metropolitan Police was created in 1829, its official mandate was crime prevention.[3] However, the role of the police officer was met with scepticism and disorder; at public meetings police officers were called names such as 'robin redbreasts, crushers, bluebottles, bobbies, coppers, raw lobsters and peelers'.[4] The working class took objection to the fact that there would be a greater regulation of public spaces, and the middle class were unhappy that they had to pay for a service which lowered the tone of their neighbourhood.[5] If we fast-forward almost 200 years, people are still protesting against the police, their conduct and their powers.

1. RI Mawby, 'Models of Police' in T Newburn, *Handbook on Policing* (Willan, 2012) 17.
2. E McLaughin, *The New Police* (Sage, 2006) 2.
3. ibid 3.
4. ibid.
5. ibid.

March 2021 saw a spate of public protests against the Policing, Crime and Security Bill which effectively enhances the police power to curtail public demonstrations. Effectively, since their creation, the police have always faced pressure to have their powers curtailed or the institution abolished.

At the outbreak of the Second World War, there were almost 200 separate police forces that were split up across England and Wales. By the mid-1970s, these were reduced to 43.[6] Each of the 43 forces had a clear hierarchical structure of accountability from chief constables, police authorities and central government. Arguably, this relationship with central government means that the role of the police has never been too far from political influence. The 1980s and the miners' strike best emphasise the politicisation of the police, where 'the police were clearly used to enforce government policies, notably in breaking the power of the unions'.[7] In a similar time period, relations between the police and BAME communities were teetering on the brink of destruction. In 1981, the catalyst for the Brixton riots was 'essentially an outburst of anger and resentment by young black people against the police'.[8] Born against this backdrop of racial mistreatment and sub-standard treatment of suspects in the police station, the Police and Criminal Evidence Act (PACE) 1984 came into force. The Act contains a great number of due process safeguards to ensure that the police use their powers correctly. For example, the Act introduced restrictions on the use of stop and search, which now requires a justifiable reason to be carried out (a safeguard not in place at the time of the Brixton riots). There are also time limits on detention at the police station, a suspect can have breaks and free access to a defence representative, and there are prohibitions on the use of oppressive questioning, with the ramification that evidence so obtained should be inadmissible at trial.

So, this short, potted history of the police tells us a number of things. Crime prevention is their primary goal, but arguably the bigger role they had to play was as officers of the peace – looking to defuse situations rather than making an arrest and instigating criminal proceedings. Nowadays, things are different, and the bobby on the beat is no more. Since 2010, the police have lost around 10,000 frontline officers and resources are tight. The approach to defusing situations has been replaced by arresting a suspect once the relevant PACE test has been met (the tests of reasonable suspicion and necessity will be explored in **Chapter 3**). Having a tougher approach to law and order is seen to be vote winner by politicians – look at any political party's manifesto over the last 30 years and you will see something along the lines of 'We will be tough on crime!' This approach is questionable, as it makes the public believe there is a growing crime problem that needs addressing. Crime levels have been relatively stable over the last few years, and the year ending June 2020 saw a 4% reduction in crime (although this might have been influenced

6. Mawby (n 1) 20.
7. ibid.
8. Scarman, Lord, *The Brixton Disorders 10-12 April 1981* (Cmnd 8427, 1981).

by the Covid-19 pandemic).[9] Nevertheless, we hear near-constant calls for an increase in police powers so they can protect society from the 'bad guys'. The modern police officer has a vast array of powers to infringe the liberty of a suspect, often with a low threshold to satisfy in order to wield these powers. The conversationalist, walking the streets, whistling his favourite tune is gone. The officer in the 21st century is a law enforcer and protest stopper, with powers often increasing following public disturbances. They have arguably become used as a political tool, deployed so those in power can say, 'We are keeping you safe, so vote for us.'

1.3 The prosecution

The Royal Commission established in 1962[10] recommended that a separate body should be created to separate the investigative and prosecution stage of criminal proceedings. This added layer of independence would ensure that tension between the two stages would not arise. However, this recommendation was not implemented, and many police forces continued to prosecute their own cases in magistrates' courts. For cases that would be heard in the Crown Court, the police instructed solicitors and barristers to prosecute cases on their behalf.[11] As this situation evolved, the police gradually started to employ their own in-house prosecuting solicitors who would act on the instructions of the police.[12] The prosecutor would have little recourse if the police wanted to go ahead and prosecute a weak case or 'overcharge' a suspect.

This arrangement between the police and the prosecution came under attack in the report on the 'Confait affair'.[13] This case raised questions about the procedures followed by the police during the interrogation of three youths, suspected of the murder of a male prostitute. The interrogation led the youths to falsely confess to the murder of Maxwell Confait. In 1977, an inquiry into the investigation was opened and recommended many of the provisions contained within PACE 1984, as well as establishing the Crown Prosecution Service (CPS) under the Prosecution of Offenders Act 1985. Both changes dramatically altered pre-trial investigation. The report revealed that the officer in charge of the investigation was willing to breach the existing Judges' Rules and put severe pressure on the suspects when questioning them. The prosecutor was deemed unable or unwilling to act independently from the police, and the youths were wrongly convicted of

9. www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingjune2020#:~:text=The%20police%20recorded%205.8%20million,July%202019%20to%20March%202020.&text=Overall%2C%20theft%20offences%20fell%20by,the%20year%20ending%20June %202020 (accessed 28 April 2021).
10. *The Royal Commission on the Police* (Cmnd 1728, 1962).
11. For a further discussion of the police's use of solicitors and barristers in the 1970s, see J Sigler, 'Public Prosecutions in England and Wales' [1974] Crim LR 642.
12. *The Investigation of Criminal Offences in England and Wales: The Law and Procedure* (Cmnd 8092-1, 1981) 49–52.
13. See *Inquiry into the Circumstances leading to the Trial of Three Persons on Charges arising from the Death of Maxwell Confait* (HCP 90, 1977).

murder.[14] The report, chaired by Sir Henry Fisher, proposed a number of recommendations: that the Judges' Rules should be overhauled, and that the safeguards provided to suspects, such as having a right to have a solicitor present during interrogation and the right of young people to have an appropriate adult present, should be made clearer.

Following this case, the Royal Commission on Criminal Procedure (the Phillips Commission), reporting in 1981, proposed that an independent body be created to take over cases that the police decided to prosecute. If the prosecutor did not believe that the case should be taken to court then the prosecutor would have the authority to discontinue the case, have the charges changed or have the police investigate further in order to obtain more evidence. The Government accepted the majority of the recommendations made by the Phillips Commission. As highlighted above, this resulted in the Prosecution of Offenders Act 1985 and established the Crown Prosecution Service (CPS). The head of the CPS would be the Director of Public Prosecutions (DPP). The Director's position was not a new creation; it was initially created in the late 19th century to advise the police on criminal matters and handle serious cases. Despite the CPS having a national identity, prosecutors were based locally, and the CPS was organised into areas that matched police forces, each headed by a Chief Prosecutor.

Generally, in England and Wales, prosecutors are responsible for charging decisions. In order to charge a suspect with a crime, the prosecutor will apply one of two charging tests:

(a) the Full Code Test; and
(b) the Threshold Test.

Paragraph 4.1 of the *Code for Crown Prosecutors* (the *Code*)[15] states that in order to start or continue with a prosecution, the Full Code Test needs to be met. If the Full Code Test cannot be met, the prosecutor is permitted to continue with the prosecution by using the Threshold Test. Should any prosecution not satisfy these tests, the charges against the suspect will be dropped.

The Full Code Test

There are two stages to the Full Code Test, and both need to be passed in order to continue with a prosecution. The first stage is the evidential stage. Here, the prosecutor needs to be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. In order to reach this decision, the prosecutor must consider what the defence might be and how that will likely affect the prospect of conviction.[16] Put simply, a realistic prospect of conviction is something that is greater than a 50% chance. You might think that this prospect is quite low. However, this is the most stringent hurdle that the prosecution has to pass through. Once the prosecutor has decided that the evidential stage is met, they can move on to the public interest stage. In every case where there is sufficient

14. ibid.
15. www.cps.gov.uk/publication/code-crown-prosecutors (accessed 28 April 2021).
16. ibid para 4.6.

evidence to justify a prosecution (or to offer an out-of-court disposal), the prosecutor needs to consider if a prosecution is in the public interest.[17] Paragraph 4.10 of the *Code* highlights an important safeguard – the prosecutor has some level of discretion in deciding whether to prosecute a suspect. The *Code* states that 'it has never been the rule that a prosecution will automatically take place'. This means that if the prosecutor does not consider that it is in the public interest to prosecute an offence, they are not compelled to do so.

In order to ascertain if something is in the public interest, the prosecutor needs to consider:[18]

- the seriousness of the offence;
- the level of culpability of the suspect;
- what were the circumstances of the offence and level of harm caused to the victim;
- the age and majority of the suspect at the time of the offence; and
- whether a prosecution is proportionate.

The Threshold Test

Should the prosecutor be unable to satisfy the Full Code Test, that does not mean that it is the end of proceedings. There is a safety net built in, which means that if the Full Code Test is not satisfied, the prosecutor can apply the Threshold Test. There are five conditions to the Threshold Test:[19]

(1) The prosecutor must be satisfied that there are reasonable grounds to suspect that the person to be charged has committed the offence in question.
(2) There needs to be a reasonable belief that the continuing investigation will yield further evidence (within a reasonable time period) that will establish a realistic prospect of conviction. The prosecutor must consider:
    (a) the nature of any further evidence and the impact it will have on the case;
    (b) the charges that all evidence will support;
    (c) the reasons why this evidence is not available immediately;
    (d) the time required to obtain the evidence;
    (e) whether the delay in applying the Full Code Test is reasonable.
(3) The seriousness or the circumstances of the case and level of risk posed by granting bail justifies the making of an immediate charging decision.
(4) There are continuing substantial grounds to object to a bail application.
(5) It is in the public interest to charge the suspect.

The evidence used to inform the charging decision must be regularly assessed to ensure that charging the suspect is still appropriate, as is the objection to bail. The Full Code Test must be applied as soon as the anticipated further evidence is generated.

As you can see, in order to charge a suspect, the prosecutor has a great deal of discretion in their decision. Furthermore, and perhaps more concerning, is the fact

17. ibid para 4.9
18. ibid para 4.14(a)–(g).
19. These are set out in Section 5 of the *Code*.

the threshold needed to be satisfied in order to charge someone is very low indeed. Ultimately, the prosecutor needs a reasonable belief that the person committed the crime. Effectively, this has already been satisfied because, without this reasonable suspicion, the person would not have been arrested by the police.

1.4 The defence

Defendants have not always benefited from representation at trial. It was only in the mid-18th century that a prohibition on defence representation was lifted. The introduction of defence counsel to the criminal trial disentangled two activities that were previously the sole responsibility of the unrepresented defendant: it was the duty of the defence lawyer to probe whether the prosecution had submitted a tenable case, and the lawyer would offer evidence of a defensive nature to rebut the prosecution's allegations. The defence lawyer was able to insist on asking the judge whether the prosecution had discharged its burden of adducing sufficient evidence to support a verdict in its favour. The defence lawyer would typically move for a verdict of an acquittal at the conclusion of the prosecution's evidence. If a judge overruled this, the defence would then present its evidence.[20] Further, the inclusion of the defence lawyer changed the structure of the trial; it broke up the dual roles of speaking and defending that had previously been the responsibility of the accused. The defence lawyer assumed the role of defender, insisting on prosecutorial burdens of proof and largely shutting down the role of the accused.[21] The trial had evolved, and the new 'lawyer-dominated' trials were no longer the place where the accused merely aired their response to the charge, but it became the forum in which the accused's defence counsel tested the prosecution's case, and adversarialism was born.

The early 20th century saw the continuation of the 'testing the prosecution's case' form of trial. The defence lawyer was firmly established as a key actor in the criminal justice process. In fact, the position and role of the defence lawyer gained further importance as access to legal representation was increased. The Poor Prisoners' Defence Act 1903 established that legal aid would be provided for trials on indictment for serious offences, where this would be in the interests of justice. It was not only the defence lawyer's role at trial that grew in importance during the early part of the 20th century; the defence lawyer was also becoming more active at the pre-trial stage. The Judges' Rules of 1912 stated that suspects should be able to consult with a solicitor, albeit with a caveat that this caused the police no unreasonable hindrance.[22] This reaffirmed the position of the 'testing of the prosecution's case' over the 'accused speaks' trial.

20. JH Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2005) 258.
21. ibid 307.
22. However, research shows that only 9% of suspects sought legal advice and only 7% received it. See P Softly, *Police Interrogation: An Observational Study in Four Police Stations,* Royal Commission on Procedure, Research Study No 4 (1980).

Whilst the availability of defence representation via legal aid was increased by the 1903 Act, judges were encouraged not to actively advertise that access to legal advice was readily available. However, attempts to keep the right to legal advice under wraps were effectively removed by the advent of the Legal Aid and Advice Act 1949. In theory, the 1949 Act would have a great impact on the defence lawyer's role: it provided for legal representation for all except those who could not by any reasonable view be regarded as appropriate for state assistance at all.

In 1950 the Council of Europe recognised the importance of the defence lawyer's role in the criminal justice process in the European Convention on Human Rights,[23] an international treaty that protects the human rights and fundamental freedoms of citizens of member states of the Council of Europe. Article 6 protects the right to a fair trial, and specifically Article 6(3)(c) allows a defendant to either defend themselves or be defended through legal assistance of their choosing. If they are unable to afford legal assistance, it is to be given free of charge when it is in the interests of justice to do so.

Reporting in the 1960s, the Widgery Committee[24] recommended that legal aid should be granted taking into account:

(a) the gravity of the charge; whether the accused is in real jeopardy of losing their liberty or livelihood;
(b) whether the case raises a substantial question of law;
(c) whether the accused can state their own case and follow proceedings;
(d) whether legal representation is desirable in the interests of someone other than the accused. For example, in the case of sexual offences against young persons, when it is undesirable that the accused should cross-examine the witness in person.[25]

Following the recommendations of the Committee, the Criminal Justice Act 1967 set out the guidelines governing when the use of legal aid should be authorised. This has been repealed and replaced by a similar test in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which states that any grant of legal aid must be in 'the interests of justice'[26] as defined in s 17(2):

> (2) In deciding what the interests of justice consist of for the purposes of such a determination, the following factors must be taken into account—
>
> (a) whether, if any matter arising in the proceedings is decided against the individual, the individual would be likely to lose his or her liberty or livelihood or to suffer serious damage to his or her reputation,
>
> (b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law,
>
> (c) whether the individual may be unable to understand the proceedings or to state his or her own case,

23. This is formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms.
24. Departmental Committee Report: *Legal Aid in Criminal Proceedings* (Cmnd 2934, 1966).
25. ibid at para 180.
26. Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 13(2)

(d) whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual, and
(e) whether it is in the interests of another person that the individual be represented.

Should the above factors be met, a person will qualify for legal representation in court.

However, when considering the role of the defence lawyer, there is a danger of oversimplifying it as one that merely advances the interests of the client. The role of the defence lawyer can be seen to operate on three interwoven levels: first, they are the mouthpiece of their client; secondly, they are an officer of the court; and thirdly, they act as a zealous protector of the rights of their client.[27] Despite being charged with advancing their client's case, however, the defence lawyer's obligation to their client is, at times, tempered by obligations owed to other parties in the criminal justice process. This notion was expressed by Lord Reid in the case of *Rondel v Worsley*:[28]

> Counsel has a duty to fearlessly raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But as an officer of the court concerned with the administration of justice, he has an overriding duty to the court, to the standards of his profession and to the public, which may often lead to a conflict with his client's wishes …[29]

It is clear from this statement that the role of the defence lawyer is not as clear-cut as merely advancing the case of their client and acting in their best interests. At times, they will be charged with actively engaging in ethical decision-making. These ethical obligations will be discussed below, but here we are attempting to construct a theoretical conception of the defence lawyer. It has been claimed that the defence lawyer operates on the horns of a trilemma: they need to accumulate as much knowledge about the case as possible; to hold it in confidence; and yet to never mislead the courts.[30] The adversarial criminal process in England and Wales is rooted in the image of the defence lawyer acting as the accused's shield from the powerful state; this notion has in turn cultivated the ideal of neutral partisanship being a central tenet of the role of the defence lawyer.[31] This duty of neutral partisanship reflects a dual part of the adversarial ethos: the accused is to be adequately protected from the 'oppressive' state, and the truth is best discovered by arguments on both sides of the question.[32] Despite this notion of 'zealous advocacy' being the root of the adversarial process and the best way to discover the truth, very little is said on how ethical implications should underpin the role of the

27. M Blake and A Ashworth, 'Ethics and the Criminal Defence Lawyer' (2004) 7 *Legal Ethics* 167–90 at 167.
28. [1969] 1 AC 191.
29. ibid at 227–28.
30. Blake and Ashworth (n 27) 173.
31. *ibid* 169.
32. *Ex parte Lloyd* (1822) Montagu's Reports 70, 72n per Lord Eldon.

defence lawyer. Does the notion of zealous advocacy permit the lawyer to take advantage of any legal point that favours their client? Should the defence lawyer be so aggressive in challenging the prosecution's witnesses that their evidence is rendered weak, muddled or confusing?[33] It is clear that part of the defence lawyer's role is to act as a zealous advocate in advancing their client's best interests, but how is this primary goal tempered by various obligations to other parties? To answer that, the obligations placed on the defence lawyer will be examined to ascertain how they impact the role.

Following Lord Reid's judgement in *Rondel v Worsley,* the obligations of the lawyer's role can be deconstructed into three core duties:

(1) the duty to the client;
(2) the duty to the court and the administration of justice;
(3) the duty to the public.

Ultimately, the role of the defence lawyer is one that involves juggling a number of conflicting and difficult obligations. The role is greater than merely advancing the case of the client. Whilst the duty to the client involves acting in a partisan manner, the notion of partisanship is heavily impinged by duties to the court and the administration of justice, as well as a duty to the public. The duty to the court and the administration of justice frowns upon certain acts that may be beneficial to the client, such as ambush defences, which despite being legitimate are discouraged by the court for fear that they distort the search for the truth. The duty to the public ensures that the behaviour of the lawyer is ethically and morally correct.

1.5 The judge

As the role of defence lawyers has evolved with the development of the justice system over time, the same can be said for the role of the judge. Prior to the defence lawyer becoming a central cog in the trial process, it was the judge who was responsible for calling and questioning witnesses; essentially, they were the prober of truth who painted a story of facts for the jury to consider and then return their verdict. However, as the trial process became more dominant, the responsibility of the judge dwindled and they became more of a passive umpire. By the mid-20th century, the notion of passivity fully encapsulated the role of the judge. In 1944, Lord Greene (then Master of the Rolls) stated that it is outside the parameters of the judge's role to conduct cross-examination. For if he 'descends into the area [of trial combat he] is liable to have his vision clouded by the dust of conflict'[34] and would no longer be a neutral umpire. This stance continued into the late 1950s when Lord Justice Denning arguably expressed the classic conception of a judge:

> The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been

33. See D Napley, *The Technique of Persuasion*, 4th edn (Sweet and Maxwell, 1991) 57.
34. Per Green MR, in *Yuill v Yuill* [1945] 1 All ER 183 at 189.

> overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate.[35]

Ultimately, the judge ought to sit and listen, and intervene only where necessary, so that the advocates would not be unduly hampered by judicial intervention.[36]

This cloak of passivity was worn until the early part of the new millennium. In 2001, Lord Justice Auld's *Review of the Criminal Courts of England and Wales* created a seismic shift in judicial demeanour. Auld LJ suggested that 'the criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for the truth.'[37] This reminder served as a catalyst for a judicial sea-change, where judges became more actively involved in cases in order to search for the truth.

The courts were very quick to reclaim control of the trial process and embrace this change. In *R v Chabaan*,[38] the defendant appealed against his conviction on the basis that the judge would not allow an application to hear expert evidence. He expected the case to dealt with in a swift and efficient manner. On appeal, Judge LJ stated that a trial judge was 'always responsible for managing the trial … that is one of his most important functions'.[39] As such, the judge was well within his right to refuse the application as 'the entitlement of a fair trial is not inconsistent with proper judicial control over the use of time … every trial that takes longer than necessary is wasteful of limited resources.'[40]

This approach was codified in 2003 by the introduction of the Criminal Procedure Rules, which included the overriding objective to deal with cases justly.[41] The Rules have been revised a number of times over the last 17 years, but the overriding objective has remained the same. This objective is achieved by what is called 'active case management'. Here the role of the judge has been transformed from passive observer to active case manager, which completely shifts the responsibilities of the judge. The Rules define active case management (r 3.2(2)) as:

(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;

35. Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55 at 64.
36. See further E Johnston, 'All Rise for the Interventionist: The Judiciary in the 21st Century' (2016) 80(3) *Journal of Criminal Law* 201–13.
37. Auld LJ, *Review of the Criminal Courts of England and Wales* (2001) 154.
38. [2003] EWCA Crim 1012.
39. ibid at [35].
40. ibid at [36].
41. Criminal Procedure Rules 2020, r 1.1.

(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.

This mantra of case management was further reiterated in *R v Jisl*,[42] where Judge LJ re-emphasised the approach to case management:

> 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 … Resources are limited … It follows that the sensible use of time requires judicial management and control.[43]

It is clear that the role of the judiciary has changed. Judges have shed the cloak of passivity and are no longer the neutral umpire. They are viewed as a case manager, with a responsibility to preserve resources and lead the trial to a timely conclusion.

1.6 The jury and the magistracy

When we think about a criminal trial in England and Wales (or any other common law jurisdiction for that matter), we think about a jury trial where the defence and prosecution lawyers battle it out in the arena of the courtroom with the goal of convicting or acquitting the defendant. Arguably, this premise has been entrenched in common law, where the right to be tried by one's peers has been a cornerstone in the process of ascertaining justice.[44] The core functions of juries, the composition and selection of the 12 jurors and the purpose that they serve is primarily governed by the Juries Act 1974.

It is essential to understand how often jury trials are used in England and Wales. Statistics tell us that juries are rarely used in England and Wales, despite them being viewed as a quintessential foundation of criminal procedure. The vast majority of defendants who would be eligible for a jury trial (ie charged with an indictable-only or either-way offence) avoided this by entering a plea of guilty in 79% of cases in the third quarter (Q3) of 2020. This was an increase of 10% on the same quarter in 2019 (69%).[45] Moreover, in Q3 2020, only 8% of all defendants

42. [2004] EWCA Crim 969.
43. ibid per Judge LJ at [114].
44. C Davies and C Edwards, '"A Jury of Peers": A Comparative Analysis' (2004) 68 *Journal of Criminal Law* 150.
45. Ministry of Justice, *Criminal Court Statistics quarterly, England and Wales, July to September 2020* (December 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944734/ccsq_bulletin_jul_sep_2020.pdf (accessed 28 April 2021).

dealt with at the Crown Court entered a plea of not guilty. This is representative of an 11% point fall on Q3 2019.[46] This demonstrates that jury trial is infrequently used due to high guilty plea rates. To put this into context, in March 2020, there were roughly 245,000 individuals dealt with for indictable-only offences.[47] Therefore, if roughly 8% of defendants plead not guilty, then this would amount to around 19,600 individuals choosing trial by jury. Again, this is a significantly low number compared to those pleading guilty prior to trial.

Over the course of recent years, there has been a steady call in the media to abolish jury trials,[48] as they lack the efficiency of the magistrates' court. This problem has been exacerbated by the Covid-19 pandemic. At the end of Q3 2020, there were 50,918 outstanding cases in the Crown Court, an increase of 44% on Q3 2019 (35,478 cases). This is the highest level of outstanding cases seen since the end of 2015 and continues the consistent increases seen since Q1 2019.[49] Furthermore, in Q1 2019, the mean number of days from first listing in the magistrates' court to completion in the Crown Court was 178 days.[50] This is just over five months, which emphasises the protracted nature of this process.

In order to increase the efficiency of the court process, the Single Justice Procedure (SJP) was created in 2015.[51] This allows for cases involving adults charged with summary offences to be dealt with by a single magistrate, sitting without a prosecutor or defendant being present. The number of SJP cases has increased each year since its introduction, accounting for 57% of all completions at the magistrates' court in Q1 2019.[52] Therefore, since its introduction, 87% of SJP cases are listed and completed at the magistrates' courts on the same day.[53] The speed and efficiency of this process is extremely attractive to policy makers, and it has been estimated that the removal of jury trials could save the criminal justice system around £30 million per year.[54]

Nevertheless, despite the costs, it is clear that jury trial can hold advantages for the defendant over trial in the magistrates' court. 'Jury equity', arguably the biggest advantage, means that regardless of the evidence advanced at court, the jury do not have to return a verdict that follows the evidence. That may sound bizarre, but it is correct – if the evidence points to the guilt of the defendant, the jury are well

46. ibid.
47. Ministry of Justice, *Criminal Justice Statistics quarterly: March 2020* (August, 2020): www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-march-2020/criminal-justice-statistics-quarterly-march-2020 (accessed 28 April 2021).
48. See www.theguardian.com/commentisfree/2021/jan/22/justice-system-crisis-abolish-jury-trials-covid; www.thetimes.co.uk/article/call-for-trials-without-juries-amid-fear-that-crisis-will-put-criminals-on-streets-qk93vdttf (accessed 28 April 2021).
49. Ministry of Justice (n 47).
50. Ministry of Justice, *Criminal court statistics quarterly, England and Wales, January to March 2019* (June 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812556/ccsq-bulletin-q1-2019.pdf (accessed 28 April 2021).
51. Criminal Justice and Courts Act 2015.
52. Ministry of Justice (n 50).
53. ibid.
54. BBC News, 'Cut jury trials, says victims' champion Louise Casey' (November 2010): www.bbc.co.uk/news/uk-11680382 (accessed 1 July 2021).

within their rights to return a 'not guilty' verdict because they believe that is the correct thing to. In *R v Ponting*,[55] a civil servant leaked documents concerning circumstances surrounding the sinking of the Argentinian cruiser, the *General Belgrano*, by a British submarine during the 1982 Falklands War. The defendant was prosecuted under the Official Secrets Act 1911 but appealed to the jury that his actions were in the public interest. Notwithstanding the judge's direction that he had no defence in law, the jury returned a not guilty verdict. Evidently, this case demonstrates that juries cannot be trusted to deliver procedural justice. However, it could be argued that the jury took an ethical approach and, debatably, did the 'right' thing. Furthermore, the case of *R v Biezanek*[56] reinforces this concept of jury equity, where the jury refused to convict a defendant of supplying cannabis for medical reasons. The defendant's daughter had an incurable illness, and the defendant sought to rely on the defence of duress of circumstances. The jury acquitted her after 40 minutes of deliberation. Again, it could be argued that, morally, the jury came to the right decision. However, the defendant was factually guilty and was acquitted notwithstanding the evidence against her.

These two cases pose an interesting argument – is it more important for juries to return a legally sound verdict, or should they rely on their conscience and ethics when reaching their verdict?

But what if we simply cannot trust juries to reach a sound verdict? This was illustrated in the case of *R v Young*,[57] which saw four jurors consult an ouija board outside of the deliberation room to determine their decision on the defendant's guilt. A unanimous guilty verdict was reached, but this was later quashed and a retrial ordered. However, it nevertheless illustrates the silliness and lack of responsibility with which some jurors may act.

A core responsibility of the juror is to shut out all irrelevant considerations and only pass a verdict based upon the evidence which has been advanced at trial. However, in high-profile cases, which have garnered much media attention, is this really possible? In 2010, a Ministry of Justice report found that in a sample of jurors, 70% serving on 'longer, high-profile cases' recalled media coverage of the case.[58] A further 35% recalled pre-trial media coverage, and 20% found it difficult to disregard these reports.[59] This has frequently raised concerns about jury fairness and created a lack of trust within the system.[60] Therefore, both external influence and latterly the effects of the Covid-19 pandemic have suggested a public desire to make jury trials redundant.[61] Conversely, the Bar Council and Law

55. [1985] Crim LR 318.
56. (1993, unreported).
57. [1994] 11 WLUK 246.
58. Houses of Parliament, *POSTNOTE: Unintentional Bias in Court* (Cm 512, 2015).
59. Bar Council, 'Guest blog: How will restricting jury trial and reducing jury numbers effect the delivery of justice' (2020): www.barcouncil.org.uk/resource/guest-blog-how-will-restricting-jury-trial-and-reducing-jury-numbers-affect-the-delivery-of-justice.html#_ftn25 (accessed 28 April 2021).
60. C Thomas, 'Are juries fair?' (2010) *Ministry of Justice Research Series 1/10*, 40.
61. BBC News (n 54).

Society Survey in 2002 found that over 84% of the public trusted a jury to come to the right decision and felt that trial by jury was fairer than being tried by a judge.[62]

However, if all cases were heard by either a single judge or a bench of magistrates, there could be a higher number of miscarriages of justice. Yes, the magistrates' court deals with cases in a far more efficient manner, but it is in Crown Court jury trials where the most serious cases are heard and the most severe sentences handed down. The magistrates' court can impose a sentence of an unlimited financial penalty or six months' imprisonment (or 12 months for two or more either-way cases).

If we were to have more cases heard in the magistrates' court, we might want to increase the training offered. Magistrates are lay people, and it is not a pre-requisite to have any formal legal education; anyone can be a magistrate so long as they embody the six key qualities of the role:

(1) good character
(2) commitment and reliability
(3) social awareness
(4) sound judgement
(5) understanding and communication
(6) maturity and sound temperament.

Once the required threshold to be a magistrate has been met, basic training is given to ensure candidates can carry out their duties. Whilst we may be critical of magistrates as an alternative to judge and jury, they carry out an important function of dealing with low-level crime, something that the criminal justice system is inundated with, and generally in serving the community.

This section has shown that there is a clear desire to keep cases away from juries. Whilst in some circumstances, juries can be seen as irresponsible and lacking accountability, they provide a fundamental cornerstone to our criminal justice system – even if they are rarely used. Decisions about modifying the criminal process should not be informed by efficiency drivers alone. Economic savings for the justice system cannot and should not trump the fair trial rights of defendants. Trial by jury 'is the lamp that shows that freedom lives',[63] and this lamp should be upheld and protected in modern society.

1.7 Conclusion

This chapter has outlined the myriad conflicting goals that are entrenched within the criminal justice system of England and Wales. In a suspect's first encounter with the system, they will be met with the police, who are looking to arrest the person they suspect has committed the offence. In high-profile cases, the police are under an inordinate amount of pressure to catch the culprit. At times, the police

62. Law Society Gazette, 'Public opposes curb on jury trials, survey says' (2002): www.lawgazette.co.uk/news/public-opposes-curb-on-jury-trials-survey-says/35989.article (accessed 28 April 2021).
63. P Darbyshire, 'The lamp that shows that freedom lives – is it worth the candle? [1991] *Criminal Law Review* 740.

face a great deal of public scrutiny and opposition, merely for doing the job the government has tasked them to do, often at a great threat to their lives and safety.

Once the police have arrested a suspect, it is for the prosecution to charge the suspect and prepare the case for trial. The defendant might have a defence lawyer who will look to zealously defend their client from the charge and seek to establish doubt in the prosecution's case in order to secure an acquittal. This acquittal might be given by a jury, but statistically it is more likely that the case will be heard in the magistrates' court by a bench of lay people. All of these actors have conflicting goals and objectives, and they are all important cogs in the wheel of criminal justice.