THE SECRET BARRISTER

Stories of the Law and How It's Broken

PICADOR

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Introduction: My Opening Speech

'And so that is your defence, is it, Mr Tuttle?'

A pause. His eyes dart to his girlfriend in the public gallery and back to me – a micro-glance, no more – but enough, I'm hopeful, for the jury to have clocked. I turn my head just slightly, crossing gazes with the lady on the front row at the far end. She's noticed. She's folded her arms. In fact, several of them have. The elderly chap in the navy blazer and beige slacks nudges the gingham-shirted, fabulously bearded fellow to his left, and they trade conspiratorial grins.

The body language is not good for Mr Tuttle.

He digs his fingers into the sides of the witness box, groping for the right response, oblivious that there isn't one. As his cheeks flush and he shuffles his feet, he appears to look longingly at the dock at the back of court, stung with regret at his decision to leave the safety of its perspex confines and walk the long fifteen feet to give evidence in his own defence. He had to, of course. It is near-impossible to successfully run self-defence without giving your own account on oath as to why you brought fisty justice to bear upon the man next door. But it is obvious that, if Mr Tuttle could turn back time, he'd give serious consideration to exercising his right to silence.

The double doors to my right groan. The usher slides in cradling his clipboard, pursued by a crash of law students, who are silently urged towards the public gallery. The only thing a barrister enjoys more than an audience is a bigger, more impressible audience. So I wait for them to squeeze themselves into the narrow oak pews in the back right corner. The lengthy pause, as Mr Tuttle weighs up how to answer my semi-rhetorical question, helps build the

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suspense. I savour it. I calmly top up my plastic cup from the water jug, and take an insouciant sip of water.

As I do, I notice that all eyes in the courtroom are momentarily trained on a trailing undergrad who, having entered last, has managed to clout Mr Tuttle's partner with his manbag as he climbs over her to the last space on the front row.

She audibly mutters some choice expletives as the student removes himself from her lap. The clerk of the court, hitherto tap-tap-tapping away at her computer, looks up and stares.

'What? He hit me in the face! Could have had my fucking eye out.'

'Shhhh!' the clerk hisses, waving a gowned arm towards the usher, who duly trots to the public gallery to administer a further, entirely superfluous, shhhh.

I look up behind the clerk towards the judge, expecting some sort of judicial admonishment for these noises off, but Her Honour Judge Kerrigan QC is still leaning back in her chair and staring longingly at a fixed point on the ceiling. Now the casual observer may, quite wrongly, think this an indication that Judge Kerrigan is bored by the pedestrian advocacy of a twenty-something upstart apparently channelling an unholy trinity of the Jeremies Paxman, Clarkson and Kyle as they superciliously showboat their intellectual advantage over the bewildered Mr Tuttle. The same observer may, equally mistakenly, bolster this conclusion by reference to the way in which Her Honour appears to have been, at various stages during the twenty-six laboured minutes of questioning leading up to this point, closing her eyes and dropping her head, before jolting alert again with a quiet snort.

But I know better. The Learned Judge is, quite plainly, bowled over by my oratory skill; no doubt mentally formulating the letter of praise that she will be sending to my Head of Chambers immediately the trial concludes. *Advocacy,* she will surely write, *has a new champion. A golden age of justice is upon us.*

Everyone now seated and hushed, I can resume my sparring. Mr Tuttle again glances for reassurance to his girlfriend.

'You won't find the answer in the public gallery, Mr Tuttle.' I obnoxiously smile at him.

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‘It’s a very simple question. What you have said is what you’re honestly asking this jury to believe, yes?’

This is an appallingly phrased, and wholly improper, question. Questions in cross-examination should strictly only be aimed at eliciting facts, not providing an opportunity for the advocate to comment. Closing speeches are where we get to make plain how preposterous we think the other side’s case is. And clearly Mr Tuttle is asking the jury to believe what he said, otherwise he wouldn’t have said it. But I’m feeling good, this is my first jury trial, and no one yet has interrupted to stop me. So I wait for Mr Tuttle’s response.

He delivers another flick of the eyes to the gallery, and back. ‘Yes,’ he nods, any defiance long since melted.

‘How tall are you, Mr Tuttle?’

‘Dunno.’

‘Would you agree that you’re over six foot?’

‘Probably.’

‘And how much do you weigh?’

It doesn’t matter what his answer is. Mr Tuttle is, at a conservative estimate, roughly the size of a supertanker, and, by obligingly wearing a skinny fit, short-sleeved white shirt, is displaying to marvellous effect every square inch of his tattooed mega-roided biceps. These questions are simply to hammer home the point.

As he mutters estimates, I yank my black gown straight. Posturing with faux furrows, I turn to the jury and look towards crossed-arms woman. I catch her eye. She raises an eyebrow. She knows where we’re going.

‘And,’ I say, looking straight at the jury so as to maximize my apparent disbelief, ‘you are telling this jury that the blind man on crutches hit *you* first?’

I swivel to him at those last three words and release them as slowly as melodrama allows. An audible snigger from my left tells me that Mr Tuttle’s goose is cooked.

There is nothing he can now say to make his position seem less ridiculous. At this point in a boxing match, he would be hurried out of the ring by minders to avoid him doing himself any more damage. No answer can improve his position. One response,

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however, could take the goose out of the oven, elegantly carve it and serve it to the grateful cheers of the prosecution. And Mr Tuttle obliges.

'It wasn't how you're making it sound, yeah?'

The joy. I hear a stifled snort from the Crown Prosecution Service paralegal sitting on the row in front of me. My cross-examination, as written out neatly in the standard-issue blue counsel's notebook perched on my lectern, was going to end on that last, over-gestated question. But now, not only is Mr Tuttle giving the jury an implausible story, he's trying to wriggle out of it. The one thing worse than a liar is a liar lying about being a liar. So I treat myself to an encore.

'It wasn't how I made it sound?'

'Nah.'

'Well, we know Mr Martins is blind, yes?'

'Yes.'

'And you agree he was on crutches?'

'Yes.'

'And you say that he hit you first?

'Yeah.'

'Right. So, let's try again. You're saying that the blind man on crutches hit you first, aren't you?'

'Umm . . . yeah.'

'Right.'

As I take a beat to work out how best to gracefully conclude, there's a frantic scrabbling noise from the end of Counsel's Row – the long wooden bench at the front of court, facing the judge – as Tuttle's defence barrister, Mr Rallings, a surly old hack of forty years' call, furiously scribbles something on a scrap of paper and thrusts it with force along the bench towards me. Up until this point, Rallings has done his best to maintain a rictus poker frown as his client merrily yanks pins out of grenades and stuffs them down his trousers. But now he's stirring.

I take it. This is unnerving. Why a note, mid-cross-examination? Have I done something wrong? Is he pointing out that I've said something that breaches a vital rule of evidence or court etiquette? The blood rushes to my face as the panic takes hold. I have not been doing this long. I don't know what I'm doing. I'm a

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Crown Court virgin – no, a baby, a zygote. What fatal sin have I committed? I've blown it. I must have. Lord knows how, but the look on Rallings' wizened face – that cocksure lip-curl-cum-snarl – tells me all I need to know. Carried away with the myth of my own brilliance, I have somehow fluffed it all up. I have flown too close to the sun on wings forged of a misplaced confidence in my plainly meagre ability. I've kicked off my Crown Court career by losing the unlosable trial, and this scrumpled grey leaf of A5 bears my epitaph.

I try to feign composure as I unscrunch the note. Whatever it is, I silently counsel, it will be OK. I have my *Archbold* – the criminal lawyer's bible – to extricate me from any legal problem. I have the warm embrace of a four-legged friend waiting at home if I'm ultimately disbarred. Things will be OK.

I glance down at what Rallings has to tell me.

On the paper is a really rather good drawing of a stick man in a wig. He's sobbing into his arms. He has a little goatee like Rallings. Below the impression, Rallings has simply written: THIS IS A FUCKING TURKEY SHOOT.

He nods grimly, leans back and looks at the jury. And, then, with an almost imperceptible glint in his eye – a comradely tell of shared ownership of a moment, a sinking defendant setting fire to his own lifeboat, that we'll both remember for years – he turns to me, angling his head out of the line of sight of the jury. And winks.

This, ladies and gentlemen, is the English and Welsh criminal justice system in action. I don't suggest it is the finest example, but it serves as a rough extract of how contested matters of criminal law are settled. And it probably broadly conforms to the picture most of us in the UK immediately summon to mind when we think about justice. Whether learned from first-hand experience or absorbed from pop culture, we all share a conception of criminal justice that we have come to accept as representing the way things are done, and the way things *should* be done. It's culturally embedded, like apologizing when someone else bumps into you, or avoiding eye contact in a lift.

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For some of us – if my non-lawyer friends are a reliable barometer – this mental portrait of English criminal justice fuses Judge Judy unholily with *that* scene from *A Few Good Men*. Others fall back on the home-grown motifs of Rumpole, Kavanagh QC or, lord help us, *All Rise for Julian Clary*.[1] But whatever variants we visualize, we probably all agree on the basics: an adversarial battle – *adversarialism* being a loose term for the model pitting the state against the accused in a lawyer-driven skirmish for victory played out before an impartial body of assessors – comprising a courtroom, judge, jury, accused, lawyers, witnesses, questions and speeches in some sort of configuration. And plenty of wigs.

That, for most people though, is possibly where contemplations on criminal justice end. I imagine few of us devote much, if any, time to thinking critically about our criminal justice system; to considering how and why we have this particular way of doing justice, or reflecting on the impact it has upon the hundreds of thousands of people – defendants, witnesses and victims – who pass through the system every year. Not in the way that most of us form and gladly share opinions on the way we administer or fund healthcare, say, or the merits or demerits of types of schools. And this I find odd; because criminal justice affects us all.

We are yet to find a society that does not have rules surrounding the behaviour of its members and sanctions for their transgression. Agreeing social imperatives and taboos, and enforcing them through shunning, appears to be instinctual behaviour in cooperative primates[2], and the notion of a codified criminal law can be traced back to Bronze Age Mesopotamia and the Code of Ur-Nammu in 2050 BC. The precise rules have since differed across time and geography, but a mechanism for administering criminal justice always exists. To commit a crime is to break a law that offends not just those directly affected, but strikes at the heart of our communal values so deeply that we agree that organized, coercive action is required to mark the affront. Crimes are marked as the gravest breaches of our social codes which, unlike civil wrongs such as breach of contract, the state cannot leave to individuals to privately arbitrate.

The criminal law establishes the boundaries of our humanity by identifying the no-go zones and endowing the state with unique

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powers of correction intended to punish, deter, protect and rehabilitate. Crimes are the legal disputes that evoke primeval, visceral reactions in people with no stake in the fight, intruding through screens and leaping off pages and into our core identity, pinching and testing the standards by which we define ourselves. If crimes are permitted to occur unaddressed, or are attributed to the wrong person, the harm extends beyond those directly involved. It means that our streets are less safe, our values are undermined and our personal liberty is at risk. A fundamental term of our social contract is that the rules are enforced fairly against us all; a breach of this term offends our innate sense of fairness like little else.

And it is not merely theoretical. While we may not wish to think about it, for most of us the impact of criminal justice will someday be immediate and all too tangible. It is certain that at one point in your life, you or someone you love will be in a criminal courtroom; whether it is as a juror, a victim of crime, a witness or locked behind that perspex screen at the back of court, screaming your innocence and flanked by bruising security guards dragging you down to the cells.

I can understand why people might only think of criminal justice in the abstract. Without first-hand experience of the system, it is easy to not give its impenetrable workings much of a second thought. But that first direct contact changes everything. At this point it is brought home, vividly and viscerally, what criminal justice means in practice; not abstract concepts in dusty textbooks, but a suffusion of humanity – tears, blood, anger, loss, redemption and despair. 'Dispensing criminal justice' means changing lives forever. The trial process and court's judgment can tear a life apart. Families can be broken, children separated from their parents and people locked up for decades. A miscarriage of justice can leave the aggrieved confined, metaphorically or literally, in a prison from which there appears to be no escape. While in the UK the state no longer has the power to kill at the end of a criminal trial, functioning justice can still ultimately be a matter of life and death.

Furthermore, until that first contact, you may take for granted that, much like other inscrutable fundamentals of our society such

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as intelligence-gathering, refuse collection or library cataloguing, when required the system will broadly, allowing for the margin of error common to all state-delivered services, work as it should, and that the right outcome will be delivered in the end. This entirely understandable complacency is, for many people I meet, what makes that first immersion in the criminal justice system so shocking, as they realize not only how strongly they disagree with the way in which our society prioritizes and dispenses justice, but how, quivering outside the courtroom door, it is now too late to do anything about it.

As someone immersed in the fog of the criminal courts, my fear is that the public's lack of insight into our secretive, opaque system is allowing the consecration of a way of dealing with crime that bears little resemblance to what we understand by criminal justice. That defendants, victims and, ultimately, society are being failed daily by an entrenched disregard for fundamental principles of fairness. That we are moving from a criminal justice system to simply a criminal system.

When you have sat in as many decrepit court cells or tired, coffee-stained witness suites as I have, looking into the eyes of someone whose most basic sense of what is 'fair' and what is 'right' has been entirely crushed by their exposure to the criminal justice system, you can either slink into jaundiced defeatism, or you can sound an alarm.

This is what I want to talk about: to explore why criminal justice matters, and to show how I think we are getting it so wrong.

But first, a bit about me. I'm a criminal barrister. Not a particularly special one. My cases, by and large, aren't the ones you'll see on the news. I am the kind of jobbing, workaday junior practitioner whom you may find representing you if you suffer the twin misfortunes of being accused of an everyday criminal offence, and of not having available to you someone a little bit better.

I'm a 'junior' barrister in a similar way that the term is applied to junior doctors. It is not a signifier of youth, rather a catch-all for any barrister, from trainee (or 'pupil', in the legalese) up to grizzled old warhorse, who has not been appointed Queen's

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Counsel (the honour bestowed upon the most impressive in our ranks).

Hopefully, our paths will never cross. But if they do, I can guarantee that, like an undertaker or a clinician at an STD clinic brandishing a cotton bud, it will be at one of the lowest points of your life. Ours is the trade in human misery; the grotty little cousin of the finer, more civilized, more commercial tributaries of the law.

The role of barristers in this misery is, I have learned, not widely understood. Mostly the fault for that lies with us. For professional advocates, we do a strikingly bad job of explaining what we do, or why it matters. In a nutshell, criminal barristers are first and foremost advocates, presenting cases in court, usually the Crown Court, on behalf of either the prosecution or the defence. In practice, the job also requires the skills of a social worker, relationship counsellor, arm-twister, hostage negotiator, named driver, bus fare-provider, accountant, suicide-watchman, coffee supplier, surrogate parent and, on one memorable occasion, whatever the official term is for someone tasked with breaking the news to a prisoner that his girlfriend has been diagnosed with gonorrhoea.

My daily fare is eclectic and erratic. Usually I will be prosecuting or defending in jury trials, but some days are peppered with other, shorter hearings: opposing a bail application for an alleged arsonist here; advancing mitigation at the sentence hearing of a heroin dealer there. Sometimes I'll be doing my own cases, sometimes covering for colleagues who are stuck elsewhere.

It is unpredictable, irrational, adrenaline-infused mayhem every second of every day, where the only certainty is uncertainty. Hearings and trials overrun, find themselves suddenly adjourned or are listed immediately without warning, making it impossible to say with confidence what you will be doing or where you will be in four hours' time. Your bones ache, your shoe leather disintegrates bi-monthly and your shoulder creaks from dragging your suitcase laden with papers, books, wig and gown between courts and cities. You can become inured to the blood-spattered underbelly of the human condition; unmoved by the mundanity of yet another 'bog standard' stabbing, or desensitized by the unending parade of

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sexual abuse. You are at best a part-time family member and a fair-weather friend, expected by the courts to abandon holidays, weddings and funerals at a judge's command. An early night sees me home at 8 p.m. A late night is the following morning. Throw in the industry-wide 'perks' of self-employment – the perennial insecurity, the fear of work drying up, the absence of sick pay, holiday pay or pension, the fact that legal aid rates can work out at below minimum wage – and the criminal Bar is in many ways an intolerable existence.

But it is also irresistibly special.

In an age where juries have all but disappeared from civil courtrooms, criminal law is the last vestige of the pure advocacy tradition, where the power of persuasion and force of rational argument, its significance augmented by the historical trappings – the mode of speech, the splendour of the courtroom, the ridiculous Restoration-hangover horsehair wigs – is the tool by which liberty is spared or removed. The attraction to an egotist with an insatiable desire to hold centre stage – a description applicable to the near-entirety of the Bar – is plain; but for me, and most criminal barristers I know, there is a greater, overarching reason for choosing this path: crime is where the stakes are highest.

The worst that happens if you lose a case in civil or commercial law is that you lose a lot of money, or fail to win money. If you lose a family law case, you might lose your children. In a repossession case, you could lose your home. These are all significant, sometimes life-changing events. But if you lost a criminal case, up until 1965, you could lose your life. And while we have left behind our tradition of sanctioned bodily violations, dismemberment and killing, we have supplanted it with the deprivation of liberty, a punishment capable of encompassing all of the losses above and far more beyond. Loss of the freedom to live with those you love, to work in your job, to provide for your family; the abrogation of the pursuit of happiness, the pausing of your existence, for a period determined by the overbearing power of a state largely uninterested in the consequences for you or your family, is a price whose value only those who have paid it truly know.

And those of us criminal hacks who hawk our wigs and gowns from court to court across the land do so, spending long hours

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sifting through the very worst of the human condition, because of a fervent, some might say naive, faith in the rule of law and our role in upholding it. If criminals avoid justice, the loss is not only felt by the victim. The danger created by harmful behaviours going uncorrected presents a significant threat to the individual liberty of us all. If there are too many wrongful convictions, or too few criminals getting their just deserts, the delicate social contract bonding us all to each other and to the state can swiftly disintegrate. Simply put, if enough people don't believe the state to be capable of dispensing justice, they may start to dispense it themselves.

It is for these reasons that it is not hyperbolic, I honestly believe, to suggest that working criminal justice, and our role prosecuting and defending criminal allegations, is essential to peaceable democratic society. It is when people feel that justice is denied that they are at their most indignant and rage-filled; it is in the gaps between justice that anti-democratic, subversive urges can take root.

This is why I consider what I do on a day-to-day basis to be not just a privilege but a civic responsibility. And it is for the same reasons that the current state of our criminal justice system should terrify us.

Because despite the noble principles underpinning the system, despite its international prestige, its intellectual craftsmanship and the very real blood, sweat and tears spilt in its ponderous cultivation, my still-tender years exposed to the grim reality have taught me that the criminal justice system is close to breaking point.

Access to justice, the rule of law, fairness to defendants, justice for victims – these fine emblems which we purport to hold so dear – are each day incarnated in effigy, rolled out in the Crown and magistrates' courts and ritually torched.

Serious criminal cases collapse on a daily basis because of eminently avoidable failings by underfunded and under-staffed police and prosecution services. The accused and the alleged victim can wait years for a trial, told their cases are 'adjourned for lack of court time' for a second, third or fourth time, notwithstanding the brand new courtroom, built at significant

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public expense, sitting empty down the corridor due to slashed court budgets. The wrongly accused wait until the day of trial, or perhaps for eternity, for the state to disclose material that fatally undermines the prosecution case. Defendants can find themselves represented by exhausted lawyers able to devote only a fraction of the required time to their case, due to the need to stack cheap cases high to absorb government cuts. Some defendants are excluded from publicly funded representation altogether, forced to scrape together savings or loans to meet legal aid 'contributions' or private legal fees, failing which they represent themselves in DIY proceedings in which the endgame is a prison sentence. The bottom line is that victims of crime are denied justice, and people who are not guilty find themselves in prison.

And what astounds me is that most people don't seem to care. Or even know.

On the day after a parliamentary report published in May 2016[3] began with those nine damning words – *the criminal justice system is close to breaking point* – not one single newspaper thought it more newsworthy than repetitive scare stories about migration or, in one case, a confected 'scandal' over *Britain's Got Talent*.

When Karl Turner MP tabled a parliamentary debate over the parlous underfunding of the Crown Prosecution Service (CPS) in January 2017, his litany of sobbing CPS staff and collapsing prosecutions – the things that we in the courts see every day – was attended by a meagre handful of MPs, and met by a virtual media blackout.[4] When the courts upheld government initiatives to deprive the wrongly accused of their legal fees,[5] there was no clamour. Just deafening silence.

If the criminal justice system were the NHS, it would never be off the front pages.

I find it impossible to reconcile this collective indifference, because it is plain that innately we all do care. We know that from the green ink letters to the editor when a paedophile gets a 'soft sentence' or 'early release' from prison, or the police fail to investigate serious allegations of sexual abuse or, worst of all, when the wrong person is convicted. We know from popular culture – from our *Serial*s and *Making a Murderer*s and our Innocence Projects – that the ideal of justice, and in particular

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criminal justice, can be perhaps our greatest unifier. But something somewhere has clearly gone wrong.

I think it's traceable to the failure of the establishment – and us, the professionals in the system – to properly explain to the wider public how the criminal courts work, why they work the way they do, and why that is a good or bad thing, which has led to a catastrophic dissonance in public understanding. What a jury, or what the public, gets to see is but a pinhole view of the system. There is far more happening behind the scenes, or unreported in magistrates' and Crown courtrooms, closeted in comfortable anonymity and about which the people we serve simply don't know.

This is why I have written this book. I want to shine a light on what really goes on, to take you into the rooms you never get to enter; but more than that I want to explore why we should care, and to illustrate what happens when we don't.

I'm probably not the sort of barrister usually invited to publish a book. I am not reliving a CV bursting with the great and weighty cases of our time. I profess no particular specialism or expertise in my field. I am not an academic. I am not a jurist, a philosopher, an historian or a scholar. I am as much a stranger to the gilded upper echelons of the legal system as they are to me. But I have spent the best part of a decade prosecuting, defending and advising on behalf of my fellow citizens, and I wanted to write this book while I am still a relatively fresh face to this warped game, before the delicate balance between idealism and cynicism tips too far. I write anonymously because it buys the freedom to be candid; to call upon my own personal experiences, and those of others, to illustrate the first-hand tales of justice and injustice that play out every day in courts throughout the land.

This book is loosely structured following the life of a criminal case, from the first appearance before a magistrates' court, through to trial in the Crown Court, sentence and appeal. And it considers, at each stage, how justice works, and, more importantly, how it often doesn't.

I will also do my best to explore some of the questions raised along the way; in particular common public concerns that we in the system should perhaps be better at answering. Why should the

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taxpayer fund legal aid for career criminals? How can you defend someone who you believe has raped their own child? Does our system of adversarial justice, pitting the state against the accused in a winner-takes-all war of attrition, do more harm than good? Is the sentencing of criminals just a giant con on the public? And the one overarching question of my own: how, if we truly value criminal justice, have we allowed our system to degrade to its current state?

Certain details of the cases that follow have been changed to preserve the identities of those concerned; however the core of each reconstruction – the incompetence, the error and the malice – is all too true. The examples cited are not special. They are not the stories that make the news. They are not the miscarriages of justice that engender Twitter storms or provoke magazine confessionals or inspire true-life cinema. They are the ordinary tales of injustice that stalk the criminal courts; the fleeting, repetitive diminishment of human dignity that crosses the path of the jobbing criminal hack.

My perspective is necessarily limited, and my role entirely incidental; but I hope it is nevertheless of value.

A working criminal justice system, properly resourced and staffed by dedicated professionals each performing their invaluable civic functions, for the prosecution and the defence, serves to protect the innocent, protect the public and protect the integrity, decency and humanity of our society. This should be a societal baseline. Not a luxury.

Most of you reading this will never expect to be plunged into a criminal courtroom – never expect to hear the constabulary knock on the front door, never expect to be a victim of crime, never expect to be accused of a crime you didn't commit. But the one thing I have learned about criminal justice is that it doesn't discriminate. Anyone can be reeled in. And if you are, whether you're giving evidence against the man who hurt your child, or swearing blind to a jury that that pedestrian stepped out in front of your car without looking, you want the system to work.

When it doesn't, the consequences can be unthinkable.

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1. Welcome to the Criminal Courtroom

> 'It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.'
>
> Mr Justice Frankfurter,
> United States Supreme Court, 1950[1]

To an extra-terrestrial touching down outside a city Crown Court, our way of resolving disputes where an individual is alleged to have breached our central social code would be unfathomable. Get two people with plummy accents, stick them in black capes, shove horsehair wigs on their heads, arm them with books of rules weighing as much as a grown pig and use them as proxies to verbally joust in front of a bewigged sexagenarian in a big purple gown, while twelve people yanked off the street sit and watch and try to make sense of it all and decide who's in the right. The winner gets nothing. The loser gets locked up in a concrete box.

To those earthlings not intimately acquainted with the English and Welsh criminal justice system, this spectacle is probably only marginally less bizarre. At this stage, it is therefore worth taking a moment to examine it a little closer. Before looking at how and why criminal justice may not be working, we need to explore how it *should* be working. Let's go back to that opening scene with our enormous-bicepped Mr Tuttle and quickly consider the elements within the courtroom. What exactly is taking place? How did we come to choose this ostensibly absurd routine as our vehicle for crime and punishment?

Let's start with the accused himself, slouched stony-faced in the dock.

The Accused

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Mr Tuttle punched his neighbour in the face after a disagreement about a border between their properties, something that happens all over the world and has happened throughout history, and which means under current English and Welsh law he stands charged with 'assault occasioning actual bodily harm'. He was arrested by the police following the neighbour's complaint, interviewed in a police station with a solicitor and, after the police investigation produced sufficient evidence for the Crown Prosecution Service to authorize a charge, was charged. As he denies that he is guilty, he is being tried.

This particular offence can be tried in either a magistrates' court or a Crown Court. We'll come back to this distinction later, but what's important at this point is that Mr Tuttle has exercised his right to have his guilt determined in a Crown Court by an independent jury of his peers, who will know nothing of the case before coming to it. The twelve jurors will observe and listen to the evidence and arguments presented by the two competing sides, prosecution and defence, and will be directed by the judge on the applicable law, before retiring to consider one question: can they be sure that on the evidence the offence is proved beyond reasonable doubt? If guilt is proved, the maximum penalty the state can impose is a period of imprisonment, in this case up to five years.

As discussed, although culturally ingrained as the default mode of trying alleged crimes, this process is far from universal.[2] While we have exported our treasured form of adversarial, state-versus-defendant justice around the world, usually at the end of the barrel of a colonial musket, many other countries do things very differently. The most commonly cited distinction is the rough divide between Anglo-American adversarial proceedings, and Continental, Napoleonic-inspired inquisitorial proceedings.

If Mr Tuttle were being tried in Belgium, for example, he would find that he was party to what felt like an inquiry rather than a contest. As this is not a particularly serious allegation, he would fall under the jurisdiction of the middle 'tier' of the court system where the investigation is often placed in the hands of an investigating judge, who directs the police to gather evidence and then assesses it in a mostly paper-based trial process. Mr Tuttle's

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lawyer's role in challenging the prosecution witnesses would be minimal, with any questioning being conducted through the judge. There would be no jury, and he would have to wait a month following his trial for the judge's decision.[3]

If he were being tried in Saudi Arabia, he could expect to find himself in a closed courtroom, with no lawyer, charged with a *qisas* ('retaliation-in-kind') category of Sharia crime for which a judge might order an unpleasant form of physical retribution. Had Mr Tuttle's victim been unfortunate enough to lose an eye in the assault, the court could order that Mr Tuttle's eye be gouged out.[4] On the plus side, had this been a capital case of homicide, Mr Tuttle could evade execution by paying *diya*, or blood money, to the victim's family.

In our courts, Mr Tuttle could have avoided the stress of a trial by pleading guilty. Even if there was no other evidence against him, his confession to a criminal offence would be gladly banked by the English courts. However in Japan, unless the state had corroborative evidence, Article 38 of the constitution would prevent him being convicted even if he gave a full and frank confession.

Put simply, without diving into a full-blown international comparative analysis, our familiar system is not the only way to deal with Mr Tuttle. Nor has it been the way our country has always tried the Tuttles throughout history.

In Anglo-Saxon England, the notion of trying a criminal allegation on the evidence simply did not exist. Until the tenth century there were no formal courts; instead wronged parties were encouraged to settle blood feuds with the accused by payment of *wergild* – blood money. From the mid-sixth century, the king handed down laws, or 'dooms', supplemented by local customary law. As Saxon kings gradually took a greater interest in enforcing the law, certain offences, such as treason, homicide and theft, were taken out of the scope of private settlement between the parties and into the hands of the king. Come the tenth century, if a citizen were accused of breaching either the king's law or local custom, he would be dragged by his accuser before a monthly community court and, unless he could find sufficient 'oath-swearers' to attest

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to his innocence, would have his guilt determined by trial by ordeal.

This would take either the form of trial by hot water, requiring Mr Tuttle to plunge his hand into a cauldron of boiling water to retrieve a stone; or trial by cold water whereby the accused would be trussed up and hurled into a lake. If his injuries healed within three days, in the case of the former, or if he sank, in the case of the latter, God had deemed him an innocent, if slightly burned/drowned, man. If his seared palm still appeared a bit bloody and charred, or if he floated (as many defendants did, simply because the way in which they were tied up created a buoyancy effect), this was God delivering a guilty verdict.

Following the Norman Conquest, Mr Tuttle would have had the option of trial by combat (which from the looks of him, he would be sensible to take), with his accuser or their proxies; but it was not until the thirteenth century that something approaching a trial based on evidence, rather than wanton violence, emerged. We'll turn to that shortly.

In the meantime, before we move away from the accused, we should say a word about his fate upon (inevitable) conviction. A period of custody in one of Her Majesty's prisons is the most severe sentence the court can pass. Yet, the idea of deprivation of liberty as punishment is relatively modern. Anglo-Saxon and Norman sentencing offered a buffet of hanging, eye-gouging, testicle-extraction, nose-and-ear removal (a favourite of King Canute for female adulterers), fines, reparations and other creative facial and bodily mutilation. By the dawn of the Plantagenets and the reign of Henry II (1154–89), punishment for many crimes was standardized as the lopping off of the right hand and foot and banishment from the realm.[5]

Bodily mutilation of various grisly forms persisted through Tudor times, usually culminating in death. Public humiliation, including pillories and public whippings, were available for less serious matters until the late nineteenth century. Meanwhile prisons, first built in the twelfth century, were mainly used to hold prisoners awaiting trial or to detain debtors. From the early sixteenth century, houses of correction fell into fashion for vagrants, combining confinement with forced labour, but it was

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not until the 1800s that imprisonment took over from executions and transportation to the colonies as the favoured mode of punishing offenders. Although Mr Tuttle's offence would not then have cast him in the shadow of the noose, hanging remained for murder and treason until the abolition of the death penalty in 1965. Nowadays the courts also have an array of sentencing disposals aside from prison, including powers to impose, for example, a community order with unpaid work and an alcohol rehabilitation programme, and a compensation order. As was ultimately imposed upon Mr Tuttle back in twenty-first-century England by our possibly only semi-conscious judge, whom we should probably take a look at.

The Judge

Turning our heads away from Mr Tuttle and towards the raised bench at the back, we can see the judge. The first thing to note is that she does not have a gavel. Gavels have never been used in English and Welsh courtrooms. The one way guaranteed to provoke the pedant in a British lawyer is to illustrate a legal story with a stock photo of a gavel. What Her Honour Judge Kerrigan QC does have is a fetching black and purple robe with a red sash and a short, frizzy horsehair wig; the working court dress of a Circuit Judge. She also has a relatively fixed sense of what the law is and how that should impact upon the directions she gives the jury and the sentence she bestows, which as we'll see hasn't always been the case.

The term 'Circuit Judge' refers to the six legal circuits or regions into which England and Wales have been traditionally divided – Northern, North-Eastern, Western, Midlands, South-Eastern, and Wales and Chester. Prior to 1166, justice was mostly administered in London by the king and his advisors sitting in the King's Court (the *Curia Regis*) in Westminster, while out in the country justice was dispensed by smaller local courts, presided over by lords or stewards applying whatever kooky parochial customs took their fancy. It would mean that Tuttle would have received different treatment depending on where he lived. This created obvious

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inconsistencies in how the law was applied across the land, so at the Assize of Clarendon in 1166, Henry II sought to introduce a 'common law' applicable nationwide, by establishing a cadre of judges who roamed the circuits, sitting in pop-up courts ('assizes') and applying the new common law. A key feature of the so-called 'common law tradition' is that where legislation has gaps or ambiguities, or calls for clarifying interpretation by judges hearing cases, the rulings of the most senior courts (today the High Court, Court of Appeal and Supreme Court) have the force of binding law, and must be followed by lower courts. This means that if you want to know the law on a given topic, the statute alone only tells you half the story; you will need to know what gloss has been slapped over it by court precedents.[6]

In the criminal sphere, there gradually developed three tiers of court: the least serious matters were handled by non-legally qualified Justices of the Peace, or magistrates (about which more later); middling crimes were heard at Quarter Sessions, in which magistrates presided over jury trials; and the assizes, with their professional judges and juries, reserved for heavyweight felonies. In 1971, the Crown Court was created and absorbed the work of the assizes and the Quarter Sessions, leaving us with a two-tier court system for criminal trials – Crown Court and magistrates' court. There are now around seventy Crown Courts nationwide, the most famous of which sits at the Central Criminal Court in London – the Old Bailey.

Initially, knights, clergy, ealdormen and lords were appointed as judges by the king. By the thirteenth century, the judiciary began to professionalize as lawyers took up the robes. In the modern day, almost all judges are former practising solicitors or barristers, appointed through an independent selection process (the Judicial Appointments Commission).

When Henry II came to the throne there were eighteen judges. Now there are over 35,000,[7] including magistrates, District Judges, Circuit Judges, High Court judges, Lord Justices of Appeal and Supreme Court Justices, and all manner of part-time and specialist tribunal judges in between.

The role of the judge in the Crown Court remains strictly legal; the judge directs the jury as to what the relevant law is, and the

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jury applies the law as directed to the facts as the jury finds them to be. Upon a guilty verdict, the judge will pass sentence, but otherwise the power lies with the jury. The judge is not supposed to express any views about the factual merits of a case, even one as obviously open and shut as Mr Tuttle's. So precious are we about the separation of functions that whenever an advocate wishes to argue a point of law during a trial – for example, to apply to ask a witness about their previous convictions – the jury is sent scurrying out of court so as not to be contaminated by anything that might be said during the legal argument between the advocates and judge.

The Jury

Craning our necks to the judge's right reveals two benches of six attentive citizens – our iconic jury. Mr Tuttle's jury, like any other, is a ragtag assortment of twelve randomly plucked justice-dispensers. Try as we always do to read the jury out of the corner of our eye, it is as reliable a science as tasseography. The only proven maxim for barristers is Beware the Nodding Juror, as a juror who bobs and smiles enthusiastically as you hammer out your closing speech will invariably be the one who delivers the verdict that crushes your case.

Every trial in the Crown Courts[8] calls upon twelve randomly selected members of the public aged between eighteen and seventy-five to hear the evidence and to unanimously (or, in certain circumstances, by a majority of ten to two) agree on whether a defendant is guilty or not guilty. Unless you have a criminal record or are seriously mentally unwell, anyone is eligible,[9] and most of us will at some point be called to serve on a jury. However, notwithstanding its unchallenged position as the defining emblem of our justice system, the modern jury is also a product of a long process of evolution.

Around the same time as laying the foundations for the common law, Henry II also promoted the concept of a twelve-man jury to arbitrate land disputes, which in 1166 he extended into the criminal sphere in the guise of the 'grand' or 'presenting' jury.

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Despite the name, this jury performed a vastly different function to the modern jury; investigative rather than adjudicative. Whenever a judge rocked up on Circuit to preside over a pop-up court, twelve free men were summoned and charged with reporting, under oath, any felony (serious crime, including murder, robbery and theft) that they knew of or suspected. Having pointed the finger and presented inculpatory evidence, the squealing grand jury would then sit back as God rolled up his sleeves and mucked in with trial by ordeal.

This persisted until 1215, when Pope Innocent III and the Fourth Lateran Council belatedly realized the dubious godliness of trial by ordeal and forbade clerics presiding over it. Instead, local men likely to know the circumstances of a crime were engaged as a fact-finding band of investigators who would assemble at court, pool their knowledge and determine guilt. In this model, the 'grand' jury – which over time grew to twenty-three members – were still responsible for 'presenting' the accused – agreeing that there was a case for him to answer – with the smaller, 'petit' twelve-man jury then proceeding to hear the evidence at trial.

The idea of a grand jury acting as a filter to determine whether someone should face trial died out in England and Wales in 1933[10] (although is still alive in American criminal proceedings); but the twelve-strong jury remains our touchstone. Originally deployed to settle civil disputes as well, juries are now the near-exclusive property of the criminal courts. The nature of a jury has morphed over the centuries from a gaggle of local Poirots expected to have first-hand knowledge of the allegation they were trying, to a disinterested body of strangers receiving evidence from sworn witnesses. In stark contrast to the thirteenth century, today's jurors are expressly prohibited from conducting any investigations or having any prior knowledge of the parties involved in, or the circumstances of, a criminal case. None of these twelve know Mr Tuttle, or, prior to the start of the trial, knew how strongly he felt about the encroachment of his neighbour's weeping willow over the boundary fence.

As a juror, you can often feel like a spare part, waiting backstage for days, called into court hours after you arrive and shunted out again whenever a lawyer stands up to boom, 'Your Honour, a

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matter of law has arisen.' It would be easy to gain the impression that jurors are the least important people in the courtroom, rather than central to the entire process, so it is probably worth considering for a moment why we still cling to the ideal of the jury.

The first reason usually offered is the jury's independence from the state. The signing of Magna Carta at Runnymede on 15 June 1215 is often cited as fundamental in this regard. The best-known constitutional landmark in English and Welsh legal history marked the denouement of an entrenched dispute between King John I and some seditious land barons plotting his overthrow. In reaching an uneasy accord, the king agreed to cede the monarch's absolute power and become bound by common law. Among the sixty-three chapters initially enacted in the treaty, numbers thirty-nine and forty stand as the two with which people today will be most familiar:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled. Nor will we proceed with force against him except by the lawful judgment of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice.

Popular re-telling of Magna Carta tends to gloss over the fact that within three months of it being signed both sides had reneged on their obligations and the king had persuaded Pope Innocent III to annul the charter altogether. It was only the following year, when John I died and was succeeded by nine-year-old Henry III, that Magna Carta was reissued as a sincere royal acknowledgement of the people's rights, sowing the seeds for democratic government, the rule of law and freedom of expression.

So, in chapters thirty-nine and forty, we see a grounding for jury trial, or 'lawful judgment by one's equals'. In reality, the land barons were keen on these clauses because injecting their own people into the adjudication process increased their chances of future land disputes with the king being settled in their favour. However, this self-interest should not detract from the underlying merit: in a battle with the state, the inclusion of an independent, non-state actor in the adjudication process is a necessary safeguard against oppression.

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And so it has proved with criminal trials. No matter the perceived strength of the prosecution case, if the jury has a feeling that something is not quite right – if the prosecution seems oppressive or unjustified, or the jurors don't share the judge's apparent faith in the *bona fides* of the prosecution witnesses – no one can stop them acquitting the defendant. This was the take-home lesson from a famous 1670 Old Bailey trial of two Quakers, William Penn and William Mead, for 'unlawfully and tumultuously' preaching outside a church. When a rebellious jury led by a man called Edward Bushel refused to return guilty verdicts in the face of a strong prosecution case, the judge's response was:

> Gentlemen, You shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it.[11]

Any modern juror forced to sit through an afternoon of interminably dull evidence, waiting pained for a judicially sanctioned smoking break, will no doubt sympathize. After the tobacco-and-fire-starved jurors were duly imprisoned for contempt of court, Bushel took his plight before Chief Justice John Vaughan, who ruled that jurors could not be punished for acquitting according to their conscience, thereby consecrating the jury's hallowed reputation as the bulwark of individual liberties. While the jury has to accept the judge's directions as to what the law is and how it applies, the verdict is entirely a matter for the twelve angry laypeople.[12] In the eighteenth century, many juries fought back against the widespread use of the death penalty by committing what was known as 'pious perjury', and returning verdicts deliberately designed to circumvent capital punishment (for example by undervaluing stolen goods to render an offence of theft a non-capital crime).[13] In the famous articulation of Lord Devlin: 'Trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.'[14]

The second popular justification for juries is an appeal to democracy. Bringing the life experience and oft-acclaimed 'common sense' of twelve ordinary people to bear on the fact-finding process is important not just in adjudicating disputed

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matters of fact (i.e. which witness is lying), but also in determining questions of contemporary mores. If criminal law sets the boundaries of interpersonal behaviour, democracy arguably demands that the interpretation of those boundaries meets with public consent. For example, a key ingredient to proving offences under the Theft Act is dishonesty, the legal test for which requires that the defendant acted in a way that was dishonest 'according to the ordinary standards of reasonable and honest people', and that the defendant *knew* that his conduct was dishonest by those standards.[15] So pooling their respective experience and values, the jury firstly determines the moral question – what is dishonesty here? – and then the factual question – did young Steve McThief know he was being dishonest? A trial I prosecuted early on in my career centred on whether a young beauty therapist, Chantelle, who had picked up a mobile phone dropped in Asda and flogged it in the pub, had acted dishonestly. She insisted with wide eyes that it was not dishonest – finders keepers, losers weepers. The jury disagreed – this was blatantly dishonest by the standards of upstanding Bristolians, and it was clear from her unimpressive answers under cross-examination that Chantelle knew as much.

Mr Tuttle's case itself stands as a further case in point. He claimed that he had used reasonable force acting in self-defence. If the jury accepted that the blind complainant had indeed swung for the ginormous Tuttle, they would need to consider whether Mr Tuttle's response – two jabs to the mouth topped off with a slap – was 'reasonable' in the circumstances as Tuttle honestly perceived it to be. What is 'reasonable' in these cases is a value judgment entirely for the jury.

As it happened, the jury either disbelieved his account entirely, or believed it but were sure that he was not using reasonable force against his blind opponent. We will never know which; juries cannot be asked about their verdicts nor do they give reasons. When the jury finishes deliberating and returns to court to be asked by the court clerk for the verdict, the defendant hears the foreman deliver only a one- or two-word verdict sealing his fate.

Of course, the jurors could only reach their verdict having heard evidence from the various parties who witnessed the alleged crime.

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The Witnesses

Opposite the jury stands the witness box. Each witness, including Mr Tuttle if he so chooses, will enter the witness box – they do not, in the American, 'take the stand' – swear an oath or affirmation to tell the truth and give their evidence orally in the form of answering questions put to them by the advocates for each side. The prosecution witnesses go first. The prosecution advocate examines the witness 'in-chief', asking the witness open questions to elicit their evidence, before the defence cross-examine the witness through a series of short closed questions designed to undermine the prosecution case and lead the witness to the desired answer. The prosecution is permitted to ask brief clarifying questions in 're-examination'. When it is time for the defence witnesses, the sequence is reversed.

The full spectrum of human behaviour is exhibited from this small, boxy wooden platform. Some witnesses are accomplished performers; others have to be reminded repeatedly, and in increasingly impatient judicial tones, to speak loud enough for the jury to hear. Some are captivating in their believability; one man I cross-examined looked towards someone in the public gallery before answering each question I put to him. When, for the benefit of the jury, I asked him why he kept glancing to his left before answering, and whether it was because his answers were being prompted, he unwittingly sparked hilarity among the jurors by looking to his left before replying, nervously, 'No.'

Save for exceptions, such as complainants in sexual allegations whom the judge can allow to testify over a video-link from outside the courtroom, it is from the witness box that live evidence in a trial emerges. Uncontroversial witnesses can have the witness statements that they made to the police read to the jury, saving them the hassle of attending court. But the main evidence will be given live. It will often be supplemented by exhibits, such as documents and photographs, and the parties may produce a list of 'agreed facts' to fill in the background, but the hallmark of criminal trials is the oral tradition.

Oral evidence is assumed to be intrinsically superior to written evidence. The idea is that a living, breathing, sweating witness

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standing a few feet away from the jury and testifying in their own words to what they have personally seen or heard affords the jurors the best chance to get the measure of a witness. It is far easier to embellish, lie or commit to a mistake in a written statement; having your words forensically jabbed and teased as they fall from your lips is apt, the theory runs, to bleed out the inconsistencies and half-truths.

The value attached to oral evidence is such that this alone can prove someone guilty. Unlike in Scotland, where the rule of 'corroboration' requires two independent sources of evidence before a jury can convict, the word of one witness will suffice (except, curiously, in prosecutions for perjury and speeding). Often defendants will complain that there is 'no evidence' against them. What they usually mean is that there is no evidence to corroborate what a witness says. A single sworn oral account is itself evidence, and if the jury are sure that it is true and accurate, it can be decisive.

It should be emphasized that all sworn evidence, whether given by prosecution witnesses, the defendant or defence witnesses, carries equal weight: just because the defendant stands accused, his evidence and that of his witnesses is not automatically worth any less (although it may be after it has been shredded in cross-examination).[16]

The CPS

Sitting at the long bench directly in front of me is Megan, the Crown Prosecution Service caseworker, who is the in-court representative of the prosecuting agency instructing me as their advocate to take down Mr Tuttle. Once upon a time this would have been a CPS lawyer, but repeated budget cuts mean that there is now usually a single administrative caseworker covering multiple courtrooms and rushing around to tend to the demands of multiple barristers and multiple judges.

The CPS is a relatively modern invention. Until 1880, there was no public prosecutor; a victim of a criminal offence seeking to prosecute had to either pay their own lawyers or present the

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prosecution case themselves, save for the most serious cases in which the Crown would take the lead and instruct counsel.[17] Between 1880 and 1986, the state took control of prosecutions, with nearly all decisions made by the local investigating police force. However, nationwide inconsistency and a succession of weak cases being booted out of court by judges raised questions over whether police officers were best placed to make fair and objective calls on whether cases they had painstakingly investigated and glued together should be prosecuted or binned. So it was that 106 years and two Royal Commissions later,[18] the Prosecution of Offences Act 1985 gave us the Crown Prosecution Service; an independent authority headed by the Director of Public Prosecutions, which would be split into geographical regions and provide independent, expert legal advice to the police, and take charging decisions – that is the decision whether to charge a suspect and, if so, with which offences – in all but the most straightforward, minor cases with which the police could be trusted. This would theoretically lead to uniformity of charging decisions, improve the quality of the decisions taken and ensure that prosecutions were prepared fully and efficiently for court. We'll look in due course at how those good intentions are playing out in practice.

The Solicitor

Further along the same row as the CPS caseworker, perched in front of Mr Rallings, a pin-striped young man with glasses and designer stubble takes notes. This is Mr Tuttle's solicitor. In most Crown Court trials, a defendant has a solicitor responsible for the conduct of litigation – trial preparation, management and client care, put very loosely – with the barrister instructed by the solicitor to provide specialist advice and present the case in court. The common, if slightly tortured, analogy of the solicitor–barrister relationship is that of the relationship between a general practitioner and a consultant surgeon. With which solicitors would probably agree, if the GP diagnoses the problem, tells the surgeon exactly what needs doing and sits forbearingly in silence as the

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surgeon brags to the patient about how his surgical skills have saved the day.

The distinction has existed since the fourteenth century, when lawyers were categorized as either behind-the-scenes ‘attorneys’ or courtroom advocate ‘pleaders’. Today, barristers automatically enjoy full ‘rights of audience’, which permit us to appear in any court in the land, from magistrates’ courts through to the United Kingdom Supreme Court. By contrast, solicitors are only permitted to appear in the ‘inferior courts’, as they are (supposedly non-pejoratively) called – magistrates’ and county courts – unless they undertake specialist courses and qualify as ‘solicitor-advocates’.

The importance of a good criminal solicitor cannot be oversold. Not just because their faith in my limited abilities pays my mortgage, but because their role, unlike the aloof barrister who will rarely even speak to you directly, except at intimidating ‘conferences’ in their chambers where you sit around an antique table sipping Assam tea from bone china, infiltrates every part of the criminal process. The solicitor will be squatting in your stinking police cell post-arrest, advising you on your rights, the nature and strength of the allegations against you and how you should approach the impending police interview, during which they’ll sit dutifully alongside, barking at any sneaky trick questions from the officers. After you are charged, your solicitor will usually be the one representing you at the first appearance before the magistrates, advising you on the initial evidence, the appropriate plea and whether to opt for trial before magistrates or jury. If it’s a Crown Court case, they will handle the heavy-duty defence evidence-gathering: taking witness statements, pursuing lines of inquiry, demanding undermining disclosable material from the CPS. They will instruct an expert to challenge the Crown’s mistaken DNA evidence, prepare the various administrative documents that the court requires and ensure that you get as much face-to-face contact as you desire, whether at their offices or in one of Her Majesty’s salubrious remand prisons. They will analyse the evidence and devise strategy, tactics and presentation with the barrister, or if the case is a magistrates’ trial, they will usually do all the courtroom advocacy themselves as well. In the Crown Court, the best solicitors will attend throughout your trial

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to offer moral and practical support to you and your barrister. They will help you get your belongings back from the police if you win your trial, and will visit you in prison to advise on your appeal if you finish runner up. Good solicitors will be your first and last point of contact, on call twenty-four hours a day; their *raison d'être* being to protect you from the merciless swing of the prosecution scythe.

The Barrister

Standing up and engaged in polite, overly formalized exchanges with the judge are myself and Mr Rallings – the barristers. Our role is to present our respective clients' cases as persuasively as possible, by adducing evidence, arguing over the applicable law, questioning witnesses and persuading the jury of the virtue of our cause in chest-beating speeches. This is the nub of the adversarial criminal trial.

For many, an air of mystery hangs over what we actually do. Partly this is because many people's experience of lawyers will be limited to civil, as distinct from criminal, law. In its very loosest sense, civil law encompasses a broad range of legal services from non-contentious – such as the conveyancing when you buy or sell a property, or wills and probate – to contentious, including personal injury claims, contract disputes, employment law, divorce and commercial litigation. If this is all you have encountered of the legal system, you will invariably be dependent on second-hand accounts, TV shows and guesswork to cobble together an understanding of the alien world of criminal litigation. Public unfamiliarity may also be because the Bar is traditionally a 'referral profession'; individuals have to go through a solicitor to instruct a barrister, meaning most contact is at arm's length.[19]

But mostly, it's our fault that the public doesn't know what we do. We glide by, certain that our professional heritage gives us a self-evident importance requiring no introduction, with the result that not many ordinary people know much about us. No one needs a primer explaining the difference between a GP and a surgeon. But ask your average jury to delineate titles tossed around by the

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legal industry, and most would fumble in an indistinct haze of barristers, solicitors, lawyers, advocates, attorneys, paralegals and briefs, before volunteering a tentative jumble of words ending with a rising inflexion on the word 'Rumpole'.

Put into the criminal context, our adversarial justice system pits the state against the accused. A publicly funded prosecutorial office (usually the Crown Prosecution Service) instructs a barrister to prosecute those accused of criminal offences to persuade a jury that the case is proved on evidence beyond reasonable doubt. The prosecuting barrister will advise the CPS on what further evidence is required and on any complex legal matters arising, and will present the prosecution case at trial. The accused is in turn defended by (theoretically) equally competent legal counsel, instructed by defence solicitors, advising the client on the evidence against him and, if the client denies guilt, fighting to ensure that the law is applied in the client's favour, cross-examining the prosecution witnesses and trying to persuade the jury that the prosecution case has not been made out. If the client pleads guilty or is convicted, the defence barrister will present his mitigation at the sentence hearing before a judge.

Out of the 15,000 barristers in England and Wales, around 4,000 of us are criminal practitioners, assuming one of these diametric roles in Crown Court (and occasionally magistrates' court) cases across the country. Most of us are self-employed; hired guns, ethically obliged by the 'cab rank rule' to take the first case that comes calling to our clerks, regardless of its merit or our personal feelings about the parties or principles involved. And in crime, this means that most barristers both prosecute and defend (although not, obviously, in the same case). And my view has always been that doing a bit of both is good for the soul. It reinforces your independence. It sharpens your objectivity. And it helps you, in any given case, to know your enemy.

As for what causes a law graduate to swallow the red pill marked 'Barrister', we all have our official stock answers gathering dust from our days interviewing for pupillages. A *thirst* for justice. A *passion* for advocacy. A *need* to help the helpless, voice the voiceless and improve the unimprovable. (If you think that last one is particularly cringeworthy, you'd be right. But, believe it or not, for

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my first five interviews, I actually thought it sounded impressive.) Sentiments which are all, in their essence, both necessary and true. But most applicants are too timid to admit the core motivation that lures someone to the Bar: the cry for attention, the desperate need to be centre stage in the climactic scenes of people's lives. A combination of sated vanity and, buried deep below the affectations of brash nonchalance, a quiet but sincere desire to help people tends to be the unifier among most criminal hacks.

Up until the eighteenth century, however, Mr Tuttle would not have had the advantage of an advocate to plead his case to the jury.[20] Despite the legal profession having been recognized in law since 1275,[21] it was simply not the practice, until the 1700s, to sully us with the criminal process, with pleaders confined to civil proceedings. Instead, the 'altercation trial' that emerged in the sixteenth century pitted the alleged victim, who was also the prosecutor, directly against the defendant in a daytime TV-inspiring confrontation, while a jury determined guilt according to the defendant's often-inarticulate responses to the prosecution's allegations. It was something of a free-for-all, with no rules of evidence, and no lawyers.

Barristers first started traipsing into criminal courts towards the beginning of the eighteenth century, when the Crown, having up until now nominally prosecuted in the king's name but outsourced the grubby work to the complainant, decided to instruct lawyers to prepare and prosecute their cases in court. However, there persisted an institutional, judge-bolstered resistance to allowing the defendant to be legally represented. This was, rather splendidly, justified in terms of concern for the defendant, who, it was considered, would make a much better fist of telling a court about matters that he had witnessed first-hand than if he had some stuffed shirt distilling his words for him. The defendant's interests, it was said, could be adequately protected by the judge ensuring that the trial was conducted fairly.

Such was the 'disadvantage' of being legally represented, that, by the early seventeenth century, though it was not uncommon for defence lawyers to be permitted to act for people accused of trivial misdemeanours, judges insisted that their courtrooms remain

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defence-lawyer free in serious felony cases of life and limb, purely for the defendant's own benefit. Cynics of the age suggested that the prohibition on defence lawyers was simply to make it easy for a bumbling, vulnerable accused to unwittingly inculpate himself. It simply wouldn't do to have lawyers distracting the jury when the 'truth' could so easily be extracted from an unrepresented defendant.

To an extent, judges were right. Once the Treason Trial Act of 1696, which guaranteed the right to defence representation in treason cases, nudged the door ajar, beseeching lawyers persuaded judges to incrementally extend the right to representation in other, serious trials, until, by the end of the eighteenth century, defence advocates were a regular presence in the criminal courts. And, as feared, they ran riot over the settled production line of convicting miscreants. At first the barrister's role was strictly limited: he (for it was always 'he' until Helena Normanton smashed the glass ceiling in 1922) could address the court on matters of law. And he could cross-examine the prosecution witnesses. He was not permitted to assist in the presentation of the defence evidence, and was not allowed to address the jury. The theory was that defendants would continue to be obliged to speak in their own defence, from which the truth would emerge.

Inevitably, lawyers pushed the envelope. Matters of facts were spuriously recast as matters of law. They used cross-examination to indirectly address the jury. Some of them resorted to outrageous acts of intellectual – and actual – dishonesty to save their clients. But, most importantly, it was thanks to their ingenious arguments that courts found themselves railroaded into developing laws of evidence – such as the rule against hearsay (things said out of court being relied on as evidence in court), designed to protect defendants from being convicted on the basis of untested second-hand gossip.

In 1791, in a trial at the Old Bailey, celebrity barrister *du jour* William Garrow sternly told the judge that 'every man is presumed to be innocent until proved guilty'. This was the first formal articulation of what would, in 1935, be described by the Court of Appeal as 'the golden thread' running through the web of English criminal law[22] – the presumption of innocence, and the burden of

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proof. Its application in practice – that the prosecution must prove its case beyond reasonable doubt (or, as it is nowadays phrased for juries, proved so that they are 'sure' of guilt) – is without question, as you will hear in every defence advocate's closing speech to the jury, the greatest protection our system offers. No one shall have their liberty infringed on the basis of guesswork or supposition.

The Trials for Felony Act 1836 gave all prisoners on trial for felony the right to be represented by defence counsel, and granted defence counsel the same right as the prosecution to address the jury on matters of fact. That was the final piece of the jigsaw. Belatedly, we had arrived. Complainant-led altercation had given way to lawyer-dominated adversarialism.

It should be said that professional ethics have improved since the nineteenth century. Many people today might assume from popular culture that the famous complaint from the *Law Times* in 1844 that 'An Old Bailey Practitioner is a byword for disgrace and infamy' still holds true, and there undoubtedly persists a media-reinforced image of defence lawyers breaking whatever codes of morality or law are required to secure the acquittal of clients whom they know are guilty. But in reality, our professional obligations are strictly prescribed.

The Bar Code of Conduct imposes a duty on the barrister to 'promote and protect fearlessly and by all proper and lawful means his lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person'; but the key is 'proper and lawful'. Our overriding duty is to the court. We cannot mislead the court by saying something that we know to be untrue. So, for example, if my client tells me he scrumped an apple, I can't stand up and suggest to a jury that he didn't, or that the witnesses who saw him scrumping are lying. But if he insists that, notwithstanding the compelling testimony of the two hundred witnesses in the orchard, he is an innocent man, I roll away my personal views on the veracity of his tale, put on my wig and get ready for battle. We do not judge. We don't know the truth of our clients' situations, and it's not for us to guess. All we can do is advise and advance their instructions as best we can, even where, as with Mr Tuttle, it might appear obvious that the client is as guilty as original sin.

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This feeds into the core identity of the Bar: its independence. The majority of criminal barristers are self-employed practitioners operating out of clusters of offices known as 'chambers' (or 'sets'), originally in the fifteenth century housed in the Inns of Court in London, but nowadays spread throughout the country. The Inns of Court – Lincoln's Inn, Inner Temple, Middle Temple and Gray's Inn – are our professional associations. A barrister must be a member of one, and it is at the Inns' ceremonies that Bar school graduates are 'called to the Bar'. Standing in the heart of London's legal district, sweeping across the west boundary of the City of London from Holborn through to Temple, the Inns are, for the uninitiated, perhaps best described as a cross between an Oxbridge college and Hogwarts. Great vaulted gothic halls, libraries and chapels, and sprawling acres of rare, capital green squares have evolved from monopolistic providers of barristerial training and accommodation to a softer hybrid of continuing education and administering professional discipline. And, of course, dining. Which is important, because, believe it or not, in order to qualify as a barrister in this country, a historic condition has been that, as a student at Bar school, you had to attend your Inn and eat twelve meals. You plough yourself into a £32k professional loan[23] to undertake the £20,000-a-pop Bar Professional Training Course, and then fasten your napkin. While recent developments mean that these 'qualifying sessions' can now also be completed by attending courses and other, somewhat more relevant, events,[24] you can nevertheless still secure membership of the oldest advocacy tradition in our legal history by ingesting heavily subsidized haute cuisine twelve times. And people say we're out of touch with the modern world.

Chambers house anything from half a dozen to several hundred self-employed barristers, and are designed to allow sole practitioners to pool knowledge, wisdom and overheads, such as rent and staff. The most important of these are the clerks. Clerks are our pimps. They get the work in to chambers, schmoozing solicitors and prostituting barristers to ensure that everyone's diaries remain full, and that cases are covered. And the chambers system underpins that fulcrum of independence. The theory is that barristers are beholden to no one. Our advice to our clients can be

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unused material during a trial and honourably discloses to the defence the key that sets the defendant free. There's a reason why ascending tyrants always round up the lawyers first.

I really can see why our criminal justice system, as curiously evolved a mongrel of a system as one might hope to find – one which, even the official website of the English and Welsh Judiciary admits, is 'contradictory', 'confusing' and which 'it is doubtful [. . .] anyone asked to design a justice system would choose to copy'[26] – is still widely regarded as one of the best in the world. When it works, I would tend to agree.

The problem is that often it doesn't. As we shall see, despite the grand principles at its heart, at nearly every stage of our prized system of criminal justice we see things going badly, and preventably, wrong.

Let's begin where all criminal prosecutions start their lives. To do so, we need to rewind from the Crown Court setting. For the first station in the voyage of every criminal case lies in a far less grandiloquent location: the Magistrates' Court.

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2. The Wild West: The Magistrates' Court

> 'There is, I verily believe, no people's court on either side of the Iron Curtain or anywhere in the world which is as representative of the responsible elements of society as the lay bench of England and Wales.'
>
> Lord Hailsham, 1984 AGM of the Magistrates' Association[1]

Kyle slumped amidst the swelling noise of the waiting area and impatiently banged the split rubber of his soles against the backrest of the chair in front. This had the unintended result of awaking its slumbering, but invisible, occupant, who, cuddling his tin of Special Brew in his anorak and reeking potently of urine, had been sprawled across three seats, apparently sleeping off the effects of the previous night.

Whether this man had a case listed before the magistrates that morning, or was accompanying a friend or simply enjoyed the hospitality of the one public space where society's unwelcome can pass a day, sheltered from the elements, without interrogation or risk of being moved on, was not immediately clear. At some point that morning, a harried usher would pop out of Court 4, ask the gentleman which case he was here for, and, upon getting no coherent reply, would swiftly move on under the assumption that, whoever he was, he was not her court's problem, and his implicit leave to doze would be extended.

Three police officers, their radios buzzing, strode past cradling polystyrene-clad coffee, negotiating the scores of recognizable ne'er-do-wells spilling out of the rows of screwed-down seating. One officer swerved to avoid a woman swinging a bulging Morrisons carrier bag over her head as she directed imaginary sky traffic with gusto, and the constables darted into the safety of the police room at the far end of the lobby, where they could sip

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Americanos in peace until troubled by the prosecutor to give evidence in their trial.

The hubbub of gathering souls was getting too loud for Kyle to think. An indecipherable tannoy directed someone of some name to go immediately to see someone else of another name at the cells. Solicitors bearing chunky files swept past the rows of chairs, calling out the familiar names, which were quickly matched to the familiar faces, that they would be representing that morning. These shouted names were harmonized by the chorus of the ushers, springing out of their respective courtrooms like cuckoos to summon the next unfortunate on the list.

A man with a gleaming head, zipped-up tracksuit and giant curved scar stretching from his forehead over his scalp and ceasing just below his nape, was accosting each suit that walked by: 'Are you the duty?' ''Scuze mate, are you the duty?' 'Love, you ain't the duty, are ya?' A probation officer, starting her delayed 9 a.m. appointments for pre-sentence reports, squeezed past him and into the Probation Office, followed by a candid youth bravely wearing a fashion T-shirt bearing the slogan, 'Weekend Offender'.

At the furthest corner of the lobby, an ostensibly more respectable crowd assembled outside the door to the traffic court; a businessman in Armani, flanked by his privately paid road traffic solicitors, fidgeted nervously, the soundness of his multi-thousand-pound investment about to be tested to destruction before a foul-tempered District Judge.

Kyle gazed around for his solicitor and absent-mindedly dragged his bulging Adidas carrier bag back and forth along the floor by its drawcord. Inside were the bare essentials – tracky bottoms, T-shirt, underwear, deodorant, family photos – that his brothers said he would need at the Young Offender Institution to which he was heading after today's hearing. At only nineteen years old, Kyle now appeared at the magistrates' court with the same regularity as he had at the Youth Court up to the age of eighteen, and well knew the score. The magistrates had taken pity on him after his last car radio theft – the sixth of his career – and had imposed a community order with eighty hours of unpaid work six weeks ago. Having been found in the passenger seat of a 'borrowed' VW Golf barely a month later, Kyle was prepared for the spell in custody

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that was now looming. He just wanted the hearing over and done with, so he could check out of this human zoo, excuse himself from the present company of junkies, wife-beaters, drink-drivers and the otherwise socially dispossessed and meet up with his mates on the inside.

A man from British Gas flashed his identity card at the usher outside Court 2, and was promptly escorted straight inside, his application to the magistrates for warrants to disconnect the energy supplies of errant non-payers taking precedence as first order of business. As he stepped through the doorway, his escorting usher waved away a perspiring, onrushing barrister staggering under the weight of a dozen double-stuffed files, who was pleading to nil effect that they were the prosecutor allocated to this courtroom and simply had to get into court. Their desperation was palpable, as if they were being chased by a swarm of flying deathmonkeys, salvation from which lay just beyond the threshold.

This prosecutor was me. And I was desperate. I was the junior gopher instructed to prosecute all the cases listed in Court 2 that day – the so-called 'prosecution list' – and, having had the four-foot stack of files comprising the papers for today's seven listed trials in my custody for less than ten minutes, was seeking refuge from the attentions of the seven defence solicitors vying for my attention and demanding answers which may, or, more likely, may not, lie within these unread, disordered Crown Prosecution Service files. I knew that, in fifteen minutes' time, I would be summoned into court before three magistrates expecting me to be in a position to start the first trial, and as yet I didn't even know what any of the cases were even about, let alone what my questions for the witnesses would be. With every pokey meeting room in the building either arbitrarily locked or occupied by defendants giving instructions to their briefs, the courtroom itself was my best and last bet for a few uninterrupted moments to read the damn files. Denied, I'd have to wing it. Somehow I was going to have to stand up in court and prosecute trial after trial, examining and cross-examining witnesses and making devastatingly persuasive arguments of fact and law, without knowing what the hell I was talking about.

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I soon learned that I'd fit right in.

Welcome, ladies and gentlemen, to the magistrates' court. This, the lowest court on the criminal rungs, is where all[2] criminal cases start their lives. If you are charged with a criminal offence, this apparent replica of an inner-city A&E department on a Saturday night is where your journey begins. If your case is sufficiently serious, it will be dispatched from here to the more civilized and structured Crown Court to live out its days in front of a jury (assuming you do not plead guilty), and your sojourn before the magistrates will not extend beyond a single, brief 'first appearance'. Those offences deemed fit for summary (magistrates') trial – your low-level assaults, thefts and driving offences – remain in the lower court to be case-managed and, at some point in the future, tried before the magistrates, or, as they are referred to interchangeably, Justices of the Peace (JPs).

While most of us probably think of jury trial as our most common criminal tribunal, 94 per cent of the 1.46 million individuals brought before the magistrates each year[3] will never see the inside of a Crown Court. Their cases, from first appearance through to – if they plead guilty or are convicted after trial – their sentence, will be dealt with at one of approximately 150 magistrates' courts dotted across the land, and their fate determined most likely by three out of 17,500 serving magistrates;[4] volunteers with no formal legal qualifications but the power to determine both rulings of law and findings of fact, and to send their fellow citizens to prison for up to a year.

That last sentence may have taken you by surprise. Unqualified volunteers in charge of law and justice? A little history is probably needed for context.

In 1195, Richard I decided to commission good and lawful men to act as *custodes pacis* and keep the local peace. Since that time, volunteers from the landed gentry have sat in judgment over the lower orders, their office later formalized in law by the Statute of Westminster 1361. These Justices of the Peace were not expected to be learned in the law, in contrast to the judges who sat in the King's Court and the assizes on the Circuits and presided over

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contested criminal allegation would be frankly astronomical. Only 1 per cent of criminal cases are resolved by jury trial,[7] and the cost of that, the Ministry of Justice insists, is already too high. Accordingly, for all but the most serious offences, the magistrates' court offers a compromise. Three volunteer JPs – an experienced 'chair' sitting in between two 'wingers' – assisted by a qualified 'legal advisor' to parse the relevant law, offer a scaled-down version of the judge-and-jury trial, preserving its essential democratic goodness, while diluting the formality, delay and expense of Crown Court proceedings. The law, trial procedure and rules of evidence are basically the same as in the Crown Court; the primary distinctions are the body determining guilt, the level of formality – there are no wigs, gowns or judicial robes, for example[8] – and the fact that solicitors, not just barristers, have rights of audience and so handle the bulk of the courtroom advocacy. Due to the dialled-down formality and absence of a jury, magistrates' trials are far quicker than Crown Court trials; trials last half a day in the mags, on average, compared to days, if not weeks, in the Crown. And, of course, there's the cost: £1,150 a day to run a magistrates' court, compared with an average £1,900 per day for a Crown Court.[9]

A further advantage is that magistrates are multi-purpose, and as mini-judge-cum-juries are able to deal with matters of law which Crown Court juries are forbidden from touching. For instance, magistrates can run case management hearings, at which pre-trial issues – such as whether the parties are ready for trial, or defence applications for the prosecution to disclose relevant material – are thrashed out between the parties. They can determine legal applications, for example arguments over whether a piece of evidence is admissible at trial. Unlike juries, magistrates, having returned a guilty verdict, can go on to sentence the defendant. And there are scores of ancillary functions, including issuing search warrants to the police and authorizing utility companies to disconnect households defaulting on bills. Outside the adult criminal courts, magistrates can undertake special training to qualify to sit in the Youth Court, which deals with children aged between ten and seventeen, and the Family Court.

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What we have, in summary, is a system designed to deliver affordable, speedy, summary justice for high-volume, less serious crime. Over the past ten years, various initiatives[10] have popped up to streamline proceedings, the aim now being that all magistrates' cases be reduced to two hearings – the first appearance and, as soon as possible thereafter, trial and/or sentence. Two hearings, boom. The best bits of the jury system, only a fraction of the cost. All topped off with an infusion of a near millennium of hardy English tradition, which in the law is nearly always A Good Thing.

That, I am afraid, is as favourable a gloss as I am able to put on magistrates' court justice.

I did my best over the previous pages. Honestly I did. I emptied out my bag of rhetorical tricks; I gave you statistics, forced whimsy, a whistle-stop history lesson and exploited the virtues of the jury system in the hope that you might overlook how poorly the same arguments transfer to magistrates.

The truth is that the entire case in favour of magistrates' courts, as we currently run them, is a sham. There is little sustainable rationale for their existence in principle, and no justification whatsoever for the way in which these courts operate in practice. There is no excuse for the amateur, sausage-factory paradigm of justice and 'that'll do' complacency that pervades 94 per cent of criminal cases, other than that most cynical political trinity: it's cheap, it's the way we've always done it and no one who votes either knows or cares. And the more you experience magistrates' court justice, and interrogate the base assumptions of this system, the less explicable the whole pantomime becomes.

Let's rewind to Kyle, kicking his heels in the lobby and waiting for his brief. Kyle's brief is Rachael, the same fearless, no-shit-taking solicitor who has represented Kyle from his early days in the Youth Court, and has watched with weary familiarity as, in spite of her best efforts, her thirteen-year-old client has carved out the same career path as his older brothers. Rachael also represented Kyle during his interview at the police station following his arrest, so is already familiar with his latest snafu, but this isn't always the case. Sometimes defendants will be

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represented at the police station by the duty solicitor, but select a different firm, or the court duty solicitor, to act for them at court. Assuming they satisfy a strict means test, defendants will usually be represented before the magistrates by solicitors from legal aid firms. Meanwhile the prosecution is handled either by in-house CPS lawyers, or by external solicitors or junior barristers, like me, instructed for the day as 'agents'.

When Rachael arrives, Kyle will confirm his instructions, admitting that he took a ride in the car knowing that it was nicked, and upon being advised on the sensible course will follow Rachael into court to enter his guilty plea.

The first thing to note is that the figures on the bench are unlikely to conform to Kyle's, or indeed many defendants', definition of peers or equals. The demographic of most defendants in these courts is homogeneous; society's lost boys and girls, a sorry parade of abused children turned drug-abusing adults. Sliding on and off the bottom rung of social functioning, in and out of homelessness, joblessness and wretched worthlessness, their histories are scabbed with violence, mental ill-health and chaos, and their present lies in a parallel universe where the middle-class ambition of the Good Life is replaced with a desperate scrapping for daily survival.

As I say, those sitting in judgment will invariably not be of the same stock.

For a start, it is possible that the 'mini-jury' in his courtroom won't even feature lay magistrates, but will instead comprise a single professional District Judge. DJs, as they're known in the trade, are legally qualified full-time judges who sit alone in magistrates' courts. Their powers and functions are largely the same as lay magistrates; they hear trials and case management hearings and pass sentence. The only formal difference is their professionalism. DJs first emerged around 1740 in the shape of 'stipendiary magistrates', salaried Justices of the Peace appointed as a response to rampant corruption among lay justices in London.[11] Now there are around 130 District Judges nationwide splitting the workload with around 100 part-time 'deputy' DJs and 17,500 magistrates. DJs are experienced legal practitioners – usually solicitors or barristers – appointed on the recommendation

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of the Lord Chancellor upon demonstration of, among other qualities, their knowledge and understanding of the law. Whatever the advantages of DJs (and we'll come to those shortly), a single legal expert appointed by the state is hardly a diverse, independent exemplar of participative democracy. If it's a scaled-down version of the jury, it's scaled down by 12:1. Where that 1 is a state-salaried solicitor. Given that Kyle has no say over whether his case is heard by a District Judge or by JPs, it is clear that the noble principle of lay participation is not inviolable.

But even if, as was the case on this day, Kyle found himself before a lay bench, it is obvious that magistrates too are anything but a mini-jury. Jurors are randomly selected from the electoral register, and anyone aged between eighteen and seventy-five (save for those with serious criminal convictions or severe mental illness) can be compelled to sit on a jury. Students, stay-at-home parents, police officers, judges, MPs, the employed, the self-employed, the unemployed, the retired, the obscenely wealthy, the desperately poor, big business owners, small business owners, zero-hours workers, conservatives, trade unionists, neoliberals, Marxists, the disabled, the abled and the full gamut of racial, cultural, class and religious identities are impanelled as jurors, whether they like it or not. Jurors do not self-select (and, unlike in the US, cannot be strategically chosen to suit the parties). Jurors don't put themselves forward as Solomons walking among us. It takes a certain type of character to volunteer to sit in judgment over one's fellow citizens as a hobby. And it so happens that, to the present day, that type of character has uniformly been white, middle aged and middle class, with a traditionally conservative leaning.

Geoffrey Robertson QC offered a withering description of magistrates in his evidence to the House of Commons Home Affairs Committee in 1995, painting them as:

> Ladies and gentlemen bountiful, politically imbalanced, unrepresentative of ethnic minority groups and women, who slow down the system and cost a fortune.[12]

In fairness, we have seen slight improvements since 1995, a time when JPs were recruited *sans* interview by a tap on the shoulder

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from an old chum. But the unsurprising legacy of an institution which, until 1906, jealously restricted membership to the landed gentry, and until the 1990s was still dominated by freemasons,[13] is that today with your average bench, you're not entrusting your liberty to the collective wisdom of twelve everymen; the butcher, baker, candle-stick emporium televangelist etc. You're often pitching to the admissions board of a 1980s country club.

While I have only once been treated to a demonstration of explicit magisterial racism – a white chairwoman musing, apropos of nothing, in front of me as prosecutor and her embarrassed colleagues: 'Mohammed is now the most popular boys' name, apparently. Isn't that terrifying?' – it is the subtler expressions of privilege and prejudice that pervade.

'We understand that your upbringing was difficult,' I've heard countless well-heeled chairs tell nineteen-year-old heroin addicts, graduates of the council-estate-to-care-home-to-streets pathway, moments before they're given eight weeks because (reading rote from the mags' pro forma sentencing remarks), 'You must learn that shoplifting is a very serious offence and you must stop committing serious offences of shoplifting.' More times than I can recall have I heard the same monotone chiding of homeless alcoholics who have breached a court order, usually obtained at great public expense by the local authority, banning them from begging for money. 'Breaching a court order is a very serious offence . . .', the chair's finger wags at the wretch in the dock, making little effort to hide his incredulity at why this man doesn't just stop begging, put on a decent suit and get a job.

This is not, I hasten to add, the attitude of all magistrates. A number bring to the bench invaluable, real-world experience of the underbelly of society. Community outreach workers, youth workers, social workers, teachers, medics and people who know the daily reality of the Kyles living hand-to-mouth, growing up in abject, abusive poverty and being trapped from a young age between disjointed education and peers and family members dragging them into criminal lifestyles. I've met these magistrates outside the courtroom, and their broad independent-mindedness and hunger for social justice represent beautifully the ideal to which the institution aspires.

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courts'. And that is what they were; the courts were (and many still are) physically attached to the local police station. The police guarded the doors, brought the prisoners to court, put prisoners in the dock and were the primary state prosecution agency until the Crown Prosecution Service was created in 1985.

Even now, you will still hear old-school mags occasionally slip into possessive determiners when referring to the prosecution: 'our officer' or 'our prosecutor'. Indeed, as I crash into court laden with my files, before I can catch my breath the chair peers up from behind her spectacles to score a double whammy: 'Ah finally, our prosecutor. Now, is our policeman here for the first trial?'

It's a cliché in legal circles, but no less true for so being, that if it's the word of a police officer against your client, it's usually game over before you've begun. You're normally facing a combination of General Melchett starting Captain Blackadder's trial by commanding, 'Pass me the black cap, I'll be needing that,' and Alan Partridge suggesting to a lawyer interviewee that 'with the greatest respect, the police are hardly likely to arrest a man if he's innocent, are they?' Or, in the historic words of the magistrates themselves:

> Quite the most unpleasant cases that we have to decide are those where the evidence is a direct conflict between a police officer and a member of the public. My principle in such cases has always been to believe the evidence of the police officer, and therefore we find the case proved.[19]

Don't assume that the bias operates solely against the Kyles of our society. The angriest defendants I've seen at the magistrates' courts have been those of impeccable reputation from comfortable backgrounds who are charged with an offence based on the word of a police officer. Assaulting a police constable during a neighbourhood dispute by allegedly jabbing a finger in the officer's face, for instance. Or being accused of driving while using a mobile phone. They turn their heads, eyes wide in burning disbelief as the magistrates unquestioningly accept the hesitant officer's account, and reject the evidence of the defendant and his two witnesses.

'But . . . that police officer lied!' they splutter, purple-faced as they leave the courtroom. The family join in: 'How can the magistrates not see that?' And the defence lawyer can only nod as they fill out the appeal form. 'I know.'

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