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VICTIMS OR DEFENDANTS – CAN THERE BE JUSTICE FOR ALL?

"Of every 100 crimes recorded by the police, only 24 are successfully detected. The police take action in 19, of which four are discontinued or written off by the CPS, five result in cautions, and nine result in guilty pleas or convictions and just one results in an acquittal."[1]

The Lord Chancellor's words speak volumes: the problem of the criminal justice system is far less about the effectiveness of the judicial system than the failure of the police to detect crime. It is surprising therefore that so much of the White Paper, *Justice for All*,[2] should be preoccupied with improving conviction rather than detection rates.

That said, an effective court system should act as a deterrent in its own right. So, many of the technical recommendations aimed at improving the efficiency of the judicial system are to be welcomed for victims and defendants alike. Better case management; the reduction of defence gamesmanship; a criminal code, even using hearsay along the lines admissible in civil trials all fall into the category of good, sensible stuff.

Contrast, however, three controversial proposals: removing the double jeopardy rule; the admission of previous convictions; and discontinuing trial by jury in complex cases. On the face of it, at least two of these recommendations appear motivated by high-profile prosecutions that "went wrong"[3]. Righting the wrongs of one-off "failed" prosecutions, however long and loud the media bay, is not a sound basis for criminal justice policy-making. Far better in a just society

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[1] The Lord Chancellor, Lord Irvine, *Annual Judges Dinner: Mansion House*, 18 July 2002
[2] *Justice for All* CM 5563 18 July 2002
[3] The cases that come to mind are *Stephen Lawrence* and *Maxwell*

that a guilty defendant should go free than that an innocent scapegoat should be jailed. Robert Brown's case illustrates the point[4].

Whatever the safeguards, removing double jeopardy is deeply troubling. For one, it ends the finality of the court case. It leads to the suspicion that cases may be brought too early (because the prosecution can always have another go if it all goes wrong first time), and, for victim and defendant alike, it drags out the whole business of court proceedings even further.

This is not justice for either party: it falsely raises the hope of the victim of second-time, third-time, fourth-time (how many times?) "justice", while the defendant is faced with the sword of Damocles option. Not just now, but retrospectively. How many old cases tried on a different basis will be prosecuted again? How many old wounds of victim and defendant will be re-opened? It has always been a tradition of our justice system that innovations such as this not be retrospective, and rightly so.

Do we really need to remove double jeopardy to protect society from criminals? All the evidence suggests that the real criminal re-offending fraternity is small[5]. Chances are that the "guilty" defendant will re-offend so another case can be made out against him. So, yes, one victim may be deprived his triumphant day in court. But far better this than that resources are diverted into re-prosecuting a string of cause celebres.

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[4] Court of Appeal, 13 November 2002
[5] *Justice for All* p 11

Allowing courts to be informed of previous convictions is a tricky one. It is not, after all, new. Judges already hear of previous convictions at sentencing, and courts may also be told of a previous conviction if the case is on all fours with the instant case. These are sensible exceptions. It seems hard then to foresee circumstances when admission of previous convictions would not be used by the prosecution as the clinching argument in an otherwise difficult case.

Further, it detracts from the whole foundation of our justice system: that the defendant is tried on the facts of the case on the presumption of innocence until proved (rather than inferred to be) guilty. It weights the cards against the defendant, while nothing is gained by the victim seeing the wrong man go down and the perpetrator at large. The devil will be in the detail of safeguards.

Ending jury trial in complex fraud cases again appears designed to improve conviction rates. But as Peter Rook QC has already indicated, if this is the motive, the measure is mis-targeted, because 86 per cent of fraud trials result in a conviction[6].

This is not the only reason for concern. Taking the jury out of these types of cases will lead to two-tier justice: white-collar justice dispensed by judges and blue-collar justice dispensed by magistrates and juries. This is not only unfair to victims and defendants in both parts of the system, but has the potential to be deeply socially divisive; not to mention the cardinal principle of trial by jury or peer review which it undermines. It is argued by some that fraud trials are too complicated for the layman to follow. This, it is contended, is best resolved by a new fraud charge[7] rather than cutting at the root of the jury system.

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[6] Cited in *The Daily Telegraph*, 17 October 2002, p22

If detection and conviction are two pillars of justice, then punishment is the third. Apart from the odd inconsistency, the White Paper at long last recognises that prison in its current incarnation works neither as a deterrent nor as rehabilitation. Yet, it is here that the balance between victim's justice in the form of retribution and protection, and the defendant's in rehabilitation is at its most strained. The victim's knee-jerk reaction is to equate retribution and protection with a long prison sentence, despite the longer-term consequences for society of repeat offending.

Starting to break this cycle by addressing (in the well-known Blairite phrase) "the causes of crime" is the real achievement of this White Paper. It is striking just how much criminal case law[8] has been set by defendants who committed their crimes under the influence of alcohol, drugs and/or mental health problems, and for how long the system failed properly to discriminate between the treatment of "the bad" and "the mad".

So, can there be justice for all? For victims and defendants? While the language of the White Paper is strong on "re-balancing … in favour of the victim"[9], with the implication of new rights for victims at the expense of criminals, the trick it actually achieves overall is not an "either/or" but a "both/and" solution.

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[7] As advocated by the Law Commission
[8] Examples include *Moloney, Lipman, The Yorkshire Ripper, the battered wife cases*
[9] *Justice for All* p 11