**Leveson’s Narrow Pursuit of Justice:**

**Efficiency and Outcomes in the Criminal Process**

*Luke Marsh*

*Faculty of Law, The Chinese University of Hong Kong; e-mail: luke.marsh@cuhk.edu.hk*

*Abstract: Sir Brian Leveson’s Review of Efficiency in Criminal Proceedings (2015) represents the latest judicial effort in England and Wales supporting executive attempts, under the guise of ‘efficiency’ measures, to scale back protections traditionally afforded to criminal defendants and has dramatic implications for the maintenance of accurate case outcomes. This includes the integrity of the prosecution process; in particular, the reliability of CPS decision-making; the quality and completeness of the disclosure regime; the culture of CPS; its management and oversight.*

*This article will argue that the Review adopts a narrow approach to ‘efficiency’ which takes no account of the interest in the accuracy of verdicts, as set out in Rule 1.1.(2)(a) of the Criminal Procedure Rules, and will have no bearing upon the ‘real inefficiencies’ of the process. What appears to be the core of the Review is in fact floss surrounding its competing ambition: shifting cases to magistrates; intensifying pressure to plead guilty; marginalising the defence; and diminishing jury trial.*

*Key words:* Leveson Review; Criminal Procedure Rules; Efficiency; Verdicts; Guilty pleas

**Introduction**

The focus of this article is the impact of Sir Brian Leveson’s[[1]](#footnote-1) *Review of Efficiency in Criminal Proceedings* (‘*Review*’) (2015) in England and Wales upon the accuracy of trial verdicts, taken here to include those following guilty pleas*.* It will be argued that the *Review*, whether intended or not, forms a key plank in an executive and judicial narrative which increasingly has centred around ‘cost efficiency’, ‘cut-backs’ to legal aid and ‘austerity justice’ [[2]](#footnote-2) but has more broadly resulted in the attenuation of key features of the adversarial criminal justice system. One set of consequences has been a reduced reliance on the adduction of prosecution evidence through pre-trial issues such as the disclosure regime, including requirements on the defence to disclose its case before the prosecution case is fully understood;[[3]](#footnote-3) to respond to judicial probing without sufficient prosecution disclosure,[[4]](#footnote-4) and the growing pressure on defendants to plead guilty at increasingly early stages.

When the Lord Chief Justice asked Leveson to conduct the review, he did so with the following Terms of Reference (‘TOR’) all set within the context of existing initiatives,[[5]](#footnote-5) ‘culture’,[[6]](#footnote-6) unimplemented recommendations of previous commissions, inquiries[[7]](#footnote-7) and governmental reforms[[8]](#footnote-8):

1. *Review current practice and procedures from charge to conviction or acquittal, with a particular focus on pre-trial hearings and recommend ways in which such procedures could be:*

*a. further reduced or streamlined;*

*b. improved with the use of technology both to minimise the number of such hearings or, alternatively, conducted (whether by telephone, or internet based video solutions) without requiring the attendance of advocates.*

*2. Review the Criminal Procedure Rules to ensure that:*

*a. maximum efficiency is required from every participant within the system; and*

*b. any changes proposed are fully supported by the Rules*.[[9]](#footnote-9)

A further and laudable aim was to ensure that proposed reductions in criminal legal aid could be justified on the basis that the rate of remuneration would not be affected because, with the elimination of considerable waste and inefficiency, ‘less work’ would be required to be put into each case.[[10]](#footnote-10)

As I shall argue, the *Review* fails to address the depleted state of criminal justice in this jurisdiction with a system already beset with fundamental problems and hints at worse to come. Before addressing these issues, I set out in brief what I see as the principal recommendations and the *Review’s* strategic priorities.

**Principal recommendations**

The direction plotted by the *Review* rests heavily on its ‘first overarching principle’: ‘*Getting it Right First Time’*.[[11]](#footnote-11) The underlying premise is that actors in the justice system should be able to place their faith in the Crown Prosecution Service (‘CPS’), whom Leveson holds up (alongside the police) as one of ‘the gatekeepers of the entry into the criminal justice process’ to ‘make appropriate charging decisions, based on fair appraisal of sufficient evidence, with proportionate disclosure of material to the defence’.[[12]](#footnote-12) Once the initiating decisions are made, the second overarching principle is that there should be one identified person in each institution (police, CPS and defence) responsible for the conduct of the case. The third overarching principle is the Criminal Procedure Rules (‘CrimPR’)[[13]](#footnote-13) should place a duty of direct engagement between identified representatives who have case ownership responsibilities[[14]](#footnote-14) so that interlocutory matters can be concluded without the need for a formal hearing in court,[[15]](#footnote-15) this, in turn, being reliant on the introduction of an IT system: the *CJS Common Platform*.

Under the *Common Platform* online case management is intended to take place from the point of charge. Police will supply all relevant documentation via a ‘digital case file’ to the CPS.[[16]](#footnote-16) Case progression will then operate electronically with the parties filing their statements, applications, written submissions and exhibits online. Prosecution and defence lawyers will be expected to present their case digitally in court, with jury access to tablet computers allowing them access to permitted documents. All these data will be held collectively in ‘cloud’ storage. While the physical presence of defence lawyers and juries remains necessary (for the time being),[[17]](#footnote-17) defendants will increasingly appear ‘virtually’.[[18]](#footnote-18) Making this work is the job of the fourth overarching principle: effective and consistent judicial case management through robust application of the CrimPR.

**Leveson’s system priorities**

As is apparent from its title, ‘efficiency’ is the fulcrum upon which this *Review* makes its recommendations. In this regard Leveson, as a member of the Criminal Procedure Rules Committee, would have had in mind the overarching mechanism within the CrimPR that ‘governs’ criminal cases: the ‘overriding objective’.[[19]](#footnote-19) This objective, namely that ‘cases be dealt with justly’ redefines ‘justice’ to include not only ‘acquitting the innocent and convicting the guilty’[[20]](#footnote-20) but also ‘dealing with the case efficiently and expeditiously.’[[21]](#footnote-21)

Proportionate cost-efficiency therefore has a legitimate role in the delivery of justice, but the *Review’s* approach is overly narrow, reflecting a little-discussed but core weakness in the CrimPR: the Code does not explain how to weigh cost-savings against the accuracy of verdicts and nor, having accommodated the potentially conflicting goals of the Rules, does Leveson. In fact, Leveson’s interpretation of ‘efficiency’, as will be argued, weakens the imperative need for accuracy in trial verdicts*.*

In giving priority to a narrow interpretation of ‘efficiency’ based on ‘cost-reduction,’ the *Review’s* direction ignores the other ‘efficiency’ of the process, which historically meant striving to secure the *correct outcome* in terms of guilt and innocence.[[22]](#footnote-22) While the overriding objective has expanded this traditional interpretation to encompass financial considerations, the *Review* re-shrinks its codified definition at the expense of other key elements thereby putting accurate verdicts at increased risk.[[23]](#footnote-23)

In spite of this, publication of the *Review* has been received without significant anxiety.[[24]](#footnote-24) Reception of its recommendations has been muted[[25]](#footnote-25) perhaps because it is located within the government discourse of austerity and the assertion of senior judicial figures laying claim to a ‘new landscape’ for criminal justice in ‘a period of significant retrenchment’ owing to ‘changed financial circumstances’.[[26]](#footnote-26) I argue that the *Review* should not only cause misgivings for what it does recommend but equally be a source of concern for what it fails to do and for the direction it plots. I set out my concerns by considering: (i) its methodology; (ii) its structuring of debate through its narrow interpretation of ‘efficiency’; (iii) its misconceived ‘overarching principles’ and conceptual misunderstanding of what comprises ‘a case’; (iv) inevitable outcomes of the *Review’s* approach; (v) the real ‘inefficiencies’; (vi) failures confronting the systemic problems of the process (vii) and its departure from its own stated terms of reference.

*(i) Methodology of the Review*

The first clue that the *Review’s* objectives are aimed at *cost-reduction* rather than *cost-effectiveness*,[[27]](#footnote-27) is that its approach to the gathering of or reliance on actuarial data throws up serious misgivings. Indeed, Leveson was forced to proceed largely under his own steam. Although the *Review* was spurred by the (previous) Lord Chancellor,[[28]](#footnote-28) governmental interest did not extend to the provision of the resources needed to undertake the task. In the result there was ‘no time or little opportunity for evidence gathering’[[29]](#footnote-29) nor was there any ‘quantitative analysis of the effect of the changes’ proposed.[[30]](#footnote-30) These explanations offered for the limitations of the *Review* are inadequate.[[31]](#footnote-31)

Firstly, a *Review* of such significance bearing upon all criminal cases demands underpinning by resources commensurate with the gravity of the issues involved.[[32]](#footnote-32) For the *Review* itself to be dependent on such charitable help as it was able to secure is a telling insight into the erosion of state funding which has marked changes to the criminal justice process in England and Wales over the past three decades.

Secondly, the *Review* was undertaken within a time frame that restricted what it could possibly achieve. According to the TOR, Leveson was required to ‘[r]eport to the Lord Chief Justice within 9 months.’ No explanation is offered for this extraordinary haste and none is easily identifiable.[[33]](#footnote-33)

Thirdly, notwithstanding the resource constraints, much of the evidence needed to fulfil the TOR was already in the public domain; yet it was ignored, incompletely addressed, or uncritically adopted.

*(ii) Its defective understanding of ‘efficiency*’

The efficiency ‘savings’ propounded, even in purely financial terms, are largely illusory in part because the *Review* was not underpinned by research and offers no costings or statistics. The bulk of what is hypothesised is ‘guesswork’; a measure upon which *no system*, not least one which puts the liberty and reputation of the individual at stake, should be based*.* While all systems of criminal justice must have regard to financial prudence, costs cannot be elevated at the expense of correct decision-making let alone serve as its replacement. I argue that the principal ‘inefficiencies’ in the process are failures to achieve the intended outcome: the conviction of the guilty and the acquittal of any who are or may be innocent. A more appropriate understanding of ‘efficiency’ would recognise that breakdowns of this kind are inextricably linked to enormous system-wide financial costs: failures in decision-making have caused (and continue to cause) untold cost to the public purse as well as untold human distress.

Of concern, the *Review’s* efficiency reformsare set to be ‘implemented with all speed’[[34]](#footnote-34) despite two faulty pillars propping up its frame. First, the cost-savings the *Review* foresees are all *assumed*, as is the belief that they will flow from new technology.[[35]](#footnote-35) This includes ‘IT benefits’ as an assumption and IT ‘investment’ as a certain but unquantified cost. This is particularly insupportable given the high degree of organizational complexity that exists between the police, CPS and courts, and when we consider that the installation of a multi-layered IT infrastructure brings with it ‘the need for oversight … and support [likely to be] enormous’.[[36]](#footnote-36)

Second, many of the problems the *Review* identifies are a direct consequence of the criminal justice system being financially stretched by an ideology located in cost-reduction; compromising, as it does, the integrity of the individuals implicated.[[37]](#footnote-37) Tighter budgets will not lighten these problems, and ‘less work’ (however achieved) will do little to assist a defence profession, beleaguered by unsustainable strictures on income.[[38]](#footnote-38)

*(iii) Issues of principle and theory (‘a case’)*

The principles advocated in the *Review* might have some value if the prosecution could *reliably* discharge its obligations to make ‘appropriate charging decisions based on fair appraisal of sufficient evidence, with proportionate disclosure of material to the defence.’[[39]](#footnote-39) However, CPS decisions are not ‘neutral’ affairs but determinations which must be scrupulously interrogated by a resolute advocate. Hitherto, while even under a ‘new culture’ the defence may be required to advise the prosecution of defects of which it is aware,[[40]](#footnote-40) there is no other expectation that the defence must act on the basis that the prosecution case is without defects.

The principles advanced in the *Review* assume that there is a fixed ‘reality’ which directs and constrains prosecutors so that ‘*Getting it Right First Time*’ becomes merely a technical issue dependent upon competence and compliance with the prevailing rules. This ‘mechanistic’ theory is unsustainable. *Every* decision – whether to initiate or even discontinue a prosecution; what offence is appropriate and whether to upgrade or downgrade it; which evidence should be used to support it; and which evidence disclosed – is subject to discretion and choice. There is no ‘getting it right-ideal’ because there is no fixed entity but rather an entity that can be fixed. In other words, *cases* are not ‘discovered’ but *constructed*; and *constructed to achieve particular outcomes* (whether a conviction, an acquittal or other disposition).[[41]](#footnote-41) What this means is that the ‘it’ of the *Review* is something which is *ex post facto* constructed as if the ‘it’ were a pre-existing entity that had been ‘found’, put into legal form.

For example, the case against the *Birmingham Six*, was *constructed* to achieve a guilty outcome although the defendants played no part in the bombings; the *Confait* prosecution, including the nature of leading counsel’s line of questioning at trial and the subsequent *Fisher Report* itself was *constructed* to achieve a guilty outcome although, in truth, the three boys were not involved in the killing; and the prosecution against *Stefan Kiszko* was *constructed* to achieve a conviction although subsequent forensic tests showed that the defendant could not have committed the crime.

If criminal trials begin with this ‘core’ principle it is almost inevitable that court actors will assume that the prosecution *have* got it right. This leaves little role for the defence and opens the door to system-pressure on defendants. By contrast, the whole theory of the common law, which involves proof beyond reasonable doubt in one form or another, is to *test* the claims of the prosecution.

*(iv) Outcomes of the Review’s approach*

*(a) IT consequences: marginalising the accused.* The digital files that are the ambition of the *Review’s* ‘profound revolution’,[[42]](#footnote-42) may give the appearance of professional competence, but this risks precipitating a speed of disposition which encourages errors (or omissions) through over-reliance on electronic records.[[43]](#footnote-43) Defendants also face digitisation, with video-links removing the need for physical presence. While some financial advantage and time saved is likely achieved by conducting conferences on purely administrative matters via a video-link, the notion that legal advice can be effectively provided in a disembodied format constrained by fixed time-slots is highly questionable.[[44]](#footnote-44) Equally, the notion that ‘virtual’ advice is akin to ‘real’ advice belies the importance of the lawyer-client relationship of trust.[[45]](#footnote-45) ‘Virtual courts’ will marginalize defendants further and risk becoming a barrier to their ‘effective participation’ in court proceedings.

*(b) Defence consequences: a reductive role.* The huge investment needed to implement the *Review’s Common Platform* comes at a time when funding for defence lawyers has sunk to levels such that growing numbers of junior advocates are bleeding away from the profession.[[46]](#footnote-46) The *Review’s* remedy to reduced financing is unsubtle:

Part of the solution to improving the efficiency of the whole system is to acknowledge the *critical role* that the defence can play whether in relation to *advising clients as to discount* and the *benefits of entering an early guilty plea* or obtaining instructions to *identify the true issues in dispute* (so that preparation and trials can be focused in a more limited way than otherwise would be the case)’.[[47]](#footnote-47)

The ‘vision’ of defence role presented in England and Wales could hardly be more bleak: a tri-fold state-serving function within ‘the new landscape’[[48]](#footnote-48) centred on counsel’s co-optation in ‘simple, speedy, summary justice’ facilitated by a process now openly redesigned to ‘encourage’ early guilty pleas.[[49]](#footnote-49)

*(c) Defendant consequences: pressure on plea.* A related concern has been judicial pressure on defendants to enter a plea where full (or proper) disclosure has not been made. This problem will only exacerbate alongside poor quality advice from ‘downgraded’ lawyers, itself linked to legal aid cutbacks.[[50]](#footnote-50) Remarkably the diminution of legal aid continues despite Auld having earlier identified an *essential* component of the system needed to balance the prosecution: ‘an experienced, motivated defence lawyer… adequately paid for pre-trial preparation’. [[51]](#footnote-51) And although the *Review* is not blind to the link between poor pay and falling standards,[[52]](#footnote-52) neither shying from the path of ‘poor quality advocates’ to ‘potential miscarriages of justice’[[53]](#footnote-53) – the solution - that less remuneration (in real terms) will be offset by ‘less work’, ignores the realities of criminal practice. When read against the compressed function of defence lawyers the *Review* envisions, this ‘solution’ can *only* mean greater numbers of early guilty pleas, a situation precipitated by financial benefits Leveson recommends: *‘*a fee mechanism that rewards early significant engagement with the prosecution that results in the more effective and efficient early disposal of cases’.[[54]](#footnote-54)

*(v) Real ‘inefficiencies’*

The *Review* does not merely obfuscate consequences that will stem from its recommendations; it will have no bearing upon the real inefficiencies (substantive and financial) of the process. These are: (a) wrong verdicts (b) collapse of prosecutions in respect of cracked trials and ineffective trials; (c) ordered acquittals and those directed by the judge.

1. *Wrong verdicts.* Some of the main ‘inefficiencies’ in system-failure can be adverted to briefly since they are so well-known – miscarriages of justice which have stained the criminal process in England and Wales for the past four decades.[[55]](#footnote-55) The major inefficiencies – the conviction of innocent people and their incarceration (at public expense) for long terms[[56]](#footnote-56) before grudging exoneration – can be gauged from a selection of notorious failures: *Michael McMahon and David Cooper* (1969); the *Confait Case* (1972); the *Guildford Four* (1974); *Judith Ward* (1974); the *Birmingham Six* (1975); the *Maguire Family* (1976); *Stefan Kiszko* (1976); the *Bridgewater Four* (1979); *John* *Kamara* (1981); the *Cardiff Three* (1990).

Setting aside the appalling human consequences, these malfunctions have led to enormous and unquantifiable financial costs, as well as requiring expensive system-wide changes, precisely ‘inefficiencies’ that should concern any review of the system. These include, in addition to countless police-led inquiries, repeated involvement of the Court of Appeal Criminal Division;[[57]](#footnote-57) civil actions by those wrongly convicted; judge-led inquiries (notably the *Fisher Report* on the *Confait* case and the *May Inquiries* into the *Guildford Four* and *Maguire Family* cases);[[58]](#footnote-58) numerous inquiries by the *Independent Police Complaints Commission* (‘IPCC’); two Royal Commissions (*Royal Commission on Criminal Procedure* (1981) and the *Royal Commission on Criminal Justice* (1993)); the establishment of the *Criminal Cases Review Commission* (1995) with its investigations triggering appeals[[59]](#footnote-59); and significant and costly legislation (including the *Police and Criminal Evidence Act, 1984*, the *Prosecution of Offences Act, 1985*, the *Criminal Justice and Public Order Act, 1994*, and the *Criminal Procedure and Investigations Act, 1996*).

*(b) ‘Cracked’ and ineffective trials.* In his inaugural speech as Secretary of State for Justice and Lord Chancellor, Michael Gove captured a major problem affecting the criminal justice system:[[60]](#footnote-60)

Across both magistrates and Crown Courts, almost 1 in 5 trials - 17% - are ‘ineffective’ - meaning the required court hearing does not happen on the day, often due to administrative issues, and needs to be rearranged. Almost 2 in 5 trials - 37% - are ‘cracked’ - meaning the case concludes unexpectedly without a planned court hearing. Last year, there were more than 33,000 ineffective trials in our criminal courts. That leaves less than half of cases - 46% - which are ‘effective’.

The difficulty with the *Review’s* approach to these damning figures is its delineation of defence involvement. Historically, blame has primarily been laid at the door of defendants. The allegation (made most emphatically by Auld) was that calculating and guilty defendants brought criminal procedure to a point of administrative collapse through working the weak spots of the system.[[61]](#footnote-61) There is little deviation in the *Review’s* account which singles out defendants as ‘hav[ing] no interest in improving the efficiency of the system or saving public money.’[[62]](#footnote-62) Furthermore, blame is attributable to defendants in *enumerating* what are said to be the three causes of ‘cracked’ trials: (1) the prosecution offer no evidence; (2) alternative pleas are accepted; (3) a guilty plea is entered ‘at the last possible moment’, only when it becomes clear that the trial will go ahead.[[63]](#footnote-63) Through employment of this false partition of liability, with defendants said to be responsible for the latter two, they shoulder the weight of causing ‘cracked’ trials, resulting in the ‘substantial waste’ of resources.[[64]](#footnote-64)

In fact, the evidence shows that the ‘waste’ is exaggerated,[[65]](#footnote-65) that a substantial proportion of trials ‘crack’ because of decision-making by the prosecution and that in only *six per cent* of cases do trials ‘crack’ because of a change of mind on the part of the defendant.[[66]](#footnote-66) A similar picture emerges with ‘ineffective’ trials: almost 62% of ‘ineffective’ trials in magistrates’ courts have nothing to do with actions by the defendant,[[67]](#footnote-67) the equivalent figure in the crown court being 61%.[[68]](#footnote-68)

*(c) Directed/Ordered Acquittals.* The other category of inefficiency in this vein is directed and ordered acquittals: *ordered* before a jury has been convened; *directed* where the prosecution starts their case but because of their ineffectualness they eventually collapse. In this regard, the attrition rate of cases prosecuted by the CPS in the crown court is alarming. The statistics for 2010[[69]](#footnote-69) show that *no fewer than 64% of defendants (20,921) who pleaded not guilty in cases dealt with in 2010 were acquitted*.[[70]](#footnote-70) Of those acquitted, 62% (13,037) were ordered; a further 8.3% (1,749) were directed.[[71]](#footnote-71) In other words, at least 70% of acquittals result from fatal weaknesses in the prosecution case.

*(vi) Causes of inefficiency*

*Systemic problems with Leveson’s ‘gatekeeper’.* As attested to by the wellspring of miscarriages of justice and by official statistics relating to failed prosecutions, the ‘inefficiencies’ are largely located within a dislocated, dysfunctional prosecution.[[72]](#footnote-72)

*The CPS.*

The key principle ‘*Getting it Right First Time*’, demands a cadre of independent and competent prosecutors who are able: to assess with a high degree of accuracy whether a charge should be instituted or continued and at the appropriate level of seriousness; to discharge its disclosure obligations; to prepare and conduct the case competently in accordance with prevailing rules; and to do so independently and objectively while exercising the highest standards of integrity and care.

The *Review’s* account meets a very different reality. While the *Review* points to the financial costs incurred by changed charges leading to ‘cracked trials’ the bare statistics hide an underlying disarray within the CPS and the consequent social costs.[[73]](#footnote-73) The basic duty to select the correct charge and present evidence that speaks to that charge is one that all too commonly is beyond the reach of the CPS.[[74]](#footnote-74) A recent illustration of this is *Quillan & Ors*[[75]](#footnote-75) where submissions of no case to answer made by all nine defendants on all nine counts in the indictment were upheld at great cost to the public purse. The Crown did not appeal against the ruling in respect of three defendants; the Court of Appeal dismissed its appeal in respect of the other six defendants. So what brought about this disaster?

At an initial stage of the hearings, the trial judge invited the prosecution to ‘reflect further on the contents of the indictment.’ The Court of Appeal commented:

*As events were to prove, this invitation most regrettably did not force the prosecution to identify its final case and thereby to identify the real legal issues before a great deal of public money had been expended on the trial*.[[76]](#footnote-76)

The case epitomizes core weaknesses in the CPS.[[77]](#footnote-77) The allegations were that two schemes were set up with the dishonest intention of securing the payment of Income Tax relief at source from Her Majesty’s Revenue & Customs (‘HMRC’) by paying the same sum of money into pension schemes over and over again, each time causing the payment of tax relief from HMRC to the scheme. As the Court of Appeal remarked, however, there was a ‘regrettable and avoidable lack of precision as to the way in which the prosecution case was being put….’[[78]](#footnote-78) Indeed, and unaccountably, the prosecution case only became clear during the defence submission of no case[[79]](#footnote-79) with the trial judge having to ‘grapple with a number of different documents which contained somewhat different explanations of how the prosecution put its case.’[[80]](#footnote-80) In the result, the Court of Appeal held the allegation was ‘hopeless’ and should never have been put before a jury.[[81]](#footnote-81)

Structural flaws in the CPS are further evident in cases involving disclosure, a topic that the *Review* chose not to ‘revisit’ given that it has been the subject of three recent reviews[[82]](#footnote-82) (a factor that should have been a warning sign) and in light of the ‘strong commitment’ of the CPS to reform.[[83]](#footnote-83) However, as demonstrated repeatedly over the years, the issue is not addressed by an expressed commitment to change its culture; the CPS have repeatedly failed in their statutory duties despite judicial entreaties in this matter.[[84]](#footnote-84) This institutional malaise is illustrated by the case of *DS & TS*[[85]](#footnote-85) in which the gravity of the charges alone – multiple rapes, false imprisonment and assault by penetration – might have compelled the closest attention to disclosure requirements. Instead disclosure was not complete until orders were made by the Court of Appeal. The Judge described what had happened as ‘*a charade which made a mockery of the judicial system*’ and said that public money had been squandered ‘*mainly because of the abject failure of the CPS to organise disclosure at any stage prior to trial*’.[[86]](#footnote-86) Overall, the Judge found that there had been by the prosecution ‘*total incompetence and disobedience to the principles of disclosure*’.[[87]](#footnote-87)

The lesson from this and similar cases[[88]](#footnote-88) is that, as a result of institutional culture (a prosecution-oriented mentality) or institutional entropy, the CPS does not possess the competence[[89]](#footnote-89) or disposition[[90]](#footnote-90) to reliably comply with any admonition that requires ‘getting it right first time’ nor even the willingness or capability to account for manifest failings.[[91]](#footnote-91) Added to this, broader evidence is available from official reports, which evidence a de-skilled CPS. The *Fuller Review* (2015) of the CPS[[92]](#footnote-92), to name but one damning report,[[93]](#footnote-93) describes advocates conducting ‘unstructured cross-examination’, ‘failing to put the prosecution case’ and ‘being unaware how to put a no-comment interview’.

One set of outcomes is clear: inadequate case-preparation; low-quality advocacy; discontinuous representation; poor decision-making.[[94]](#footnote-94) It is in the face of this systemic malaise that the important function of defence lawyers[[95]](#footnote-95) to ensure that their client is not pressured into entering an inappropriate guilty plea, actually operates. This is magnified further where disclosure is limited, delayed or incomplete, a fact the *Review* itself highlights as common-place: ‘[o]ne of the major issues [is] the present failure of the police and the CPS to meet deadlines for disclosure.’[[96]](#footnote-96) For the future, the problems of the CPS will only be intensified by enforced budget reductions making it more reliant on in-house (overworked but often less-experienced and less well-trained[[97]](#footnote-97)) lawyers. The bulwark to this, a well-resourced and effective defence contingent and adversarial system, can offer little when it finds itself dismantling under similar strains.

*(vii) Departure from Terms of Reference: Leveson’s shadow report*

Despite the *Review* having failed both on its own terms to demonstrate ‘efficiency’, but also confront real inefficiencies of the system, it departs from its TOR in Chapter 10’s ‘Further Observations: Out of Scope’.Key among the *Review’s* observations is its push towards greater movement of cases into the magistrates’ court and the attenuation of trial by jury.

In setting out the direction of his *Review*, Leveson emphasised that his remit would be limited to changes which do not require primary legislation. However, he chose to reanimate a longstanding judicial ambition to restrict the right to jury trials.[[98]](#footnote-98) His proposal, simply stated, is that where criminal cases involve either-way offences, the defendant’s right to elect jury trial should instead be that of the court.[[99]](#footnote-99) Leveson explains that juries are a drain on resources; that the general public ‘has a proper interest in the financial and *human cost* of the criminal justice system and how best to apply its limited resources.’[[100]](#footnote-100) In making the case that jury trial undermines the system, Leveson makes passing reference to an unknown pool of jurors who complain ‘their time is “wasted” [with] what are perceived to be trivial cases’.[[101]](#footnote-101)

If implemented, these recommendations will have significant implications for the criminal justice system as they relate to the triangulation between forum, process and evidence. As a forum, magistrates’ courts in England and Wales have been seen as essentially ‘Guilty Plea’ courts and constructed as venues where ‘law’ is not really at issue[[102]](#footnote-102) with jury trials actually or potentially testing the state’s case[[103]](#footnote-103) (‘potential’ being important because it is precisely the threat of testing which causes most cases to ‘crack’ or be ‘ineffective’ and thus flag up the real ‘inefficiencies’ in the system). Of course, the more you ship cases away from the jury, the fewer of these cracked/ineffective trials or directed/ordered acquittals will occur but while this may result in the statistical appearance of enhanced ‘efficiency’, what it means in practice is that weaknesses in the prosecution case would not be so frequently or reliably revealed.

Compounding this, magistrates’ courts reflect a rapid ‘assembly-line’ approach to the disposals of cases,[[104]](#footnote-104) where lawyers juggle large volumes of clients in routine case processing;[[105]](#footnote-105) where evidence is generally not tested before its adjudicators; and a disclosure regime which is demonstrably bad would become even worse. The corollary is that defendants will be increasingly pressurized to plead guilty, be it through the sentence ‘discount’ (calibrated in the magistrates’ court to reward most where least disclosure has been served[[106]](#footnote-106)) or the criminal court charge[[107]](#footnote-107) levied upon those bold enough to put the prosecution to proof (again, calibrated to reward guilty pleas more in the lower court than those in the crown court).[[108]](#footnote-108)

If delivery of the *Review* was heavily constrained by time and budget resources, one might ask why Leveson deviated from his TOR in order to devote a chapter to an issue which has proved as rightly controversial as the removal of jury trial in prescribed circumstances. The manner in which Leveson delimits his proposal when he concedes it ‘is not appropriate for a serving Judge who has not specifically been asked to review legislation to express a concluded view’[[109]](#footnote-109) does little to lessen the momentum it inevitably creates. In making this statement, Leveson would be well aware that politically, removal of the right to trial by jury from those currently entitled, is a non-starter, without wider support from the judiciary. It is no surprise therefore that the executive’s response to his proposals curtailing them was one of swift uptake.[[110]](#footnote-110)

There is a concern then that the core ‘principles’ of this *Review* were not the real focus or indeed entire purpose of it.[[111]](#footnote-111) Far from mere ‘kite-flying’,[[112]](#footnote-112) Leveson’s meditations must be seen in the cold light of day: a judicial pretext, one executive-aligned,[[113]](#footnote-113) to provide future justification, without empirical foundation, to the further abridgement of a defendant’s right to elect jury trial, and shift classes of offences into magistrates’ courts.

**Conclusion**

This article has argued that the Leveson proposals for reform of criminal proceedings in England and Wales, under the guise of ‘efficiency’, have very serious implications for the system’s overt but increasingly threadbare commitment to accurate verdicts. Clearly, waste is in no-one’s interest; but affording undue priority to ‘dealing with the case efficiently and expeditiously’ under the CrimPRhas led to wholesale desertion of the system’s proclaimed founding values.

The *Review’s* treatment of its main subject (‘efficiency’) provides no auditing, cost analysis or ‘benefits’ beyond those of plain assumption. Accordingly, even on its own terms, this *Review* is more about cost-reduction than cost-effectiveness. The problem is both that the *Review* sees ‘efficiency’ from a narrow perspective against an unconvincing attempt to argue that the accuracy of verdicts is preserved.

When the *Review* *proclaimed* a ‘culture of failure’ existed in the courts, consideration to systemic failures of the prosecution should have been central to any meaningful review of ‘efficiency’ in criminal proceedings yet the *Review* chose to gloss over these. Instead, we are left with an unshakable assumption - *that the accused is factually guilty* - pervading this *Review*. The inbuilt failures within this state organisation give way to the utopian basis of technology aspirations which do nothing to ensure the integrity of prosecution evidence, or strengthen compliance with obligations of the CPS. Instead they risk entombing structural flaws into digital files which will then take on the air of professionalism and precipitate a speed of disposition which will not encourage careful scrutiny of cases.

The *Review’s* failure to explain how cost-cutting is compatible with retaining allegiance to verdict accuracy under the CrimPR is symptomatic of the direction in which the Rules are taking criminal justice. This is an ongoing narrative that has been constructed to avoid dealing with what are the core ‘efficiency’ issues in criminal justice: *How has the state been allowed to disregard basic principles which safeguarded verdicts? Why is the state so successful at convicting the innocent? How come it has been so profligate in throwing away resources on a defective prosecution system?* And although both the executive and the courts appear exercised about the scale of cracked and ineffective trials, the causes are conveniently nothing to do with the content of this *Review*. Efficiency is thus the cloak used to disguise these critical issues.

System redesign *is* a pragmatic response to austerity conditions, given that this is within the preserve of the Ministry of Justice. It is worrisome though that the Lord Chancellor has announced his ‘intention to do *everything [he] can* to support the Lord Chief Justice, Sir Brian and his colleagues in their work.’ Given the parlous state of legal aid lawyers, if there are to be safeguards against wrongful convictions, then the reality of those seeking to constrain or adversely change the position of the accused within the system, without faithfully articulating the principles, parameters and limitations upon which it is based, should be a matter of abiding concern to all. Traditional reliance on the system prioritising the fairness of its procedures is now met with the Lord Chief Justice’s excusatory claim: ‘The financial imperative that is *part and parcel* of the recasting of the State does *not give us the time* to take such an approach.’[[114]](#footnote-114) In turning their back on the ‘dead hand of tradition’ the senior judiciary have confirmed their allegiance to the exigencies of political need over the safeguards built into traditional principles which once prioritised securing accurate outcomes.

1. Hereafter: Leveson. [↑](#footnote-ref-1)
2. See for example, The Rt. Hon Sir Stanley Burnton’s ‘Delivering Justice in an Age of Austerity’ (2015), available through <http://justice.org.uk/> [↑](#footnote-ref-2)
3. See *West, Re* [2014] EWCA Crim 1480 (CA (Crim Div)). [↑](#footnote-ref-3)
4. *Ibid.* [↑](#footnote-ref-4)
5. In particular, changes to the Early Guilty Plea system. See <http://www.cps.gov.uk/london/about_us/early_guilty_plea_scheme/> [↑](#footnote-ref-5)
6. The development of ‘robust case management’ by judges. [↑](#footnote-ref-6)
7. In particular, the Royal Commission on Criminal Justice (Cm 2263, HMSO: London, 1993) (‘*Report*’) and the Criminal Courts Review (Royal Courts of Justice: London, 2001) conducted by Sir Robin Auld (‘*Auld Review*’) both of which were directed to increasing ‘efficiency’. [↑](#footnote-ref-7)
8. Various legislation including those pre-figured by policy papers such as ‘*Criminal Justice: Simple, Speedy, Summary*’, ‘*Stop Delaying Justice!*’ and ‘*Swift and Sure Justice*’. [↑](#footnote-ref-8)
9. This term reflects the growing supremacy of judge-led rule making under the CrimPR. For further, see M. McConville and L. Marsh, ‘Adversarialism goes West: Case Management in Criminal Courts’ (2015) 19(3) *International Journal of Evidence and Proof* 172. [↑](#footnote-ref-9)
10. However, ‘less work’ for ‘less remuneration’ requires more work to keep existing levels of remuneration. [↑](#footnote-ref-10)
11. *Review* at 2.1. [↑](#footnote-ref-11)
12. *Ibid.,* at 25. [↑](#footnote-ref-12)
13. The revised CrimPR (2015) took effect on 5 October 2015. [↑](#footnote-ref-13)
14. *Review*, above n. 11 at 33. [↑](#footnote-ref-14)
15. *Ibid.,* at 37. [↑](#footnote-ref-15)
16. *Ibid.,* at 16. [↑](#footnote-ref-16)
17. In a conference speech, Leveson foresees a future in which ‘… much of the preliminary work will be done by everyone in their… *living room* or remote video suite’. ‘Modernising Justice Through Technology’, 24 June 2015, 4-5. [↑](#footnote-ref-17)
18. See <https://www.justice.gov.uk/about/criminal-justice-system-efficiency-programme> [↑](#footnote-ref-18)
19. CrimPR, r.1.1(1). [↑](#footnote-ref-19)
20. CrimPR, r.1.1.(2)(a). [↑](#footnote-ref-20)
21. CrimPR, r.1.1.(2)(e). [↑](#footnote-ref-21)
22. ‘…[W]hen the innocent become victims of the law, the law is *not merely inefficient*, - it does not merely fail of accomplishing its intended object – it injures the persons it was meant to protect; it creates the very evil it was to cure, and destroys the security it was made to preserve’, S. Romily, *Observations on the Criminal Law of England* (Cadell and Davies: London, 1810), Note D, emphasis added. [↑](#footnote-ref-22)
23. This understanding of ‘risk’ within the justice system was acknowledged by the Royal Commission on Criminal Justice. It explained inducements are ‘sometimes held to encourage defendants who are not guilty of the offence charged to plead guilty to it nevertheless… This risk cannot be wholly avoided*…,’ Report*, above n. 7, 110at 42. [↑](#footnote-ref-23)
24. See e.g. A. Edwards, ‘The Other Leveson Report - The Review of Efficiency in Criminal Proceedings’ (2015) 6 *Criminal Law Review* 399; J. Robins, ‘“Streamlining” the Criminal Justice System’ (2015) 179 *Criminal Law & Justice Weekly* 94; B. Waddington, ‘Timely blueprint for the 21st century’ (2015) *Law Society Gazette,* 9 February 19. [↑](#footnote-ref-24)
25. N. Padfield speculates whether the *Review’s* ‘low key appearance is a crafty way’ of securing implementation ‘without controversy’: ‘Efficiency in criminal proceedings’ (2015) 4 *Criminal Law Review* at 249. [↑](#footnote-ref-25)
26. ‘Reshaping Justice’, Speech delivered to JUSTICE, 3 March 2014, at 3, emphasis added (‘Reshaping Justice’ (2014)). Available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-speech-reshaping-justice.pdf> [↑](#footnote-ref-26)
27. The point being that the recommendations are *not* cost-effective in the long term in light of all the disbenefits. [↑](#footnote-ref-27)
28. *Review*, above n. 11 at 1. [↑](#footnote-ref-28)
29. *Ibid.*, at 9. [↑](#footnote-ref-29)
30. *Ibid.,* at 10. [↑](#footnote-ref-30)
31. Although I refer to Leveson throughout, this article is not meant to attach personal responsibility – the argument here is concerned with judicial responsibility for the direction in which the CrimPR are taking criminal justice, which is instantiated in the *Review*. [↑](#footnote-ref-31)
32. In the rush, Leveson found no time to make sense of its own footnote 139. [↑](#footnote-ref-32)
33. A comparison is instructive: Leveson attempted to review *current practice and procedures from charge to conviction or acquittal with a particular focus on pre-trial hearings* *of the whole of the criminal justice process* in a time frame roughly equal to that taken by the Rt Hon Dame Elish Angiolini to review *one aspect of the process* (the investigation and prosecution of rape) *in one city* (London): *Report of the Independent Review into the Investigation and Prosecution of Rape in London*, April 2015. [↑](#footnote-ref-33)
34. In a speech delivered by Lord Chancellor and Secretary of State for Justice, the Rt Hon Michael Gove MP at the Legatum Institute on 23 June 2015 (‘Gove’): <https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like> [↑](#footnote-ref-34)
35. Despite Leveson’s general recognition of the poor track record of major IT projects: above n. 17 at 7. For a recent example of a governmental fiasco which resulted from one of its IT digital transformation programmes and led to a 40% increase in its lifetime costs (in addition to the prospect of significant fines), see the highly critical report from the National Audit Office (‘NAO’) published on 1 December 2015 which reviewed the Department for Environment, Food & Rural Affairs (‘Defra’) Common Agricultural Policy Delivery Programme. Available at <https://www.nao.org.uk/wp-content/uploads/2015/11/Early-review-of-the-Common-Agricultural-Policy-Delivery-Programme.pdf> [↑](#footnote-ref-35)
36. Padfield, above n. 25 at 249. See also D. Rowland, U. Kohl and A. Charlesworth, *Information Technology Law*, 4 edn (Routledge: Oxford, 2011), ch 1 at 5. [↑](#footnote-ref-36)
37. D. Alge, ‘The Effectiveness of Incentives to Reduce the Risk of Moral Hazard in the Defence Barrister’s Role in Plea Bargaining’ (2013) 16 *Legal Ethics* 1. [↑](#footnote-ref-37)
38. See M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State-induced guilty pleas in Britain* (Edward Elgar: Cheltenham, 2014), ch 6. [↑](#footnote-ref-38)
39. *Review*, above n. 11 at 25. [↑](#footnote-ref-39)
40. CrimPR, r.1.3. [↑](#footnote-ref-40)
41. As J. McEwan puts it: ‘Court verdicts are an imperfect reflection of how past events unfolded,’ in ‘Truth, efficiency, and cooperation in modern criminal justice’ (2013) 66 *Current Legal Problems* 1 at 203. See M. McConville, A. Sanders, and R. Leng, *The Case for the Prosecution* (Routledge: London, 1991). [↑](#footnote-ref-41)
42. Leveson, above n. 17, 3 at 7. [↑](#footnote-ref-42)
43. For an example demonstrating the unreliability and dangers of digital data, see *R v Yassain*, unreported, 16 July 2015 C.A., where incorrect assumptions were made by the Court of Appeal itself on the basis of electronic evidence. For commentary, see *Criminal Law Week*, Issue 35, 05 October 2015. For a brief overview of privacy and security issues in cloud computing, see D. Tancock, S. Pearson and A. Charlesworth, ‘A Privacy Impact Assessment Tool for Cloud Computing’ (2012) 2nd IEEE International Conference on Cloud Computing Technology and Science. Available at: http://ieeexplore.ieee.org/xpl/articleDetails.jsp?arnumber=5708516 [↑](#footnote-ref-43)
44. A seasoned practitioner has highlighted the inbuilt difficulties with reliance on ‘virtual courts’, see D. Kirk, ‘Reflections of a former prosecutor’ (2014) 78 *Journal of Criminal Law* 99. [↑](#footnote-ref-44)
45. T. Smith, ‘Trust, choice and money: why the legal aid reform “u-turn” is essential for effective criminal defence’ (2013) 11 *Criminal Law Review* 906. [↑](#footnote-ref-45)
46. See F. Gibb, ‘We must stem the loss of young barristers’, *The Times*, 17 September 2015. In 2015, the Bar Council commissioned a research survey which found that over half of the self-employed bar were ‘disengaged’, suffering from a ‘lack of autonomy’ and ‘reduced status’. Available at: <http://www.barcouncil.org.uk/media/348371/wellbeing_at_the_bar_report_april_2015__final_.pdf> [↑](#footnote-ref-46)
47. *Review*, above n. 11 at 99. [↑](#footnote-ref-47)
48. *Ibid.,* at21. [↑](#footnote-ref-48)
49. This has been achieved in a number of ways including the development of early guilty plea courts overseen by ‘less accomplished’ guilty-plea-only advocates: B. Jeffrey, *Independent Criminal Advocacy in England and Wales* (‘*Jeffrey Review*’) (Ministry of Justice: UK, 2014) 07 May, at 7. [↑](#footnote-ref-49)
50. Notable findings of the *Jeffrey Review* (*ibid.*) included that some defence firms were putting profit before the best interests of their clients. [↑](#footnote-ref-50)
51. *Auld Review*, above n. 7, ch 10 at 399. [↑](#footnote-ref-51)
52. The importance of maintaining appropriate remuneration is underscored by Leveson: ‘otherwise the highest calibre individuals will not be prepared to work in the field and standards will inevitably drop’ (*Review,* above n. 11 at 22). These observations echo his firm stance directed at the government in *R v Crawley & others* [2014] EWCA Crim 1028 at 56-58. The irony however is that the government, ‘[h]aving considered the findings of Sir Brian Leveson’s report into the efficiency of the criminal courts… have decided to press ahead with the second 8.75% reduction to litigators’ fees announced by the Coalition government.’ See: <http://www.parliament.uk/documents/commons-vote-office/June%202015/10%20June/2.Justice-Legal%20Aid.pdf> [↑](#footnote-ref-52)
53. *Review*, above n. 11at 11. [↑](#footnote-ref-53)
54. *Ibid.,* at 190. [↑](#footnote-ref-54)
55. Though there were, of course, prior miscarriages including *Timothy Evans* (1950) and *Mahmood Mattan* (1952) and more recent cases such as those of *Donna Anthony* (1998), *Angela Cannings* (2002), *Sally Clark* (2003) and *Sam Hallam* (2005). [↑](#footnote-ref-55)
56. For example, *Stefan Kiszko* spent 16 years in prison; three of the *Bridgewater Four* spent 18 years in prison, the other member, Patrick Malloy, dying in prison; the release of the *Birmingham Six* took 16 years; the release of the *Guildford Four*, convicted in 1974 and the *Maguire Seven*, convicted in 1976, did not occur until 1991, one of their number, Giuseppe Conlon, having already died in prison; John Kamara’s convictions for murder and robbery were not quashed until 19 years later; while Michael McMahon and David Cooper’s convictions were not quashed until after both had died. [↑](#footnote-ref-56)
57. Many required more than one attempt to quash the conviction (*McMahon and Cooper* were not exonerated – posthumously - until 2003 following the sixth appeal; the *Birmingham Six* convictions were not quashed until 1991 after two previous unsuccessful appeals; and the *Guildford Four* 1989 convictions were quashed after a previous unsuccessful appeal). [↑](#footnote-ref-57)
58. The Home Secretary has appointed a QC to investigate the collapse of the trial of officers involved in the *Cardiff Three* Case (2015). [↑](#footnote-ref-58)
59. By the end of May 2015, 385 of the 558 cases referred by the Commission and heard by the appeal courts were successful. [↑](#footnote-ref-59)
60. Gove, above n. 34. [↑](#footnote-ref-60)
61. *Auld Review,* above n. 7, ch 10, para. 8. [↑](#footnote-ref-61)
62. *Review*, above n. 11 at 158. [↑](#footnote-ref-62)
63. *Ibid.*, at 158. [↑](#footnote-ref-63)
64. *Ibid.*, at 61. [↑](#footnote-ref-64)
65. McConville and Marsh, above n. 38 at 104-114. [↑](#footnote-ref-65)
66. See M. Zander and P. Henderson, *Crown Court Study*, Research Study No.19, RCCJ, (HMSO: London, 1993), Table 5.1. [↑](#footnote-ref-66)
67. *Criminal Justice Statistics*, Quarterly Update to December 2012 (Ministry of Justice: London, 2013) 30 May. The statistics do not give a complete picture but disclose that 26% were ineffective because of court administrative problems, 16% because of the absence of a prosecution witness and 21% because of the absence of the defendant. [↑](#footnote-ref-67)
68. *Judicial and Court Statistics 2011* (Ministry of Justice: London, 2012), 28 June. The biggest single cause here being ‘administrative problems’ (23%) with other major causes being the absence of a prosecution witness (21%) or the prosecution not being ready (17%). [↑](#footnote-ref-68)
69. *Judicial and Court Statistics 2010* (Ministry of Justice: London, 2011) 30 June. [↑](#footnote-ref-69)
70. This is in line with the study of ethnic minority defendants by L. Bridges, S. Choongh and M. McConville, *Ethnic Minority Defendants and the Right to Elect Jury Trial*, (Commission for Racial Equality: London, 2000). [↑](#footnote-ref-70)
71. Only 28.4% of acquitted defendants were acquitted by verdict of the jury. [↑](#footnote-ref-71)
72. Although a demoralized and disorganized defence shares some of the blame. [↑](#footnote-ref-72)
73. See for example *Antoine v R* [2014] EWCA Crim 1971 in which the defendant was charged with the wrong offences and was dealt with in the wrong court. [↑](#footnote-ref-73)
74. See e.g. *Hughes v DPP* [2012] EWHC 606 where the prosecution failed to charge the obvious offence. See also *R v Goodings* [2012] EWCA Crim 2392. [↑](#footnote-ref-74)
75. [2015] EWCA Crim 538. [↑](#footnote-ref-75)
76. *Ibid.,* at 16. [↑](#footnote-ref-76)
77. See e.g. *R v Shields* [2011] EWCA 2343; *R v Cornelius* [2012] EWCA Crim 500; *R v Chaney* [2009] EWCA Crim 52; *Nolan and Howard v R* [2012] EWCA Crim 671; *R v Pelletier* [2012] EWCA Crim 1060*; R v Lawrence* [2013] EWCA Crim 1054; *R v Jonathan Dodd* [2013] EWCA Crim 660 and *R* *v* *White (Anthony)* [2014] 2 Cr App R 194(14), CA; *R v Carroll* [2015] 1 Cr App R (S) 381(54), C.A; *R v J.H.*[2015] 1 Cr App R (S) 409(59), C.A. [↑](#footnote-ref-77)
78. *Quillan & Ors,* above n. 75 at 17. [↑](#footnote-ref-78)
79. *Ibid.,* at 47. [↑](#footnote-ref-79)
80. *Ibid.,* at 71. [↑](#footnote-ref-80)
81. *Ibid.,* at 89. [↑](#footnote-ref-81)
82. *Review*, above n. 11 at 118. The reviews in question are: Gross LJ, *Review of Disclosure in Criminal Proceedings* (2011); Gross LJ and Treacy LJ, *Further Review of Disclosure in Criminal Proceedings: Sanctions for Disclosure Failure* (2012); HHJ Kinch, Howard Riddle and HHJ Kinch, *Magistrates’ Court Disclosure Review* (2014). [↑](#footnote-ref-82)
83. *Review*, *ibid.,* at 141. [↑](#footnote-ref-83)
84. Failure to comply with disclosure requirements has been a prominent feature in miscarriage of justice cases, triggered statutory intervention on several occasions (importantly the Criminal Procedure and Investigations Act, 1996 and Criminal Justice Act, 2003), countless judicial iterations (earlier in *McKilkenny* (1991) 93 Cr App R 287 and *Ward* [1993] 1 WLR 619 and notably in more recent times: *R v Olu Wilson and Brooks* [2010] 1 CR App R 33; *R v Malook* [2011] 1 WLR 63) as well as leading to initial dismissal of charges (as in *Radziwilowicz* [2014] EWHC 2283 (Admin)); the collapse of prosecutions (as in *Boardman* [2015] EWCA Crim 175); or the quashing of compensation orders (*Guraj v R* [2015] EWCA Crim 305). [↑](#footnote-ref-84)
85. [2015] EWCA Crim 662. [↑](#footnote-ref-85)
86. *Ibid.,* at 26. [↑](#footnote-ref-86)
87. *Ibid.*  [↑](#footnote-ref-87)
88. See, for example, *Boardman* [2015], above n. 84, where, as described by LCJ Thomas in *DS & TS* (*ibid.* at 1), ‘the failures… in relation to the provision of evidence had been grave and in disregard of clear directions of the court’. [↑](#footnote-ref-88)
89. See the recent example of *Guraj v R,* above n. 84. [↑](#footnote-ref-89)
90. See also HMCPSI Report, *Review into the disclosure handling in the case of R v Mouncher and others*, May 2013 which found that while there was no evidence that prosecution (or police) staff made decisions for any improper reason there was a lack of supervision of (inexperienced) disclosure counsel’s work, ‘*The management of the case by the CPS, however, was weak. Disclosure was recognised as a major issue from the beginning, but did not receive the required level of attention in spite of the first reviewing lawyer’s representations. The failure to take realistic decisions about the required resources at the outset of the case led to later problems. The CPS lawyer team did not always work together smoothly. The counsel team lacked the necessary collective experience for a case of this difficulty.* ..’ (Executive Summary, at 1.11). [↑](#footnote-ref-90)
91. See also, *CW v R* [2015] EWCA Crim 906. There was a failure (‘wholly avoidable inattention’, at 40) to secure the required permission of the Attorney General before proceedings were instituted despite numerous opportunities and the several mentions of it by counsel for CW. ‘The CPS…knew at an early stage that consent was necessary, leaving aside the several mentions of it by counsel for CW. *Quite why, thus alerted, it did not pre-arrest seek it was never satisfactorily explained.*’ (at 38). [↑](#footnote-ref-91)
92. M. Fuller, ‘Thematic review of the CPS advocacy strategy and progress against the recommendations of the follow-up report of the quality of prosecution advocacy and case preparation’ (HMCPSI, 2015) March. [↑](#footnote-ref-92)
93. Angiolini, above n. 33, has further highlighted structural failings in the CPS: e.g. paras 575, 585. [↑](#footnote-ref-93)
94. As the *Jeffrey Review*, above n. 49 at 3, stated: ‘Effective advocates simplify rather than complicate… and thereby contribute to just outcomes and save court time and public money.’ [↑](#footnote-ref-94)
95. As successive attempts to undermine the defence have continued, defence lawyers have themselves signally been found wanting, not correcting wrongful CPS charging decisions, a fault regrettably found also in prosecuting barristers and trial judges in what is rapidly becoming a deficient criminal justice system. [↑](#footnote-ref-95)
96. *Review*, above n. 11 at 178. [↑](#footnote-ref-96)
97. While the *Review* notes this, it contents itself with the observation: ‘Any solution to ensuring appropriate charging decisions must involve a commitment to a review of [CPS] staff training’ (*ibid.,* at 62) the fulfilment of which might be thought overdue in an organization that started operations in 1986. [↑](#footnote-ref-97)
98. Leveson credits ‘the excellent work carried out in this regard by Lord Justice Auld’ (*Review*, above n. 11 at 3 41) but judicial involvement in the declining role of the jury has a long history. For further see, McConville and Marsh, above n. 38. [↑](#footnote-ref-98)
99. Additionally, Leveson attempts to resurrect the argument that special categories of trials (e.g. serious and complex fraud cases) should be judge-only trials, despite reporting that the judges at Southwark ‘who try the vast bulk of the most serious fraud’ are unpersuaded about the desirability of judge alone trials for the most serious and complex cases (*Review*, *ibid.,* at 357). [↑](#footnote-ref-99)
100. *Ibid.,* at 338. [↑](#footnote-ref-100)
101. An echo of the (Lord Justice) James Committee in 1975. [↑](#footnote-ref-101)
102. P. Carlen, *Magistrates’ Justice* (Martin Robertson: Oxford, 1976); A. Bottoms and J. McClean, *Defendants in the Criminal Process* (Routledge: Abingdon, 1976); D. McBarnet, *Conviction: Law, the State and the Construction of Justice* (Macmillan: Basingstoke, 1981). [↑](#footnote-ref-102)
103. The concept of a fair trial is said to find its ideal expression in trial by jury: *R v CCRC ex parte Pearson* [2000] 1 Cr App R 1414, [145]. See also D. Riley and J. Vennard who suggest that defendants have less faith in the magistrates’ courts than they do in jury trials: *Triable-either-way Offences: Crown Court or Magistrates’ court?* (HORS No 98, HMSO, 1988) at 21. [↑](#footnote-ref-103)
104. See e.g. H. Parker, M. Sumner, and G. Jarvis, *Unmasking the Magistrates: The ‘Custody or Not Decision in Sentencing Young Offenders,* (Open University Press: Milton Keynes, 1985); S. Brown, *Magistrates at work: Sentencing and Social Structure* (Open University Press: Milton Keynes, 1991) at 81. [↑](#footnote-ref-104)
105. See D. Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing: Oxford, 2013). [↑](#footnote-ref-105)
106. Reworded in the official sentencing guidelines as ‘first reasonable opportunity’. [↑](#footnote-ref-106)
107. The Prosecution of Offences Act (Criminal Courts Charge) Regulations 2015 (S.I. 2015 No.796) which plainly introduces pressure on a defendant’s plea (by imposing a mandatory higher ‘administrative’ fee for a not-guilty plea than a guilty plea) was ‘introduced: at short notice, with no meaningful consultation with those who will have to operate it, and virtually no public debate,’ JR Spencer, *Archbold Review* 4 (2015) 11 May. [↑](#footnote-ref-107)
108. Those convicted of an either-way offence after a magistrates’ court trial must pay £1,000 (or £180 if it is a guilty plea). In the Crown Court, there is a £900 charge if convicted on a guilty plea, while those convicted following a trial will have to pay £1,200. The chairman of the Magistrates Association has highlighted a ‘deeply worrying’ trend with large numbers of magistrates resigning in protest at the new charges on defendants, who report ‘a clear influence on pleas with the very strong temptation for defendants to plead guilty to avoid a higher charge’: S. Jamieson, ‘Magistrates resign over court charges’, *The Telegraph*, 9 September 2015. Such was the intensity of criticism towards the criminal courts charge, that the government was forced to repeal the provision (as of 24 December 2015). [↑](#footnote-ref-108)
109. *Review,* above n. 11 at 3. [↑](#footnote-ref-109)
110. ‘The Lord Chief Justice and his colleagues who provide leadership to our justice system are all convinced of, and convincing on, the case for reform. They have commissioned work which makes the case for quite radical change. Should anyone doubt the need for dramatic steps, Sir Brian Leveson’s report on the need for change in our criminal justice system makes the case compellingly. He argues with *great authority* and makes a series of *wise recommendations*. They need to be implemented with *all speed*.’ Gove, above n. 34, emphasis added. [↑](#footnote-ref-110)
111. Note that Thomas LJ, above n. 26, prior to commissioning the *Review*, indicated his desire for altering the boundaries of cases where trial by jury is available to deal with the lower-end of the offences that are triable in the Crown Court. Further he strongly hinted at the need for dissolution of jury trials in fraud trials, holding himself back from full comment ‘until there is a *carefully considered report* which can form the basis of a considered view,’ at 10, emphasis added.  [↑](#footnote-ref-111)
112. Edwards, above n. 24 at 405. [↑](#footnote-ref-112)
113. Despite the Constitutional Reform Act being ‘officially welcomed as liberating the judiciary from the politicians’, Spencer, above n. 107, has argued ‘the truth, alas, is probably the reverse.’ [↑](#footnote-ref-113)
114. Thomas LJ, above n. 26 at 15. [↑](#footnote-ref-114)