“Not a stain on your character?”: The finality of acquittals and the search for just outcomes

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Abstract

Little attention has been given to the harms, both formal and informal, inflicted on acquitted defendants. This article documents the nature of those harms and questions the legitimacy of state sanctioned restrictions on the lives of acquitted defendants through the activities of the Disclosure and Barring Service and the use of enhanced criminal record certificates. Whilst recognising the heterogeneous nature of the acquitted population, and being cautious about risks posed to vulnerable others arising out of the gap between criminal and civil standards of proof, the article argues in favour of greater justice for acquitted defendants. It also proposes both a more generous approach to compensation for the acquitted and a bifurcated use of necessary restrictions for some on their subsequent liberties.

We have been shown reports which emphasise the importance of not excluding the convicted from consideration for employment, but they say nothing about the acquitted, who surely deserve greater protection from unfair stigmatisation…… Careful thought needs to be given to the value in practice of disclosing allegations which have been tested in court and have led to an acquittal. Lord Carnwath [2018] UKSC 47.[1]

On being falsely accused

The 1486 *Malleus Maleficarum*[2] urged the prosecution of witches. Many thousands of largely mature women were put to death all over Europe following accusations of witchcraft. In England and Wales it was not until 1951, when the Fraudulent Mediums Act repealed The Witchcraft Act 1735, that an accusation of witchcraft no longer had legitimacy in our courts. Even in areas where the law is manifestly risible injustices can long endure.

In the twenty first century, accusations of witchcraft no longer endanger elderly women in the courts and acquittals no longer depend upon the failure of the accused to survive the

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[1] *R (on the application of AR) v Chief Constable of Greater Manchester Police and another* [2018] UKSC 47 at [75-76].

[2] Printed 29 times between 1486 and 1669: H. Institoris (first author) and excerpted in R. Porter, *The Faber Book of Madness* (London: Faber and Faber Ltd, 2003,158).

process of prosecution.[3] Nonetheless, we shall argue that the criminal justice system functions in ways that are profoundly harmful and which, in many instances, lack legitimacy. There are, of course, some harms that are clearly authorised and which constitute deliberate and calibrated state punishment, designed to impose a just measure of pain on convicted offenders.[4] Yet many offenders also experience harms that are not intentionally inflicted by the state, but which arise in the criminal process as a form of collateral damage, such as the loss of employment, the loss of a home or psychological damage. Despite their arbitrary and unregulated occurrence, the impact of these harms on the life of the offender can often be more severe and far reaching than the commensurate sanction associated with the seriousness of the crime.[5] Although views differ about the extent to which sentencers should take account of these collateral hardships there is, nonetheless, a principle of parsimony that discourages the exacerbation of offenders' existing vulnerabilities. Thus,

[3] The practice of ducking alleged witches to ascertain guilt through survival of drowning has limited evidence to support its use. One well documented case is discussed here https://www.washingtonpost.com/wp-dyn/content/article/2006/07/11/AR2006071101218.html

[4] There is an enormous literature on state punishment; but see, for example, D. Garland, *Punishment and Modern Society: A Study in Social Theory* (Oxford: Clarendon Press, 1990); N. Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge, 1988); J. Sim *Punishment and Prisons: Power and the Carceral State* (London: Sage, 2009).

[5] See Z. Hoskins *Beyond Punishment: A Normative Account of the Collateral Legal Consequences of Conviction* (Oxford: Oxford University Press, 2019).

sentencers are exhorted to take account of an offender's age, and in particular their youth, and mental health vulnerabilities.[6]

There is also widespread recognition that victims and other witnesses need protection from the harms arising out of their involvement with the criminal justice system. In recent years, their interests have been given considerable weight in assessing and reforming procedural justice, particularly in relation to the investigation and prosecution of sexual offences.[7]

Yet there is remarkably little, if any, attention given to the harms experienced by those who are proceeded against but who are eventually acquitted, either at trial or on appeal.[8] Attention has recently been focussed on the harms suffered by those subject to miscarriages of justice by coverage of the acquittals on appeal of the post office workers and the wide-ranging collateral damage suffered by them.[9] Whilst these 'acquitted on

[6] See, in particular, the sentencing guideline dealing with mental disorders, developmental disorders, or neurological impairments https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/ (Sentencing Council, 2020).

[7] See P. Rock, *Constructing Victims' Rights: The Home Office, New Labour and Victims* (Oxford: Oxford University Press, 2004).

[8] See the damning judgment in the Court of Appeal in 42 linked cases, with 39 having their convictions quashed *Hamilton and Others v Post Office* [2021] EWCA Crim 577, and U. Azmeh, 'Abuse of process: Hamilton v Post Office Ltd (Case Comment)' (2021) Crim.L.R. 8, 684-690. For an insight into the effects of this notorious and protracted case on those wrongly accused see https://www.theguardian.com/business/2021/apr/23/so-much-has-been-taken-from-us-former-post-office-operators-speak-out

appeal' cases raise fascinating issues[10] our article addresses the neglect of those acquitted at first instance and shows how their treatment reflects important ways in which the legal powers of the state routinely undermine principles of fairness and justice. Specifically, it exposes the punitive experiences arising from the criminal procedures and from the prevailing stigma that attaches to criminal accusations in subsequent civil justice processes and the activities of assorted regulatory agencies. It concludes by proposing reformative measures that balance a bifurcated approach, offering greater protection to those acquitted in the criminal courts whilst permitting, under certain circumstances, ongoing regulation against those who may pose an enhanced risk of serious harm to others. Throughout the article we draw on our observation of one case of an acquitted accused, following its trajectory through both a criminal prosecution and accusations re-opened by the Disclosure and Barring Service (DBS), and ultimately to a precarious form of exoneration. Adopting a case study approach enabled an in-depth and holistic investigation of three interconnected questions: how the formal criminal process operated in a real-time context; how it interacted with other systems of state regulation; and how these dynamics were experienced by the accused.[11] Whilst we make no pretence that this case represents what happens in the majority of acquittals, we would nonetheless challenge the claim that

[10] See H. Quirk, 'Identifying miscarriages of justice: why innocence in the UK is not the answer' (2007) 70 *Modern Law Review* 5, 759-777 and C. Walker, 'Miscarriages of Justice in Principle and Practice' in C. Walker and K. Starmer *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press, 1999).

[11] For a discussion of the validity of case study methods see R. Yin, *Case study research: Design and methods* 2nd ed. (Thousand Oaks, CA: Sage Publishing, 1994).

generalisable conclusions cannot be drawn from a single example.[12] The case we refer to here exposes aberrant and indefensible outcomes that are generated by systemic problems that others exposed to the same processes of state regulation will encounter.[13]

Terminology: the acquitted and the innocent

In reality, acquitted defendants comprise those who are falsely or maliciously accused; those who are "technically" not guilty; and those who are factually guilty, but against whom the case is not proven. The law, however, does not formally recognise these distinctions. There is a binary outcome in England and Wales – guilty or not guilty – and a tripartite structure in Scotland, additionally involving the novel verdict of 'not proven'. In Scotland 15 jurors decide and a simple majority suffices.[14] The history of the 'not proven' verdict is controversial, and there have been numerous attempts to abolish it. 'Not proven' verdicts, although significantly outweighed by not guilty verdicts, are thought to reflect a jury's conclusion that they do not believe the accused innocent, but equally do not believe that

[12] See K. Popper, *The Logic of Scientific Discovery* 2nd ed (London: Routledge, 2002). Popper famously argued in his Theory of Falsification that the observation of one black swan would falsify the hypothesis that all swans are white.

[13] The recent well-publicised case of Lady Nourse, and the gruelling interview conducted with her on *Woman's Hour*, replicates many of the experiences which our case study documents: see, for the extensive recorded interview, https://www.bbc.co.uk/programmes/m000xsrl 10th July 2021.

[14] See J. Chalmers, F. Leverick, V. Munro, L. Murray and R. Ormston, 'Three distinctive features, but what is the difference? Key findings from the Scottish Jury Project' (2020) Crim. L. R. 11, 1012-1033.

the prosecution has proved the case to the requisite standard.[15] This is a particular problem in Scotland where corroboration is required; hence, guilt can be more difficult to prove where there is only one accuser, as is often the case in rape allegations. As Chalmers et al note, having a tripartite outcome can encourage juries to avoid making difficult binary decisions by resorting to the verdict of 'not proven'. In turn, this may systematically disadvantage, for example, rape complainants and has led to campaigns for the abolition of that verdict.[16] That both 'not guilty' and 'not proven' verdicts constitute acquittals further illuminates our argument that those who are acquitted are a heterogenous group. We favour neither the 'not proven verdict' nor distinctions between the factually and legally innocent, since we can see no way of legitimately distinguishing them. We simply recognise that the term 'acquitted' embraces a multitude of both transgressors and the blameless.

In England and Wales criminal prosecutions are routinely resolved by guilty pleas, but these can disguise degrees of factual and moral guilt, together inevitably with some who plead guilty for reasons of vulnerable expedience.[17] With respect to acquittals, aside from those by magistrates or the jury, there are also directed acquittals and ordered acquittals.[18] A directed acquittal occurs where the prosecution has failed to adduce sufficient evidence to substantiate the charge and the judge prevents the jury from considering that charge,

[15] See, for a fascinating and comprehensive review, J. Chalmers, F. Leverick and V. Munro, 'A Modern History of the Not Proven Verdict' (2021) 25 *Edinburgh Law Review* 2, 151-172.

[16] Chalmers et al, state at 153, their conclusion that the 'not proven' verdict should be abolished.

[17] J. Peay and E. Player, 'Pleading Guilty: Why Vulnerability Matters' (2018) 81 *Modern Law Review* 6, 929-957.

[18] See Criminal Procedure Rules 2020, rule 25.9(2)(e) for directed acquittals, and s.17 Criminal Justice Act 1967 for ordered acquittals.

usually at a point before the defence case opens; ordered acquittals occur before a trial begins, usually because the prosecution is unable or unwilling to offer evidence.[19] There are also 'acquittals on appeal', where the Court of Appeal quashes a conviction as unsafe.[20] Some of these are on the law, perhaps involving just a procedural technicality, others following fresh evidence.[21] But in all these various forms of acquittal the designation 'not guilty' is not a judgement on innocence: it is a recognition that the state, despite all of the resources at its disposal, has failed to establish before an independent tribunal to the requisite standard, that the accused has done the act or made the omission charged, with the relevant *mens rea* and without any excusatory defences. The criminal law does not distinguish between the status of these acquitted individuals. The jury, beyond in some cases returning a majority verdict,[22] are not asked for details of their deliberations. Indeed, a judge's direction to the jury does not use the vernacular of the need to be convinced of 'guilt beyond a reasonable doubt', but rather directs the jury to be satisfied so that they are

[19] B. Block, C. Corbett and J. Peay, *Ordered and Directed Acquittals in the Crown Court* (Royal Commission on Criminal Justice: H.M. Stationery Office, 1993).

[20] S.2(1)(a) Criminal Appeal Act 1968.

[21] See M. Zander, 'When juries find innocent people guilty. Strengths and limitations of the appellate system in England and Wales' in R. Burnett (ed), *Wrongful Allegations of Sexual and Child Abuse* (Oxford: OUP, 2016); and for an analysis of 250 factual miscarriage cases since 1970, R. Helm, 'The anatomy of "factual error" miscarriages of justice in England and Wales' (2021) Crim.L.R. 5, 351-373.

[22] Following a guilty verdict the jury will be asked 'And is that the verdict of you all?'. This leads to guilty verdicts on a majority being evident in court. For not guilty verdicts, even where a majority direction has been given by the judge indicating that a verdict of at least 10 of the jury will be acceptable, the jury are not asked whether their verdict is unanimous. Avoiding tainting not guilty verdicts with uncertainty is the key; the preparedness to undermine certainty in a guilty verdict is interesting.

'sure of the defendant's guilt'.[23] Anything which fails to reach this standard results in an acquittal. Those who are wrongly accused and subsequently acquitted may rightly feel that the whole process has been an egregious insult on their lives, but the law does not distinguish their position from those who were 'rightly' accused but not convicted. This non-differentiation of the acquitted causes difficulties, which we explore below. But it does underpin both why the verdict itself does not redress the harms done and why we, in acknowledgement of the law's formal findings, have eschewed using the term 'innocent'.

We also acknowledge that many victims and witnesses may feel aggrieved that they were not believed following an acquittal. What is often misunderstood is that an acquittal does not mean that the Court concluded they gave false testimony, only that the evidence did not prove the accused's guilt to the required standard. Whilst there is, in law, 'no stain' on an acquitted person's character, many of the acquitted remain tainted by a residual suspicion, unless or until the actual offender is discovered or fresh evidence emerges to exonerate them. In the context of an acquittal, therefore, a citizen's right to the presumption of innocence[24] does not extend to social interactions generally, and may continue to be tested in a range of other legal fora. The media, including social media, can play an important role here, most notably by implying an alternative verdict in the court of public opinion. In this way, the systemic functioning of criminal justice institutions and their interactions with other sources of power can facilitate the continuation of coercive power, irrespective of an acquittal at trial. The prospect of walking away without a stain on their

[23] *R v Majid* [2009] EWCA Crim 2563.

[24] See P. Ramsay, *The Sovereign's Presumption of Authority (also known as the Presumption of Innocence)*. (LSE Law, Society and Economy Working Paper: Law Department 15/2020).

character – shaking off the stigma of the accusation - is consequently far from the experience of many defendants who are acquitted.

The harms of the criminal process

We recognise that a prosecution which results in an acquittal at trial, even working within the parameters of its own rules, will nonetheless cause harm to those subject to the process. Yet these harms are barely acknowledged or addressed in criminal justice policy. It is as if anyone who has been acquitted should have no complaint against the system, as justice has been served. Gratitude and relief should suffice. We argue that our present system is far too complacent about the justice it delivers and that miscarriages of justice do not begin and end with the acquittal of the innocent and the conviction of the guilty. Such terms are too simplistic to do justice to the shades of meaning they embrace. Whilst the rectitude of the dispositive judgement is critically important, so is the manner in which an accused person has been treated. Acquitting those who are falsely accused has been a major objective in the achievement of justice in the criminal process, but other injustices that affect the life chances and well-being of the accused can also materialise out of other pre- and post-verdict decisions.[25]

[25] Pre-charge bail is an area where such harms – 'emotional or mental trauma and financial implications' - have been acknowledged by the state; see Home Office *Pre-Charge Bail: Summary of Consultation Responses and Proposals for Legislation* (2015:4)https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418226/150323_Pre-Charge_Bail_-_Responses___Proposals.pdf Richard Martin's (2020) unpublished study,

Deserving Compensation: the worthy and unworthy

We start with a legal paradox: the differential treatment of winners and losers in the civil and criminal courts.

Civil law remedies are based on the notion that if a person causes harm to another, for example, by committing a tort or a breach of contract, then the law should endeavour to redress that harm by restoring the person to the position they enjoyed prior to the harm occurring. This, by and large, requires those responsible for the harm to pay financial compensation or provide other reparative measures. Enforcing these remedies is another matter, but the principle is clear.

Criminal law adopts a different approach. The contest is not between the accused and their 'victim', but between the Crown (representing the state) and the accused. Where an accusation is proved to the satisfaction of the relevant adjudicators, the state is entitled to impose a punitive sanction against the guilty party and, where possible, to recover the state's costs, in full or in part, in bringing the prosecution.[26] Greater attention has been paid since 1964, when the Criminal Injuries Compensation Authority was established, to offer some compensation to the victims of criminal offences, either directly from the offender or

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cited on the website, documents the unintended consequences of the Government's attempts to address these human rights and civil liberties infringements, underlining the problematic nature of change in criminal justice procedures. See also A. Hucklesby, 'Pre-charge bail and release under investigation (RUI): an urgent case for reform' (2021) Crim.L.R. 2,82-97.

[26] See generally https://www.cps.gov.uk/legal-guidance/costs

via the Authority.[27] But although the payment of compensation should normally take precedence over the payment of a fine, this preference applies less robustly when the offence is deemed suitable for a more severe penalty.[28] The principal response of the state in criminal matters is to punish.

When the state prosecutes an accused leading to a conviction, and imprisonment follows, and then some years later the conviction is held to have been a miscarriage of justice, the incarcerated person may be eligible for compensation for their lost years. Obtaining this is not straightforward, and has become markedly more problematic, to the point where almost nobody is compensated.[29] However, there is, at least, recognition that the state has done harm to that individual.

[27] Compensation orders became payable by the offender under s.1 of the Criminal Justice Act 1972. S.67 of the Criminal Justice Act 1982 made it possible for a compensation order to be the sole penalty at sentencing, and required the payment of compensation to take priority over a fine where both were imposed together but the offender had insufficient means to pay both.

[28] An award of compensation can be made alongside a sentence of imprisonment, but it does not happen routinely, see https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/fines-and-financial-orders/compensation/1-introduction-to-compensation/

[29] https://www.thejusticegap.com/shameful-just-10000-paid-out-to-victims-of-wrongful-conviction-in-three-years/ This details the MOJ response to a freedom of information request on the numbers of applications, applications granted and amount of compensation in the period 31st March 2013 to 31st March 2020. See also C. Hoyle and L. Tilt, 'Not innocent enough: state compensation for miscarriages of justice in England and Wales' (2020) Crim.L.R. 1, 29-51.

But when the state prosecutes an individual who is subsequently acquitted there is no such recognition of harm or the need for compensation; or even necessarily the award of costs. As the CPS guidance notes[30]

> 'Such applications should be opposed citing *R v P* [2011] EWCA Crim 1130, in which the Court of Appeal stated (at paragraph 13) that *"the decision to prosecute or not is a thoroughly difficult and delicate one. It is one on which two perfectly responsible lawyers may easily differ. It is only in the clearest possible cases that a decision taken by the appropriate authority in good faith could possibly justify a penalty in costs".'*

Interestingly, this statement characterises the award of a defendant's costs order as a penalty unfairly imposed on the prosecution. From this, it appears that the harms incurred by a defendant whose case is not proven in court are a legitimate risk to be shouldered by any citizen once the prosecutor is satisfied that there is a realistic prospect of conviction following an evidential merits test, and the prosecution is in the public interest.[31] And yet,

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[30] https://www.cps.gov.uk/legal-guidance/costs 'When to make an application for costs under s.19 or s.19A' of the Prosecution of Offences Act 1985 (costs and wasted costs orders). Section 16A of the Act made applications for defence costs following acquittal more problematic and was introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Before 2012 acquitted defendants would receive back from the courts such properly incurred private legal expenses as was 'reasonably sufficient' to compensate them. The rules changed again in 2014: see https://www.gov.uk/guidance/rules-and-practice-directions-2020 section on costs (October 2020).

[31] The current principles are set out in the Code for Crown Prosecutors see https://www.cps.gov.uk/publication/code-crown-prosecutors. For an analysis of the background, see G. Mansfield and J. Peay, *The Director of Public Prosecutions: Principles and Practices for the Crown Prosecutor* (London: Tavistock Publications, 1987).

within the statement itself, the Court of Appeal's acknowledgement that such decisions are inherently volatile and unpredictable, calls into question the moral validity of the claim. But even in those rare cases where the accused person will be eligible for 'court costs', they will face additional legal fees in order to make the application.[32] So whilst the 'not guilty' verdict may help to console the acquitted accused, albeit not to the unlikely extent of establishing their innocence, there is no formal recognition that harm has been done to that individual.[33]

Not only is there no proper compensation for the acquitted accused, but that accused person, exonerated from guilt, may well have had to fund their own defence. This regrettable set of circumstances has arisen in an era when legal aid has been drastically cut across the legal system, even in the criminal field where the result of a conviction may be lengthy imprisonment.[34]

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[32] The Secret Barrister, *Fake Law: The Truth about Justice in an Age of Lies* (London: Picador, 2020), citing a case from 2018 where a GP faced a legal bill of £94,000 after the prosecution case against him collapsed, at 228. The Secret Barrister (2020: 164-196) documents the consequences for access to justice stemming from the history of changes to legal aid. See also https://www.thetimes.co.uk/article/gp-accused-of-paedophilia-by-fantasist-loses-fight-for-costs-96xj5ptkv .

[33] For a compelling account and analysis of why wrongful accusations come about, drawing on the voices of those falsely accused in positions of trust see C. Hoyle, N. Speechley and R. Burnett, *The impact of being wrongly accused of abuse in occupations of trust: victims' voices*. (University of Oxford: Centre for Criminology, 2016), and in the area of sexual and child abuse, see R. Burnett, ed *Wrongful Allegations of Sexual and Child Abuse* (Oxford: OUP, 2016).

[34] See, for example, Figure 3a: Workload in criminal legal aid April to June 2011 to July to September 2020 in https://www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2020/legal-aid-statistics-england-and-wales-bulletin-jul-to-sep-2020 and commentary on the crisis in criminal legal aid from the Law

Where acquitted, the exonerated accused will only be eligible to claim back the cost of a legally-aided defence, assuming their solicitor filled out the appropriate forms at the start of the process, and the accused was denied any legal aid under the means test,[35] and the case went to the Crown Court.[36] Even when these criteria are met, the sums recoverable are paltry by comparison with what it can cost to mount a defence with solicitors and counsel properly qualified to undertake the complexity of many criminal cases. The inability of those acquitted accused to recover the reasonably incurred costs of funding their own defence has been dubbed 'the innocence tax'.[37] In evidence to the Ministry of Justice's review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 the Bar Council identified reversing this 'tax' as one of its five priorities.[38]

Acquitted accused people can find themselves seriously financially harmed by an 'erroneous' state prosecution; where, for example, homes have to be sold or pensions

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Society https://www.lawsociety.org.uk/en/contact-or-visit-us/press-office/press-releases/government-support-needed-now-for-criminal-legal-aid-firms-to-survive

[35] The means test applied from January 2014; before then, and after LASPO 2012, an acquitted accused would have found it almost impossible to recoup any privately incurred costs. See P. Gibbs, *Innocent but broke-rough justice?* (London: Transform Justice, 2015 at p. 6) http://www.transformjustice.org.uk/wp-content/uploads/2015/10/TRANSFORM-JUSTICE-INNOCENT-BUT-BROKE.pdf See also *R (on the application of Henderson) v. Secretary of State for Justice*, Divisional Court, 27 January 2015 which ruled that the statutory changes introduced by *LASPO* were not incompatible with the accused's ECHR rights.

[36] P. Gibbs, *Innocent but broke-rough justice?* (London: Transform Justice, 2015)

[37] The Secret Barrister, 'Legal Aid Myths and the Innocence Tax' in *The Secret Barrister: Stories of the Law and How It's Broken* (London: Macmillan 2018, chapter 7).

[38] https://www.barcouncil.org.uk/resource/laspo-review--bar-council-reaction.html

cashed-in to mount a successful defence. Even without the delays in cases coming before the criminal courts, now reaching unprecedented levels,[39] these financial costs can be extensive and life-changing.[40] Liquidating assets such as selling a home may result in the loss of property ownership altogether. In the case we observed, savings were cashed in, the family home was sold and those involved relocated to a more affordable part of the country in order to meet the legal fees. By reason of his age, the accused was not in a position to replace assets and faced a permanent and unimagined change to the family's material circumstances. The family's relocation subsequently led to extensive travel and accommodation costs when the trial finally occurred. These adjustments inevitably aggravate a sense of grievance by those affected but are also likely to raise a sense of injustice amongst many members of the public. Indeed, we believe that a criminal process that deals with acquitted persons in such ruinous ways, where the consequences for their lives, and the lives of those closely associated with them, are so far-reaching, must be fundamentally wrong.

Psychological harms

[39] Delays affect defendants, victims and witnesses https://www.theguardian.com/law/2020/nov/19/criminal-justice-system-is-on-its-knees-says-top-english-lawyer and the backlog has been exacerbated by coronavirus https://www.theguardian.com/law/2020/dec/01/clearing-uk-court-backlog-will-need-extra-funds-in-future-years

[40] See Hoyle C. Hoyle, N. Speechley and R. Burnett, *The impact of being wrongly accused of abuse in occupations of trust: victims' voices*. (University of Oxford: Centre for Criminology, 2016), at 30-31.

However, the significance of the financial harms rests not only on their material consequences but also on the psychological adjustments that can arise. Indeed, for some erroneously accused persons the monetary loss might be considered the least of the harms done.[41] In contrast, the psychological costs are much harder to judge, may never be restored, and may be much less visible.

From the outset of the criminal process the psychological state of those who are erroneously accused is uniquely painful. We want to start with one illustration – a moment in time, as it were. In a jury trial, once the evidence is complete, and the prosecution and defence have made their closing arguments, and the judge has summed up the evidence and given directions on the relevant law, the jury are instructed to retire to the jury room and consider their verdict. The period between this point and the jury returning with a verdict can be brief.[42] Or it can stretch over a number of days. But what is striking, although little discussed, is how this period of waiting differentially affects defendants. For an accused, prosecuted for an offence they know they did not commit, it must be a uniquely agonizing period. There is nothing more that can be said on their behalf and they must simply wait and hope the jury reaches the right verdict. But they must wait in fear of being wrongly convicted. A not guilty verdict 'simply' returns them to their rightful state. A wrongful conviction comes with very heavy consequences.

[41] See the Alex Salmond case https://www.theguardian.com/politics/2020/mar/23/alex-salmond-acquitted-of-all-charges-in-sexual-assault-trial

[42] For example, in Alex Salmond's case, it was reported as being six hours, with the jury considering 13 charges (one being a not proven verdict) Alex Salmond acquitted of all charges in sexual assault trial | Alex Salmond | The Guardian

However, the accused who knows that they are factually guilty, and who has, as is their right, put the prosecution to proof of their guilt, will wait in the hope that the jury will 'get it wrong' and acquit them. If the jury convicts, they may be philosophical enough to recognise that this was their due; and they have simply missed out on the possibility of an escape from justice. Thus, the not guilty and the guilty can occupy very different cognitive landscapes as they await the decision of the court. For one there is the fear of false conviction and the other the hope of false acquittal.

Thinking about the trajectory of psychological harms an accused person experiences is hard to document rigorously. However, a recent review of the international literature reveals that the psychological impact of wrongful accusations covers a wide range of responses.[43] Included in the review are specific studies in England and Wales, such as Burnett's edited volume on wrongful allegations of child and sexual abuse;[44] and Hoyle et al's study of those falsely accused in positions of trust.[45] Overall, the review clustered the range of experiences around eight distinct themes: the loss of reputation and identity; feelings of stigmatisation; a deterioration in psychological and physical health; problematic relationships with others; negative attitudes towards the justice system; a detrimental impact on finances and employment; traumatic experiences in custody; and adjustment difficulties following

[43] S.K. Brooks and N. Greenberg 'Psychological impact of being wrongfully accused of criminal offences: A systematic literature review.' (2021) 6 *Medicine, Science and the Law* 1: 44-54. This reviews the psychological effects on those acquitted and those wrongly convicted.

[44] See R. Burnett, ed *Wrongful Allegations of Sexual and Child Abuse* (Oxford: OUP, 2016).

[45] See C. Hoyle, N. Speechley and R. Burnett, *The impact of being wrongly accused of abuse in occupations of trust: victims' voices*. (University of Oxford: Centre for Criminology, 2016), (2016) above.

acknowledgement of the erroneous accusation.[46] What struck us most forcefully as we followed the progress of one case over four years, was the unrelenting intensity of the suffering and the visceral nature of its experience by the accused and his family. What follows then, is a more granular account of what it means for an accused person's life to face state supported allegations. We recognise that not all accused persons will experience all of these sequelae from the point where accusations are first laid. And they will affect accused persons to different degrees, depending in part on their previous experience with the criminal justice system. For repeat players the process will be less uncertain, perhaps even for some a 'badge of honour'; for others, less serious allegations can be conducted with a degree of bureaucratic anonymity. For those facing more serious charges, irrespective of prior experience, the stakes can be very high. In any event, every accused person will have had a first interaction with the prosecution process.

In the case we observed an arrest was made following allegations which would have attracted a lengthy prison sentence. The immediate reaction of the accused was one of shock, followed later by anxiety and terror about what might happen. Subsequently this led to loss of sleep and feelings of depression and in turn, novel interactions with medical services. Having to disclose to a GP why you are feeling as you do can expose elements of your private life you would not otherwise have shared and expose you to the risks of anti-depressants and sleeping pills. Then there are worries about one's own medical records and their implications. It is not difficult to imagine the strains all of this imposes on a relationship where one party risks the financial ruin of both. But in addition to the impact of

[46] S.K. Brooks and N. Greenberg 'Psychological impact of being wrongfully accused of criminal offences: A systematic literature review.' (2021) 6 *Medicine, Science and the Law* 1: 44-54.

the loss of material assets there are a range of other intrusions that effectively demoralise and drain self-esteem. Having your home searched, with everything that entails, is impossible to quantify in relation to the consequences it has for the sanctity and privacy of a person's private life. In our observed case, computers, phones and other IT equipment were seized, making the accused's life both difficult and expensive when that equipment needed substituting because of the lengthy period of police examination. Items deemed potentially relevant to the trial will not be returned until after the trial is over, which may be many years after they were seized.[47] In the course of preparing for the trial other psychological challenges emerged. The defendant found himself having to discuss and disclose otherwise private aspects of his life with erstwhile strangers, such as his legal team; and further unwelcome and intrusive public exposure came with the trial. Media coverage or, in this case, the fear of such coverage, created additional anxieties concerning his standing in the local community. The legal rules provide a degree of privacy after charge from the wider public, but the people who knew the defendant personally, and who knew the people he knew, or the people he could come into contact with, served to extend the tentacles of approbation, or perceived approbation. With few exceptions, community contacts have an impact across societies, irrespective of whether the defendant has a career in a profession or a trade or indeed is unemployed; people live in communities. Sotto voce comments, and the stigma of police involvement, are hard to ignore. In our case, the accused found himself ejected from a local pub, and would avoid local shops, parks and the gym, for fear that

[47] Helen Pitcher, Chairman of the Criminal Cases Review Commission, noted on the 28th October 2020 (BBC Radio 4 interview) that there was then a four year time lag between some offences charged in 2018 and the listing of those cases for trial in 2022.

someone might recognise and challenge him.[48] Unchecked rumours, whether accurate or not, can have an invidious, insidious and irremediable effect. In this case, old securities were found to be no longer reliable: some friendships he trusted and confided in proved unworthy of that trust; and he was shunned by people he once thought close. His daily life, and that of his wife, became totally immersed in the details of his case. Whilst haunted by the fear of the trial and its possible outcomes, he was frustrated and made even more anxious by his failure to understand why his lawyers and the criminal process appeared to work so slowly, when, for him, nothing seemed more pressing or important than his own exoneration from guilt.[49] Broadly, his social experience generated feelings of abandonment. As a person with no prior criminal record he was exposed to a world he neither understood nor sought; and a world with which he was ill-equipped to deal because of his fears and naivety.[50] And he was exposed to the nature of places where justice is administered and which he had never previously entered as anything other than a law abiding citizen. The interview rooms of police stations, the cells, the crumbling infrastructure of our legal system and those who frequent them, increased his sense of separateness and vulnerability.[51]

[48] Such informal breaches of privacy are, of course, nigh impossible to regulate legally. Documented reports including those on social media are amenable to regulation.

[49] The intensity of case preparation and its chronology is often lost on the accused, particularly for those on bail for long periods.

[50] We use the notion of naivety to refer to those who lack an understanding of the criminal law and the legal relevance of their own defence narratives, as well as to those who are unfamiliar with criminal justice procedures.

[51] Dominic Grieve captured the essence of this in his opinion piece https://www.theguardian.com/commentisfree/2021/apr/05/uk-justice-system-court-buildings-legal-aid-cuts

Compelled to engage with the criminal justice system he found himself waiting: for people to return his calls, for another bail appointment or his next court appearance.[52] During the years awaiting trial his travel arrangements were restricted. In essence, he waited in hope of help and for change. His sense of powerlessness was described as all-consuming: feelings of anger, frustration and fear a toxic mix. But always there was fear; fear of what prison might entail, and especially of those convicted of morally repugnant or heinous crimes.

But irrespective of whether the accused has prior experience in the criminal justice system or not, research shows that those who are wrongly accused experience a range of psychological responses including feelings of bitterness and resentment towards a system out to get them or feelings of resigned powerlessness.[53] Whatever an individual's position, the coercive power of the state to operate behind the closed doors of an accused's life will have oppressive consequences. For those who are erroneously accused, the lived experience of prosecution can be uniquely agonising and inevitably exacerbated by delays in the criminal process. In the case to which we have referred, the verdict was an acquittal on all charges. Yet, as we shall now argue, the harms associated with a criminal accusation and prosecution do not necessarily end after the person has been acquitted.

[52] The significant backlog of criminal cases, noted above, has multiple causes; coronavirus and the need for social distancing merely added to the existing difficulties arising out of the under-provision of personnel and resources, and the court closure programme.

[53] See K. Campbell and M. Denov, 'The burden of innocence: coping with a wrongful imprisonment' (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 139–163. Z.D. Konvisser '"What happened to me can happen to anybody" – women exonerees speak out' (2015) 3 *Texas A&M Law Review* 303–366.

Double jeopardy

It is not unreasonable for a person who has endured the criminal process to trial and been acquitted of the charges raised against them, to imagine that their nightmare is over. However, as we noted earlier, the acquitted cohort comprises not only those who are wrongly accused, but also those who have committed the alleged offences but whose guilt has not been established to the required standard. Because the trial does not establish a person's innocence there will be those who believe there is 'no smoke without fire', and in some instances they will, of course, be correct. However, the 'no smoke without fire' presumption raises problems for all of those who have been acquitted, and particular problems for those who believed in their own innocence and were indeed found not guilty.[54] Some of these relate to the various obstacles that can inhibit their enthusiasm and capacity to re-start their lives now that the threat of a criminal conviction has been lifted. For example, some people decide that a new start is called for: moving to another area, making new friends or finding new employment. But in so doing they face the dilemma of deciding how much background information they should disclose. Early and widespread disclosure may not be sufficient to remove the suspicion of smoking fires. But conversely, concealment and then exposure at the hands of others can be equally if not more stigmatising, tantamount to corroborative evidence that they really do have 'something to hide'. Arguably, the state has a special responsibility here to protect the privacy of those they have wrongly accused and, at the very least, have a duty to desist from any further

[54] This group would include cases, for example, of misidentification when the wrong person was prosecuted for the crime; cases of misremembering; cases where malicious and untrue allegations were made, or cases where the prosecutor is erroneously persuaded of the case for prosecution.

insinuation of guilt. Protecting the privacy of those who have been acquitted does not, of course, raise the much more problematic issues relating to pre-conviction or pre-acquittal privacy, where the principle of open justice is in obvious tension with demands for anonymity.[55]

The fairness of restraining the power of the state repeatedly to prosecute an individual underpins the important legal rule of 'double jeopardy': the principle that a person should not be tried for the same offence twice. The rationale for the protection of defendants from double jeopardy in criminal trials rests on the risk of increasing wrongful convictions, the distress of the trial process, the importance of finality and the promotion of efficient investigations first time around.[56] Although the rule is not absolute in English law and has been modified to allow for a re-trial in some serious cases[57] where fresh and compelling evidence has come to light, the duty to protect the individual from oppressive and arbitrary prosecution has been recognised as a human right protected by Protocol 7, article 4, of the European Convention on Human Rights.[58] However, its scope does not prevent the pursuit

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[55] Ministry of Justice (2010) *Providing anonymity to those accused of rape: An assessment of evidence* Ministry of Justice Research Series 20/10. See https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/anonymity-rape-research-report.pdf

[56] Law Commission *Double Jeopardy* (Consultation Paper: 1999, 156) at [4.4-4.11].

[57] See Schedule 5 Criminal Justice Act 2003.

[58] See L. Campbell, A. Ashworth and M. Redmayne *The Criminal Process* 5th ed (Oxford: Oxford University Press, 2019 pp. 419-425); P. Roberts 'Double Jeopardy Law Reform: A criminal justice commentary' (2002) 65 *Modern Law Review* 3, 393-424. I. Dennis 'Rethinking Double Jeopardy: Justice and finality in criminal process'

of subsequent civil or administrative proceedings. Consequently, a defendant can be acquitted of a crime but then be subject to fresh allegations based on the same facts, such as a civil action for damages from the victim of the crime. The European Court of Human Rights established in *Walsh*[59] that an acquittal in a criminal court did not prevent the forfeiture of property in subsequent civil proceedings.

Civil recovery proceedings against an individual's property will, however, raise less awkward and controversial issues than where the action is against the individual in person. Here, as Fisher et al note, 'the reputation of the individual is tarnished to a greater extent'.[60] In Scotland a defendant acquitted of rape three years earlier on a verdict of 'not proven', was found to have committed the offence by a sheriff in the civil courts, awarding damages against him of £80,000.[61]

An acquittal in the criminal courts is clearly not the end of the legal process. A person can be sued in a civil action and a judge sitting without a jury can, on the same or similar evidence, make a different decision on the balance of probabilities. In addition to a private action in the civil courts, an acquitted person who is a member of a professional body, most notably, but not exclusively, teachers, doctors, lawyers, police officers and accountants, may also be subjected to further regulatory procedures. Again, there will be a lower standard of proof

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(2000) *Criminal Law Review* 933-951. We are, of course, aware that the reforms to double jeopardy arose, in part, out of the false acquittal of defendants; for example, in the murder of Stephen Lawrence.

[59] *Walsh v UK Application no. 43384/05* [2006] ECHR 1154 (21 November 2006)

[60] See J. Fisher, A. Clifford and O. English 'The impact of an acquittal on civil recovery proceedings' (2020) *Bright Line Law* https://www.lexology.com/library/detail.aspx?g=cf4cedad-2a76-4da2-bec5-8b1eee2140ac

[61] *AR v Coxen* [2018] SC Edin 53. See also *LXA & Anor v Willcox* [2018] EWHC 2256 (QB).

to establish professional misconduct than would be required for a conviction in the criminal court, and there is no strict rule of double jeopardy in relation to the dismissal of criminal proceedings in subsequent disciplinary hearings.[62] If proven, the consequences can be severe, resulting in being struck off a professional register and preventing any return to practise. Or there might be safeguarding issues involved.

These examples of civil and administrative procedures demonstrate the ways in which private individuals and organisations are given a chance to achieve a degree of redress that has been unavailable through a criminal prosecution. Nonetheless, for those acquitted accused, the continuation of enquiries and the reappraisal of evidence involved in these procedures, inevitably exposes them to many of the harms they had already faced in negotiating the criminal justice system. Whilst no longer in fear of a custodial sentence, the consequences of an adverse finding can still be especially punitive, resulting in the loss of employability or a heavy financial order. But even in cases where the accused has mounted a successful defence, the financial, psychological and reputational damage will have accumulated, adding to those already incurred through the criminal prosecution. It is difficult to deny that such people have suffered unfairly. Their vulnerability, however, must be balanced against the benefits that post-acquittal regulation can deliver when imposed against those who have been acquitted on the criminal standard, but against whom a finding is made on the civil standard. Aside from the possibility of 'victim' compensation, the ability to re-examine evidence according to a lower standard of proof is that it can justify the imposition of regulatory measures where there is sufficient evidence to believe that a certain individual is likely to represent a risk of harm to others. That some acquitted

[62] *R (Sinha) v GMC* [2008] EWHC 1732 (Admin); [2009] EWCA Civ 80

people will pose an on-going risk, and need to be differentiated from those who do not, arguably justifies this re-balancing of the double jeopardy rule. But for those against whom the regulatory proceedings fail because the evidence is held to fall below the civil standard of proof, and who have been re-exposed to many of the harms previously endured in the criminal prosecution, the sense of grievance will be acute. The balancing of these competing interests must be weighed on the scales of justice. Arguments in favour of this additional intervention may be strongest when dealing with accusations of seriously harmful offences that are especially difficult to prosecute successfully in the criminal courts. The attrition of rape cases from the criminal justice process is longstanding[63] and the recent case of *Coxen* opens the prospect of a second chance to imply fault and culpability on the same facts, whilst pursuing a claim for damages that may not be immediately or foreseeably enforceable.[64]

As things stand, there are extensive regulatory mechanisms that can be invoked against the acquitted accused. Whilst full and critical consideration has been given to double jeopardy protections in criminal cases, the same principled arguments - that rest on the distress caused by repeated trials, the increased risk of a wrongful outcome and the inherent fairness of establishing a point of finality - are seemingly irrelevant to the non-criminal adjudications to which the criminally acquitted can be subject. At no point is there a review

[63] See S. J. Lea, U. Lanvers and S. Shaw 'Attrition in rape cases: Developing a profile and identifying relevant factors' (2003) 43 *British Journal of Criminology*, 3, 583–599. See also the Ministry of Justice's review of rape, June 2021, https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions

[64] In *Coxen* the defendant declared bankruptcy. The plaintiff has twenty years to enforce recovery. https://www.dailyrecord.co.uk/news/scottish-news/rape-victim-who-won-80k-15002422

of the consequential harms serially inflicted on this group, all of which will have been triggered in the first instance by a criminal accusation that was not proven, and may not, in time, even satisfy the lower balance of probabilities test.

We are not suggesting that all post-acquittal enquiries are unjustifiable. Rather our concern is that, given the harmful consequences they may inflict on the accused person, there are no criteria to distinguish when, and under what conditions, further enquiries and restrictive measures can be exercised on those acquitted in the criminal courts.[65] The case for greater clarity in these matters has become more compelling as, in addition to the civil actions available to individual claimants, the state has established other mechanisms that can be used to exert control over those acquitted of criminal wrongs. The Disclosure and Barring Service and the Enhanced Criminal Record Certificate, both introduced under the Protection of Freedoms Act 2012, raise important concerns about the fairness and accountability of decision making and the accessibility of legal safeguards to protect against the coercive powers of the state.

The Disclosure and Barring Service

The protection of the public from criminal harm is rightly seen as a central function of the state, principally orchestrated through the criminal justice system. How far the state is

[65] See Law Commission, *Regulation of Health Care Professionals, Regulation of Social Care Professionals in England*, April 2014. This report, amongst other proposals, recommended a new scheme for barring health and social care professionals. https://www.lawcom.gov.uk/project/regulation-of-health-and-social-care-professionals/

entitled to intrude into the lives of individuals in achieving this goal is subject to ongoing and shifting ideas about the management of future risk. In England and Wales the contemporary development of 'dangerousness' provisions has been guided by actuarial assessments that calculate the predictive value of clusters of risk factors. Alongside this has been the growing significance of human rights jurisprudence in challenging the legitimacy of dangerousness legislation, notably in relation to whom it should apply and to what extent it should impinge on their liberties.[66] An important claim to legitimacy has been the principle of proportionality, whereby the degree of restriction is calibrated according to the severity of the predicted harm. In addition, some consideration is given to the accuracy attaching to the prediction and the relevant criteria as to how this should be assessed. Existing legal provisions predominantly target those already proven guilty of serious harm in the criminal courts.[67] However, there are recent examples of state expansionism that augment preventive sentencing policies with measures deployed by other regulatory institutions against those without a qualifying criminal conviction. One such example is the Disclosure and Barring Service (DBS) set up under the Protection of Freedoms Act 2012.[68]

The DBS is an executive non-departmental public body, sponsored by the Home Office, which

[66] For example, the response of the ECtHR to Indeterminate Sentences for Public Protection: *James, Wells and Lee v UK* [2012] ECHR 1706.

[67] See Criminal Justice Act 2003 s224-230; Legal Aid, Sentencing and Punishment of Offenders Act 2012 s122-128; and Criminal Justice and Courts Act 2015 s1-5.

[68] See also Safeguarding of Vulnerable Groups Act 2006 s2-3.

> 'helps employers make safer recruitment decisions each year by processing and issuing DBS checks for England, Wales, the Channel Islands and the Isle of Man. DBS also maintains the adults' and children's Barred Lists and makes considered decisions as to whether an individual should be included in one or both of these lists and barred from engaging in regulated activity'.[69]

Acquitted individuals can be dealt with both under the DBS's role in maintaining the Barred Lists for those in regulated professions who may in future be engaged in regulated activities with children or vulnerable adults; and generally with respect to future employment checks, where they can fall under the Enhanced Criminal Record Certificate (ECRC) regime. The latter is discussed further below.

In assessing risk for barring purposes the DBS must be satisfied that a person's previous conduct has 'caused harm or posed a risk of harm to a child or vulnerable adult', and cases can be referred by professional bodies.[70] The nature of harm can fall into any of the following categories: emotional/psychological; financial; physical; sexual; neglect; and verbal abuse. Decisions are intended to be a proportionate response to the behaviour that has occurred and the future risk of harm which is posed.[71] In reaching its decisions the DBS

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[69] https://www.gov.uk/government/organisations/disclosure-and-barring-service/about

[70] Disclosure and Barring Service *DBS referrals guide: harm, relevant conduct and risk of harm* at 2. https://www.gov.uk/guidance/making-barring-referrals-to-the-dbs

[71] Disclosure and Barring Service Annual Report and Accounts 2018-19 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825967/Publication_-_ARA_2018_2019_Web_Version_-_July_2019.pdf Notably, the Annual Report gives little indication of the DBS's work with acquitted individuals.

also claims to be aware of the impact a barring decision may have upon the listed individual and recognises that these are 'finely balanced decisions'. Nonetheless, in striking a balance, the decisions made are based on a lower standard of proof than required in the criminal courts, namely on the balance of probabilities. Inevitably, some individuals acquitted by a criminal court will subsequently become subject to regulation, when judged on the test of probability. Thus, the absence of proof of past relevant conduct can become the basis of an assessment of a risk of future harm. The DBS defines the harm test as:

> 'A person satisfies the harm test if they may harm a child or vulnerable adult or put them at risk of harm. It is something a person may do to cause harm or pose a risk of harm to a child or vulnerable adult.'[72]

And notably the harm test can be satisfied even where

> 'a person may not have engaged in relevant conduct but there are still serious concerns'[73]

On the basis of these decisions individuals will be barred from not only continuing or pursuing careers that involve working with children or vulnerable adults, but also engaging

[72] See Disclosure and Barring Service: https://www.gov.uk/guidance/making-barring-referrals-to-the-dbs#what-is-harm

[73] See the DBS *Referral Guidance: Frequently Asked Questions* at 6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/143692/dbs-referral-faq.pdf

with them in voluntary activities.[74] The extent and consequences of such decisions have considerable reach. Whilst figures on the operation and effectiveness of the DBS are scant, it is notable that on the 31st March 2017 there were some 64,000 people barred from working with children or vulnerable adults.[75] Moreover, whilst the DBS does not have powers to intrude expressly on rights guaranteed under the Human Rights Act 1998, it may do so indirectly. For example, including a person on the Barred List will not directly affect their Article 8 right to a family life, but should the same individual wish to support their child's school activities, for example, by volunteering to participate on a school sporting trip, their freedom to do so will be curtailed.[76] Their non-involvement may be awkward to explain, but the seriousness of their barred status is unequivocally communicated by the fact that a breach of the regulation amounts to a criminal offence.[77]

[74] Regulated activity for adults: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/216900/Regulated-Activity-Adults-Dec-2012.pdf and for children: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739154/Regulated_Activity_with_Children_in_England.pdf

[75] https://www.nao.org.uk/wp-content/uploads/2018/02/Investigation-into-the-Disclosure-and-Barring-Service-Summary.pdf at [14].

[76] For examples of the extent of barred regulated activity see https://www.highspeedtraining.co.uk/hub/what-is-regulated-activity/

[77] For an analysis of this complex area, see Law Commission *Criminal Records Disclosure: Non-Filterable Offences* (Law Commission, 2017, No 371), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/01/lc371_criminal_records_disclosure.pdf

It is understandable that a precautionary approach is adopted when considering the safeguarding of children or vulnerable adults. But even here, the coercive power of the state should be appropriately balanced. In some respects the concerns raised resonate with other contentious issues surrounding the introduction of behaviour orders on application, which are intended to prevent future harm and can be used in the absence of a criminal conviction.[78] A current example is the Sexual Risk Order (SRO) that can impose restrictions on a person who has 'done an act of a sexual nature as a result of which it is necessary to make such an order' to protect the public from harm.[79] There is no requirement for the sexual act to constitute an offence and Home Office guidance states that it may 'in other circumstances and contexts, have innocent intentions' and 'covers acts that may not in themselves be sexual but which have a sexual motive'.[80] There is, nonetheless, an important distinction between these civil orders and the civil powers of the DBS. The former are obtained on application through the courts: in the case of the SRO, on application from the Chief Officer of Police, or the Director General of the National Crime Agency, to a magistrates' court. The decision to impose an order is based on a civil standard of proof, and if the conditions are breached a criminal conviction could result. The DBS powers, on the other hand, are not exercised through the courts. Here, the assessment of future risk is undertaken by a government administrative body, where oral hearings are not routine and

[78] There are numerous 'behaviour orders by application' the most infamous being the Anti-Social Behaviour Order introduced by the Crime and Disorder Act 1998 s1 replaced with the Anti-Social Behaviour Injunction in the Anti-social Behaviour, Crime and Policing Act 2014 s1. See A. Ashworth and R. Kelly *Sentencing and Criminal* Justice 7th edition. (Oxford: Hart Publishing 2021 at 11.4).

[79] Sexual Offences Act 2003, s.122A.

[80] Home Office *Guidance on Part 2 of the Sexual Offences Act 2003* (2018:46).

lawyers are rarely involved. They are thus akin neither to a behaviour order on application nor to any of the behaviour orders on conviction, such as the Sexual Harm Prevention Order. The presumption applied by the DBS is not of innocence, but of a potential for risk, and hence a basis for labelling and restraint. If barred, a person aged over 24 will stay on the Barred List for at least 10 years before their barring can be reconsidered.[81] How frequently this happens is, as yet, unclear. What is clear is that the 'intention to bar' letter from the DBS recognises the significant impacts barring will have.[82] What is less clear is that the DBS takes account of its differential receipt by those who have been convicted and those who have been acquitted.[83] For the latter it can be a re-ignition of the whole nightmarish process of prosecution: indeed, in the case we studied a letter arriving from the DBS some ten months after acquittal in the criminal courts came as a fresh assault with considerable magnitude. Once again, our now acquitted accused faced old but familiar allegations; the DBS encouraged him to seek out trade union advice, the citizen's advice bureau or fresh legal representation. The scale of the task he confronted was compounded by the return of acute anxiety and fear. And whilst his robust response to the DBS ultimately led to their decision not to place him on their barred list, the prospect of further regulation by his professional body remained.

[81] Appeals are infrequent, and only applicable in cases where representations have been made; see Annual Report above, at p.13-14.

[82] Personal communication.

[83] Indeed, those who are acquitted are an exceptional cohort, being largely unsupported by NGOs etc. In contrast, see UNLOCK's campaign for convicted offenders, challenging the DBS's filtering rules *Challenging the DBS 'filtering' rules* https://www.unlock.org.uk/policy-issues/specific-policy-issues/filtering/

Acquittals and the Enhanced Criminal Record Certificate (ECRC)

To what extent and for what period having a criminal conviction should continue to be of relevance to an offender's post-punishment life has a chequered history.[84] Striking the correct balance between an offender's civil liberties, for example their right to find gainful employment, and the protection of others who may be exposed to risk as a consequence of that employment, is not straightforward. The Mason Review, an independent review of the then Criminal Records Regime,[85] had its recommendations largely adopted by Government[86] and was implemented, alongside the creation of the DBS, through the Protection of Freedoms Act 2012. However, the Mason Review had almost nothing to say about what should happen where an alleged offender is acquitted.[87] Should details of the allegations

[84] See Rehabilitation of Offenders Act 1974, government proposals for reform with respect to convicted offenders https://www.gov.uk/government/news/criminal-record-reform-to-support-ex-offenders-into-work and a critical response by Unlock https://www.unlock.org.uk/unlock-response-roa-reforms/

[85] The Mason Review *A Common Sense Approach – A review of the criminal records regime in England and Wales* (2011) https://www.gov.uk/government/publications/criminal-records-regime-review

[86] See the Government's response at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97853/gov-resp-indep-rev-crim-records.pdf

[87] See also the Government's White Paper *A Smarter Approach to Sentencing* (2020) at [250-272]. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918187/a-smarter-approach-to-sentencing.pdf The relevant section focusses on criminal records reform to amend the periods before which convictions become spent, with a view to assisting convicted offenders back into employment and thereby reduce the likelihood of re-offending. It follows on from a Supreme Court judgment

nonetheless be accessible to future employers, particularly where a job involves working with children and vulnerable adults, even though an acquittal resulted? This raises again the dilemma of the gap between a jury not being satisfied that the accused is guilty, and the persisting possibility that there may have been 'something in' the allegations even though not proven.

Under the Police Act 1997 there are three forms of criminal certificates potentially relevant to those applying for employment, to admission to certain professions, to hold licenses or to work with children or vulnerable adults. Crudely, the first deals with convictions; the second, spent convictions and cautions; and the third, what is termed an Enhanced Criminal Record Certificate (ECRC).[88] The ECRC reaches beyond the fact of a conviction or caution to include what is known as 'soft' information.[89] The certificate is based on information recorded in central records, and which is reasonably believed by the Chief Police Officer for the area, to be relevant to the specific application being made. This 'soft' information can

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in 2019 which observed that the existing provisions on disclosure of spent convictions for relatively minor offences were in breach of the ECHR in making employment more difficult; see *In the matter of an application by Lorraine Gallagher for Judicial Review (NI), R (on the appn of P, G and W) (Resps) v SSHD and anr (Appellants) and R (on the appn of P) (Appellant) v SSHD and ors (Resps)* (supremecourt.uk) [2019] UKSC 3; for commentary see https://www.lawgazette.co.uk/law-reports/disclosure-of-information-minor-offences/5069163.article However, acquitted defendants do not receive the same careful consideration in the Government's White Paper.

[88] Police Act 1997, s.113B.

[89] We do not seek to underplay the importance of such information, and its effective communication, where convictions result. There are many cases where tragedy has resulted because critical information has been 'lost' by the system; see, for example, J.Peay *Inquiries after Homicide* (London: Duckworth, 1996) but our argument here is about the rarer cases of those who have been acquitted.

include prescribed details relating to acquittals. Thus, someone who has been acquitted of a criminal offence, and who applies for an ECRC because they are seeking employment that involves working with children, may discover that details about their alleged offence are held by the state and may be used against them. Such adverse disclosure will likely represent something close to a 'killer blow'[90] to any application for a sensitive post.

The legality of such ECRCs under the Human Rights Act 1998 (and the ECHR) was examined in the case of *AR*.[91] *AR* involved an allegation of rape, and the defendant was acquitted by a jury. He understandably felt very aggrieved that he should have to defend himself every time he applied for a job which required an enhanced CRB check 'after the jury have ruled I am an innocent man'.[92] His case, one of judicial review, was ultimately considered by the Supreme Court, and their remarks were cited at the start of this article. Concern was expressed by the Court about the position of acquitted defendants, arguing not only that careful thought needed to be given to the practice of disclosing allegations that have led to acquittals, but also that 'little attention has been given to the conceptual and practical issues arising from the relationship of the procedure to criminal proceedings'.[93]

In the event the Supreme Court dismissed the appeal, which was based on a potential breach of Article 8, the right to respect for private and family life. The Court concluded that although disclosure of details of the allegation had interfered with his private life, this was

[90] Lord Neuberger in *R(L) v Comr of Police of the Metropolis* [2009] UKSC 3 at para 75.

[91] *R (on the application of AR) (Appellant) v Chief Constable of Greater Manchester Police and another (Respondents)* [2018] UKSC 47.

[92] *R(AR)* at [9].

[93] Ibid at [76 and 72].

necessary for the protection of the rights and freedoms of others, and thus proportionate. We consider this in more detail below when examining the meaning and utility that can be given to such information by those who receive it.

Earlier in this case the Court of Appeal had dismissed the claim that disclosure had breached Article 6(2), the right to be presumed innocent. Whilst the Court acknowledged that it was not open to the state to undermine the effect of an acquittal, and that the reviewing officer had used some unfortunate language,[94] nowhere did it suggest that the accused was guilty of the offence. It merely stated the fact of the allegation and of the acquittal. The Court of Appeal concluded, perhaps somewhat optimistically, that the effect of the acquittal was not contradicted by allowing others access to facts from which they might perceive (and attribute) a risk to a particular individual.

Interestingly, the Supreme Court in its postscript was somewhat less sanguine. The judges made reference to the *danger* that any potential employer will infer from a disclosure about an allegation, even though there was an acquittal. An employer might reasonably assume that such information would not have been included in the certificate unless the Chief Officer had formed a view of likely guilt.[95] The Court also lamented the absence of any objective or empirical evidence of what happens in practice.[96] Curiously, the Court

[94] The language was itself redolent of the false premise that a decision to prosecute in the first instance by the CPS indicated that they believed the allegation and thus that it was more likely to be true than false.

[95] In *R (AR)* [2018] at [75].

[96] They had been provided with a statistical summary of ECRCs over a 12 month period from Greater Manchester Police. This showed of 80 cases where the GMP had provided information pursuant to s.113(B), eleven cases included acquittal information. Others may have included allegations that did not result in a trial.

acknowledged that the ECtHR had been prepared to be much more critical of the principle of inclusion, even in the absence of any practical evidence of how such information was being used.[97]

With respect to the Article 8 issue, there was no doubt that the right to a private life was engaged, but the question was whether it was a proportionate response given the competing interests of public protection. In an earlier case, Lord Neuberger had stressed that the *relevance* of the disclosed information should be assessed in relation to the additional requirement that this information *ought* to be included in the certificate. Satisfying both considerations was held to be necessary to avoid breach of Article 8.[98] He regarded the statutory test of relevance *on its own* as too low a hurdle, precisely because it could permit the inclusion of disputed matters, or even suspicions or hints of matters. Deciding additionally whether a particular matter *ought* to be included should entail, amongst other issues, a review of the gravity of the material, the reliability of the information on which it was based, its relevance to the job sought, the time that had elapsed since the allegation had been made, and whether the applicant had an opportunity to rebut it. Without careful consideration of whether the information ought to be disclosed, the required balancing under Article 8 would not be achieved. Although in some cases the evaluation would be straightforward; in others it would not. However, what was seemingly

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For that period there were a total of 128,154 applications – the vast bulk presumably being an administratively straightforward confirmation that there was nothing to disclose.

[97] *MM v United Kingdom* (2013) (Application No 24029/07): see para 113 where Lord Neuberger's observations in *R(L)* above on the killer blow are reproduced.

[98] *R(AR)* at [29].

not required of the reviewing officer was a detailed examination of the weight of the evidence at trial, even in cases where acquittal had resulted.

In *R(AR)* the Supreme Court, cognizant of Lord Neuberger's argument about the need to justify disclosure, noted that account had been taken of the seriousness of the allegation (rape), its comparatively recent occurrence and its relevance to the post for which AR had applied. The Court acknowledged that this would create employment difficulties for AR but regarded the disclosure as necessary to meet the pressing social need for which the ECRC 'soft' information process had been enacted. Thus, and yet again, concerns about risk to children and vulnerable adults act as a trump card which is very hard for applicants - even those acquitted at trial - to overturn.

Conclusions - remedying the wrongs of acquittal

The criminal justice system constitutes a network of some of the most powerfully coercive institutions in the state armoury. In liberal democracies, these institutions are subject to systems of regulation that are intended to hold them accountable for their decisions and legitimise their practices. The rule of law embodies principles that ideally guide the criminal process in England and Wales, promising adherence to the principles of legal supremacy, the avoidance of arbitrariness and the pursuit of equality, fairness and transparency in decision making.[99] Yet, the duty this imposes on criminal justice institutions to adhere to ethical values that uphold the moral integrity of the individual is significantly

[99] M. Krygier 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (2016) 12 *Annual Review of Law and Social Science* 119-229.

weakened when the protection of individual vulnerability concerns practices and procedures after the dispositive decision has been to acquit. The presumption that harm has been averted by the acquittal of the innocent is far from the lived reality of many defendants who have theoretically 'walked free' from the court. In this article we have drawn attention to three specific areas of harm to which these individuals can be exposed: the detriments that attach to the process of the criminal prosecution itself; the ongoing regulation and control that operates to a civil standard of proof; and the subsequent attribution of risk that renders them liable to greater regulation and control than other citizens who have not been tainted by a criminal trial, even where that trial resulted in an acquittal.

Aside from reducing the protracted delays in hearings,[100] delays which must enhance the detrimental psychological impacts on the acquitted accused, some of the other harmful consequences that accrue from prosecutions, and from subsequent reviews to a civil standard resulting in no order being made, can be addressed through financial compensation. The Bar Council's recommendation to reverse the 'innocence tax' would, if implemented, offer significant protection against financial ruination. Defendants' cost

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[100] For a post-Covid review of delays see CJJI *Impact of the pandemic on the Criminal Justice System*. *A Joint View of the Criminal Justice Chief Inspectors on the Criminal Justice System's response to Covid-19* (CJJI, January 2021, paras 4.1-4.8). And for a limited analysis of delay pre-Covid see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875838/ccsq-bulletin-oct-dec.pdf

orders could be routinely granted; and legal aid properly funded, which may in turn prevent some unjustified convictions and advance more informed decision making. Again, the cynic would argue that such an approach would compensate not only the 'truly innocent' but also those who 'got away with it' – the undifferentiated cohort where the jury were not sufficiently convinced of the accused's guilt and so had to acquit. In addition, adequate legal aid is itself a problematic concept. Does it mean enough to match the prosecution's resources or as much as the accused believes is required, given the seriousness of the charges? In any system where a privatised form of justice exists, an accused person will inevitably want to employ the best legal team to defend themselves. Moreover, for those who cannot afford the luxury of a first-class defence, questions arise as to whether they are, in effect, second class defendants, at risk of obtaining only a discriminatory form of representation. But notwithstanding these difficulties, the provision of legal aid and reimbursement through defendants' costs orders, can only remedy the obvious financial harms done. Compensating an individual for the loss of their reputation, social resources or the infliction of psychological harms is much more problematic and consequently argues for greater care to avoid their infliction in the first place.

The second category of harms experienced by acquitted defendants refers to the ways in which the failed prosecution can be used as evidence of an enhanced risk to the public, which then justifies the fresh imposition of state-sanctioned control. The acquitted, as we discussed earlier, are not a homogenous group; amongst them will be those who, if subjected to a reappraisal on the balance of probabilities standard, will have the case proved against them. There may, therefore, be merit in distinguishing the 'factually innocent' and those against whom there is insufficient evidence to meet a balance of

probabilities threshold;[101] from those who are likely to meet civil standards for intervention or redress and those who have been unsuccessfully prosecuted *repeatedly* for serious offences.

So long as acquittals represent a failure on the part of the state to reach the high threshold for criminal conviction, there is scope to argue that an acquitted individual can still pose a greater than average risk to others. However, in balancing harm to the acquitted against the enhanced risk of harm they may pose to others, the scope for infringements should be tightly drawn. The existing requirement that the risk should relate to serious harm could be more rigorously defined by including only those acquitted defendants against whom there is evidence of repeated and serious unproved allegations, particularly those concerning vulnerable victims. In defining what counts as 'serious harm' one such categorisation would be that included in Schedule 5 to the Criminal Justice Act 2003, which lists the qualifying offences that permit a second criminal prosecution following an acquittal. Arguably in these cases the DBS has a legitimate interest in establishing, on a balance of probabilities, whether an acquitted accused should be included on their barred list. Additionally, where an accused has been repeatedly the subject of unsuccessful accusations of serious offences against the person, there could be scope for detailing soft information, placed in its specific context, on an ECRC. But this then raises further procedural questions about who would keep this prior record of acquittals; what should count as relevant and legitimate information and what should not; how consistency is to be achieved; and how decision makers can be held accountable?

[101] These would include some of those who receive judge-based directed or ordered acquittals.

We would argue that the existing process is unsatisfactory and in urgent need of reform. The DBS is an administrative body exercising coercive powers of the state 'behind closed doors'. It is currently entitled to consider 'soft' data from the police; and information from professional bodies, that can include hearsay, rumours and unjustified assertions that would not withstand critical scrutiny in any court. Similarly, the issue of ECRC's inclusion of 'soft' information should be reviewed, applying the criteria of relevance set out by the Supreme Court in *R(AR)*. This applies both to the information that a Chief Officer of Police might regard as relevant to disclose, and how that information might be interpreted by those who seek it. The government should thus deliver on its promise to provide employers with guidance as to how best to interpret those ECRCs that document 'soft' information against individuals who have been acquitted. Indeed, permitting reliance on evidence in an ECRC that merely supports a 'belief [by the police] that someone may pose a real risk' is a long way short of satisfying the quality of evidence necessary to support a prosecution, let alone secure a conviction.[102] These are slippery but real differences for those who have not been convicted.

We submit that before a determination is made by the DBS there should be a transparent, accountable and rigorous process in which the acquitted accused person is entitled to legal support, and not simply left to their own devices in challenging any preliminary decision made against them. For those convicted by the criminal courts, a routinized approach by

[102] The Quality Assurance Framework at page 9 refers to the difference between the quality of evidence necessary to get a case to court, and that on which the police may believe 'someone may pose a real risk' see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/295392/DBS_Applicant_s_introduction_to_QAF_March_2014.pdf

the DBS is perhaps understandable; for those acquitted, it represents a significant extension of state regulation, as well as a further assault on the integrity of those already subjected to the harms of a failed prosecution. Contamination by process should not be permitted to become corroboration by volume.

Finally, liability to greater regulation and control on the basis of attributed risk requires greater transparency and accountability. In an ideal world all citizens would be equally at risk of infringing the criminal law and being subject to its consequences; and all citizens would have an equal capacity to choose to adhere to or to break those laws. In many respects it is this depiction that underpins the liberal concept of equality before the law and the pursuit of 'blind justice'. Yet from a more critical perspective, this merely exemplifies the 'imposition of fictitious equality' that obscures 'obviously unequal bargaining positions'.[103] One place where bargaining positions are most obviously unequal is in the criminal justice system, where the legally coercive powers of the state render all accused persons uniquely vulnerable and dependent. But certain individuals possess greater resilience to recover from harm and to resist disadvantage by virtue of their differential access to opportunities and resources. An equality of arms, in what can be experienced as a juggernaut of prosecution, should therefore be guided by the principle of equity, attentive to the harms it causes and responsive in ways that address the social disparity of human vulnerability. Applied to the treatment of those acquitted by the courts, and faced with the counter argument that compensatory measures would benefit the undeserving, there is merit in arguing in favour of generosity. In Rawls' theory of justice the 'maximin principle' argues in

[103] M.A. Fineman 'Vulnerability and Inevitable Inequality' (2017) 4 *Oslo Law Review* 3, 133-149 at 135.

favour of decisions that avoid the worst possible outcome.[104] Arguably a more egregious injustice is committed if the state fails to protect the factually innocent from the consequential harms of wrongful accusation and prosecution, than if it fails to identify and sanction those committing criminal wrongs. Rawls argues that just outcomes that avoid unfair bias are most likely when rule-makers sit behind a 'veil of ignorance' that prevents them from knowing who they are and identifying with their personal circumstances and interests.[105] Being ignorant of these factors permits more objective and unbiased considerations and consequently fairer outcomes. Applied to the insecurities that can blight the futures of the acquitted accused, preventive and remediable measures should apply. Again, a necessary precondition is a properly funded system of legal aid, available certainly to anyone facing serious criminal charges as listed in Schedule 5 to the Criminal Justice Act 2003, and accessible not only for a criminal defence but to advise and possibly represent in subsequent inquiries that stem from the criminal charge. In addition, the principles of fairness underpinning the double jeopardy rule should not be abandoned in processes that apply a balance of probability test to evidence which, if proven, can impose serious intrusions on fundamental rights. Protecting rights that are owed to everyone and guaranteed under the Human Rights Act 1998 provides one way in which the veil of ignorance could shape the just treatment of those whom the state has failed to prosecute successfully. And where the balancing of competing rights is inevitable, the redistribution of risk against the acquitted accused should be proportionate and, above all, confined to the most serious cases. Continued failure to expose and assess the fairness of the collateral

[104] J. Rawls, *A Theory of Justice* Revised Edition (Cambridge: Harvard University Press, 1999 at Section 26).

[105] Ibid at Section 24.

consequences and post-acquittal regulation of those unsuccessfully prosecuted in the criminal courts leads only in one direction: to the justice of the witch hunt.