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Reforming the Role of Magistrates: Implications for Summary Justice in England and Wales

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Abstract

The role of lay magistrates in England and Wales has been progressively undermined by protracted processes of reform over the last two decades. Current government proposals aim to reorient and 'strengthen' their function through the creation of new magisterial responsibilities such as oversight of out of court disposals and greater involvement with local justice initiatives. This article argues that while these proposals embody necessary and important areas for reform, taken in isolation they will fail to consolidate the role of magistrates in summary justice unless they are enacted alongside other measures which aim to reaffirm the status of lay justices, and which seek to reverse the trend which has prioritised administrative efficiency at the expense of lay justice. Rapidly declining magistrate numbers together with continuous (and continuing) programs of court closures are irreconcilable with the future viability of a lay magistracy.

INTRODUCTION

The English and Welsh legal system is highly distinctive in comparison with many other jurisdictions in its use of 'lay' (non-professional) justices in the magistrates' courts.¹ Over the last fifteen years in particular, however, there has been significant political and legal debate about the function and rationale of lay participation in summary justice.² Recognition of the central role played by local communities appears to receive continued support from government. However, in light of the constraints associated with depleted case loads, court closures, reduction in magistrate numbers, increasing case complexity and substantial criminal justice budget cutbacks, government ministers have stressed the importance of reforming the role of magistrates in order to provide legitimacy for their continued existence as a feature of the legal system in years to come.³ Government reforms aim to reorient and expand the function of lay justices and include proposals for new magisterial responsibilities such as oversight of out of court disposals; justices' hearing certain types of cases individually rather than sitting as a bench of three; the creation of specialised traffic courts; and plans for more systematic engagement with communities through direct involvement with local projects and initiatives such as neighbourhood justice panels.⁴ Current government plans for reforming the role of magistrates clearly envisage that their revised function will enhance 'efficiency' in the court process and result in considerable cost savings.⁵ Fiscal imperatives have meant that administrative efficiency has been a central theme of proposals for change in the criminal justice system in recent years. The government's 2012 White Paper *Swift and Sure Justice*, placed particular emphasis upon more 'efficient' and 'reliable' delivery of criminal justice to 'enhance public confidence', which it intends to achieve through practical changes to the justice system including increased use of technology, longer court opening times, early guilty pleas, and changes to the role of magistrates.⁶ As the drive towards efficiency savings continues apace, reflected in court closures and increasing centralisation, the government is placing renewed emphasis upon the need for the magistracy to improve and to demonstrate efficiency in the delivery of summary justice.

A national consultation on *Reforming the Role of Magistrates* was launched by the Ministry of Justice in August 2013 which outlined proposals for magistrates to become further involved in summary

processes.⁷ These proposals are important because the volume of cases that magistrates hear has been steadily declining, with a 14 per cent reduction in court business over the last four years.⁸ This is in part a consequence of the significant increase in police use of out of court disposals. While the diversion of low-level offences from the formal court process is useful in providing greater speed, efficiency and proportionality in responses to low-level offending, many cautions and other summary disposals have been used for more serious types of offences such as assault and burglary, as well as for persistent offenders. This has undermined the role of the magistrates' court as the court of first response, and has displaced business which ought rightfully to be the preserve of the magistrates' courts, to the police. There is also ineffective scrutiny of police decision-making in relation to the use of summary penalties and the opportunity to challenge the issuing of these disposals is heavily circumscribed. Moreover, cautions for assault, for example, are not counted in official crime statistics, which impacts on data on (and perceptions of) the crime rate.

In addition, there has been a decrease of more than 20 per cent in the number of sitting magistrates since 2011 as well as the closure of many courthouses across the country.⁹ This has coincided with an increase in the number of professional District Judges, who also hear cases in the magistrates' courts, and an expansion in the judicial and quasi-judicial powers of legally qualified Justices' Clerks, who advise magistrates. Increasing professionalisation in the magistrates' courts stands in opposition to the central tenets of a summary justice system underpinned by the notion of lay justice, delivered by members of the citizenry. The government's proposals for reform come at a time when magistrates are increasingly concerned that their role in summary justice is fundamentally under threat. Against the backdrop of the government's 2013 consultation on reforming the role of magistrates, in this article I will examine the genesis and theoretical significance of lay participation in summary justice in England and Wales. I argue that the laity is an intrinsically valuable institution because the role of magistrates is an embodiment of society in the legal process which exists as a direct democratisation of that process. Moreover, lay magistrates possess distinct technocratic advantages as well as providing an important check on professional power. Economic considerations are also relevant and I contend that the relative financial merits of the lay magistracy, taken together with democratic arguments, provide the combination of elements most worthy of consideration in the conceptual framework of the value of magistrates' participation in summary justice.

In the second part of the article, I examine the ways in which the delivery of magistrates' 'local justice' has progressively been undermined by protracted processes of reform over several decades. I then analyse the impact of proposals for reform in three domains of particular significance: out of court disposals; neighbourhood justice panels; and sentencing jurisdiction and supervision. I argue that these embody necessary and important areas for reform. Taken in isolation, however, they will fail to consolidate the role of magistrates in summary justice unless they are enacted alongside other measures which aim to strengthen and reaffirm the status and autonomy of lay justices, and which seek to reverse the trend which has paradoxically emphasised *retaining* the principle of local justice, while increasing centralisation in the administration and management of magistrates' courts. I conclude that current policy proposals collectively fail to recognise that rapidly declining magistrate numbers together with continuous (and continuing) programs of court closures are irreconcilable with the future viability of the lay magistracy. The government's proposed reforms will do little to strengthen the role of magistrates if they take place in a policy vacuum.

THE LAY MAGISTRACY

The lay magistracy is one of the oldest legal institutions in England and Wales.¹⁰ Magistrates have been commissioned to keep the peace since 1195, with their role subsequently becoming formalised in the Justices of the Peace Act 1361, which devolved power to members of the community to administer justice. The lay magistracy is thus composed of unsalaried volunteer members of the general public who sit as part-time judges, known as Justices of the Peace (JPs), in the magistrates' court in England and Wales.¹¹ District Judges (DJs) also hear cases in the magistrates' court. These are full-time, salaried members of the judiciary who usually deal with longer and more complex cases coming before the court.¹² Lay magistrates sit across adult, youth and family courts, which hear around 97 per cent of criminal cases in England and Wales.¹³ Magistrates decide on matters of fact and law, and so they perform both the functions of judge and jury that are undertaken in the Crown Court. Legal advice is provided to magistrates, when required, by the Justices' Clerk.¹⁴ Magistrates hear a broad spectrum of cases including less serious criminal cases such as motoring offences, and failure to pay council tax/TV licences but they also deal with cases at the more serious end of the range of criminality such as causing death by aggravated vehicle taking, assaults, sexual offences, drug offences, frauds, theft and burglaries. For a single criminal offence committed by an adult, magistrates have the power to impose a period of not more than six months in custody (or a total of 12 months for multiple offences). Their sentencing powers also include the imposition of fines up to £5,000 and community penalties. Over 80 per cent of cases in the magistrates' court involve guilty pleas; therefore magistrates' work is predominantly concerned with sentencing rather than determining innocence or guilt.¹⁵

Although the value of a lay magistracy as an embodiment of citizen participation in justice is a cornerstone of the philosophical underpinnings of the magistracy in England and Wales,¹⁶ there has been a significant reduction in the number of sitting magistrates in recent years, from over 30,000 justices in 2011,¹⁷ to approximately 23,000 magistrates in 2013.¹⁸ Nonetheless, legal and political commentators continue to observe the important symbolic role that the lay magistracy embodies within the English legal system.¹⁹ The former Lord Chief Justice, the late Lord Bingham of Cornhill, described the lay magistracy as a 'democratic jewel beyond price'.²⁰ Historically, there has also been recognition by politicians of the central role that lay participants play in the delivery of justice to local communities.²¹ In 2000, a report commissioned by the Home Office, *The Judiciary in the Magistrates' Courts*, observed that: 'Successive governments . . . have favoured the encouragement of active citizens or of an active community. The lay magistracy, whatever its imperfections, is a manifestation of those concepts'.²²

Given the fundamental significance of the lay magistracy to the English legal tradition, it is therefore surprising that lay participation in magistrates' courts lacks a clear conceptual framework within existing legal scholarship. Discussion on the merits of lay participation has tended to coalesce around empirically untested assumptions that, for example, lay justices enhance public confidence, and a *priori* arguments that 'lay judges are good in themselves'.²³ This lack of clarity in theorising lay justice is problematic because the absence of a sound conceptual basis for magistrates' participation limits the cohesiveness of arguments favouring the retention of lay justice and fails to provide a coherent justification for the magistracy in the current climate of criminal justice reform. In the sections that follow, I endeavour to unpick and evaluate the disparate conceptual trajectories and values which frame lay participation in summary justice and I set out the theoretical parameters of lay justice around which current discussions about reforms to the role of magistrates ought to be structured.

THEORISING LAY JUSTICE

Democratic legitimacy

Within the existing literature, the concept of lay justice has frequently been viewed as being underpinned by, or identified with, theories of democratic legitimacy and democratic participation. The delivery of justice by the collaboration of lay people is intended to represent a model of 'true' democracy wherein the citizenry is actively engaged in key spheres of decision-making.²⁴ In particular, commentators have stressed the importance of lay justice as a democratic safeguard against professional power. The dominance of professional power in the form of 'expert' knowledge and discourse has to date received much attention across the study of various professional domains.²⁵ Within legal contexts specifically, scholars have notably observed that the collective effect of rules and formal procedures might tend towards signifying a 'conspiracy against the laity' whereby complexity and formality isolate the public, obfuscate the legal process, and further entrench notions that the process(es) of justice are exclusive, remote and administered by an elite professional class.²⁶ It is envisaged, therefore, that lay participation can serve to counteract lawyers' 'mystification of their trade'.²⁷ This view is predicated on the notion that the laity is seen to be 'free of the habits of thought, speech and bearing which characterise professional lawyers', and that magistrates simultaneously operate with 'a sound, practical understanding of what the law is and how it works',²⁸ thereby protecting the administration of justice from becoming the esoteric preserve of lawyers.²⁹

Anglo-American legal scholars have, moreover, scrutinised the epistemic foundations of legal education and training,³⁰ and have sought to identify the ways in which lawyers' training gives them distinctive professional values (and biases) which may inculcate 'a narrow, professionally inflected perspective on central contention of those who advocate lay magistrate participation that the laity can provide a degree of counter-balance in the administration of summary justice through heuristic skills and expertise that are not framed by traditional legal education and training.³³ However, it is a common criticism of magistrates that because they lack this legal education and training, they are relatively poorly equipped to interpret and apply the law. This view, as Ingman rightly observes, misunderstands the magistrates' function in the judicial process. Clearly, a lay justice cannot equal the professional skill of a judge, but the role of the lay justice is largely to decide questions of fact, and in doing so 'to exercise common sense and sound judgment'.³⁴ Thus, 'the duty to act judicially and impartially with an appreciation of the basics of legal procedures and evidence is, in the case of lay magistrates, far more important than the acquisition of a detailed knowledge of substantive law'.

Closely analogous, are the suppositions that lay magistrates possess distinct *technocratic* advantages in that they contribute to the functioning of a system with greater democratic accountability through, in particular, reduced bias in decision-making. Judicial decision-making that is undertaken by a lay bench as opposed to a single judge may provide greater transparency and accountability in outcomes through minimising errors across cases.³⁵ These arguments too have a considerable historical legacy. Writing on the future of the lay magistracy in this journal nearly 70 years ago, Chorley observed,

A momentary lack of concentration or inattentiveness may vitiate the whole process. The unpaid magistrates' court with its rota of several justices is not subject to this defect. It is true, of course, that the great bulk of . . . work does not provide cases where the decision can be open to doubt, but it is just the doubtful case when it goes wrong which rankles the victim, and brings into existence a social sore.³⁶

The notion of the lay magistracy as a tool for achieving greater transparency in summary justice continues to be widely propagated by advocates of the laity and the potential for magistrates' justice to provide greater accountability in outcomes across cases remains a powerful consideration.³⁷ District Judges are indeed quicker in their disposal of cases because they are employed full-time and sit alone rather than as a bench of three; hence the decision-making process is expedited by the absence of the need for discussion. While this can be advantageous since they are legally trained professionals and therefore spend less time seeking advice from the clerk, and District Judges may also be better able to curtail excessive advocacy,³⁸ a lay bench, as opposed to a single judge, may be less subject to the risk of subjective bias and/or errors in decision-making.³⁹ Jackson and Doran, amongst others, provide evidence that years of service as a professional judge can lead to the cultivation of stereotypes concerning the personality of defendants, their background, and the supposed circumstances in which offences are usually committed.⁴⁰ They suggest that these stereotypes can in turn interfere with the right of defendants to be tried only on the basis of evidence, and thus prevent judges from taking a fresh and impartial view of each case.⁴¹ While not a panacea to the problems associated with subjective bias in judicial decision-making, there is nonetheless evidence to suggest that the part-time nature of magistrates' work may go some way towards limiting their 'cohesiveness' in the court process, which can provide an important safeguard against the formation of 'clique' based mentalities and case-hardening.⁴²

Local justice

The notion of democratic legitimacy should also be understood as existing concomitantly with the concept of local justice. Through the local justice model, it is intended that magistrates 'bring common sense and knowledge of the locality and the local community to the criminal justice process.'⁴³ Magistrates have historically been drawn from the communities and surrounding areas in which they live and work. This has not been so for the appointment of District Judges who are appointed by Royal Warrant upon recommendation by the Lord Chancellor and are assigned to one of seven bench regions across England and Wales.⁴⁴ Therefore, it has typically been intended that magistrates possess greater local knowledge than their District Judge counterparts, who have a nation-wide commission.

The concept of geographically sensitive justice is disconcertingly vague, but this notion of a lay 'bench ethos' can be constructed by what Pat Carlen calls a 'mass of situationally evolved knowledge'.⁴⁵ In *Paul v DPP*,⁴⁶ for example, magistrates used their local knowledge in deciding a kerb-crawling case. There was no evidence that P's activities had caused a nuisance to local residents, as required by the Criminal Justice Act 1985. However, the justices used their local knowledge that the area was a residential and densely populated locale to provide the missing element in the prosecution's case. Woolf LJ observed on appeal that this was an instance where magistrates' local knowledge had been useful. In *Norbrook Laboratories v Health & Safety Executive*,⁴⁷ it was held that justices may rely upon local knowledge but that magistrates should disclose whenever they proposed to take judicial notice of local knowledge to enable the parties to comment and/or call evidence on the matters in question.⁴⁸ Differentiating personal knowledge from local knowledge, the court made clear in *Carter v Eastbourne Borough Council*,⁴⁹ that magistrates ought not to make use of their personal knowledge and experience of the world in place of evidence. Thus it is legitimate for local knowledge to be relied upon by magistrates where justices have a closer acquaintance with the issues raised in a particular case as a consequence of that knowledge, however they must inform parties of the intention to use this knowledge in their judicial reasoning.

Empirical scholarship suggests that judges' knowledge about local community contexts and crime problems can help to improve judicial decision-making and can assist professionals in making more nuanced decisions about both treatment needs and the risks individual defendants pose to public safety, ensuring offenders receive an appropriate level of supervision and services.⁵⁰ This might include, for example, knowledge of local economies, social demographics and cultures, as well as the availability and infrastructure of local treatment and support services, unemployment levels and the prevalence of various types of offences. Many defendants who appear before the magistrates' courts have addiction and mental health problems for example. By linking offenders to local, individually tailored community-based services (for example job training, drug treatment, safety planning, mental health counselling) where appropriate, the local justice system can help reduce recidivism, improve community safety and enhance confidence in justice.⁵¹ Links to local services can also aid victims, improving their safety and helping restore their lives.⁵² Local justice is therefore conceptualised as integral to rehabilitating offenders through developing pathways to support their reintegration back into their community.

To what extent local knowledge may be prejudicial to fairness in decision-making and case outcomes is a matter of some contention. It is a fundamental tenet of the rule of law that like cases be treated alike and there have been well-articulated concerns that a focus on 'local' decision-making may lead to inconsistency in sentencing, which has been an area of debate among legal commentators for some time.⁵³ In response, significant efforts have been made to address this issue, through in particular the introduction of sentencing guidelines and improved training for magistrates.⁵⁴ These have been important developments in improving magistrates' competency across a range of different case types.⁵⁵ Magistrates are bound by the rules of the legal system, court procedure and sentencing guidelines. Local justice need not therefore undermine judicial independence or sentence consistency. In subscribing to the notion local justice, it is possible to remain devoted to the principles of unbiased, detached adjudication conducted by third party neutrals while at the same time valuing decision-makers who understand community issues and who are well-placed to incorporate local knowledge where appropriate, and consistently with the rule of law.

While local justice should not be understood as standing 'in opposition' to a more universal or substantive approach to justice, the conceptual argument that lay magistrates should be retained because they reflect local justice, is now less persuasive. Changes to the structure and administration of magistrates' courts in recent years have dramatically reduced opportunities for the delivery of genuinely 'local justice' in the communities that magistrates serve. For example, prior to 2003 magistrates were required to live within 15 miles of the area in which they worked. Following the introduction of the Courts Act 2003, no such requirement now exists. The vast number of courthouse closures has meant that many magistrates no longer live near the court in which they sit, resulting in a reduction in magistrates' knowledge of local areas and local crime problems. The most recent program of court mergers and closures in 2012 led to a significant reduction in the number of Local Justice Areas (LJAs).⁵⁶ The Senior Presiding Judge, Lord Justice Goldring, has since stated that every magistrate must be prepared to sit anywhere in their LJA if required. The distances between courthouses can be daunting and, outside of London, can reach distances of nearly 80 miles between courts in the same LJA. The importance and value attached to local justice appears to have been reduced as national consistency has increased. Greater centralisation risks removing the 'community' dimension from the majority of criminal cases,⁵⁷ and in turn undermining the fundamental principle of the lay bench as 'a democratic bridge between the community and the legal system'.⁵⁸

The closure of many local courthouses may, on the one hand, be seen as a challenge to the legitimacy of the local justice argument but, on the other, may also suggest that the composition of a bench of three lay justices (in the absence of a jury) is even more critical if we are to retain a summary justice system which continues to value significant lay participation, especially considering only 12 per cent of charges are decided by jury deliberation at Crown Court.⁵⁹ Although the parameters of local justice have been circumscribed, advocates contend that lay adjudication continues to exemplify direct democratisation of the justice process, embodying ‘the political right of citizens to participate meaningfully in their judicial systems’.⁶⁰ Decision-making is conferred upon a greater range of perspectives and community voices, and in this way may act as a bulwark against the danger of executive influence.⁶¹ In this regard, it is important to examine to what extent the laity’s claims to representativeness are empirically grounded.

Representativeness

Historically, a significant limitation of the democratic legitimacy of the lay magistracy has been its claims to representativeness. Majority social groups, most notably white, middle-class professionals, have been over-represented in the magistracy, inevitably inviting the criticism that lay participation is not inclusive or indeed fundamentally democratic. In response to these concerns, considerable efforts have been undertaken in recent years to achieve, in particular, a more representative ethnic balance within the laity. In 2003, the magistrates’ National Recruitment Strategy involved a number of initiatives aimed at encouraging young people and minority ethnic groups to become involved in the judicial process.⁶² Application and interview procedures were streamlined, there are no longer political appointments, and JPs are not required to be citizens of the country in which they officiate. Subsequent studies have found that de-gentrification of the lay magistracy has achieved some progress in this regard.⁶³ However, while the current composition of the lay magistracy is gender balanced and ethnically representative at the national level, approximately half of serving magistrates are over the age of 60. A primary obstacle in enhancing diversity remains the discovery and recruitment of a sufficient and appropriate range of candidates for appointment.

While the criteria for, and the mechanics of, magistrates’ appointment has been reformed to reflect diversification objectives, there remain additional important barriers to participation, most notably with regard to obtaining agreement from employers for the requisite time off from work to meet the requirements for minimum sitting days. Although there is a legal duty upon employers to allow workers reasonable time off work to perform their duties as a magistrate, ⁶⁴ how much time the employee is entitled to will depend on what is reasonable in the circumstances depending on how much time away from work the employee has already been permitted for other purposes (such as holidays) and the effect of the employee’s absence on the employer’s business.⁶⁵ There is also no express duty upon an employer to pay an employee during the time taken off to serve as a magistrate. This has led to reduced participation from groups who are unable to obtain the requisite time away from their employment and has particularly impacted upon individuals who work in teaching and nursing professions; those who work part-time; and/or individuals who cannot afford to take unpaid absence from employment.⁶⁶ Collectively, these limitations serve to undermine the argument that lay justice is truly representative, although it is nonetheless considerably *more* representative than other parts of the judiciary.

To what extent the current composition of the magistracy impacts upon (or increases) public confidence is an issue which lacks a reliable evidence base. Assertions that the existence of the lay magistracy is, in and of itself, sufficient to enhance public confidence in summary justice are not

well-founded. However, there is evidence to suggest that magistrates do in fact attract greater confidence than professional judges, as well as professionals in other areas of the criminal justice system. A Ministry of Justice Report published in 2010, which collates data from the British Crime Surveys (since renamed the Crime Survey for England and Wales) from 2002–2003 to 2007–2008, found that public confidence in magistrates was much higher than professionals in other areas such as probation, prisons, the Crown Prosecution Service (CPS), and judges, with the exception of the police.⁶⁷ The data should also be considered in the context of increasing levels of confidence in magistrates: there was a five per cent increase in public confidence in their performance between 2002–2003 and 2007–2008.⁶⁸

Thus while there is more to be done in terms of achieving a genuinely representative balance within the lay magistracy,⁶⁹ significant reforms have been undertaken in recent years in response to concerns about its composition. Rather than existing as an archaic, historical anomaly within the English legal system, the magistracy has demonstrated that it has the capacity for change and adaptation; that it will initiate processes of self-accounting and operate reflexively; and that it is willing to engage with modernisation to enable it to continue to function as a contemporary democratic institution. Yet it is remarked with some regularity that the laity is indeed a ‘traditional’ institution, and tradition remains a central conceptual argument for some who advocate the retention of magistrates’ justice. Lucia Zedner has echoed the observations of many other legal commentators in expressing the view that the lay magistracy is ‘probably best explained as a historical legacy that would be an unlikely feature of a modern, rationally conceived system’.⁷⁰ In this regard, the continued existence of the magistracy is viewed as serving a pragmatic purpose within the criminal justice system, but one which is conceptually anomalous. That the lay magistracy is important for reasons of tradition is undoubtedly the weakest conceptual argument for its retention: the rationale for lay justice requires much more substantive theoretical justification than simply evidence of its historical legacy.

Instead, reflecting on the principal conceptual trajectories and values which frame lay participation in summary justice, the theoretical basis for the retention of the lay magistracy may best be constructed around the notion of a commitment to participatory democracy. The value of the lay magistracy emanates from both its symbolic democratic properties *and* its instrumental capacity and technocratic advantages. The administration of lay justice can assist in counteracting problems associated with case hardening and may go some way to subverting the domination of professional values and biases in summary justice by providing skills and ‘court-craft’ abilities that are not framed by traditional legal education and training.⁷¹ Although there are limits upon its claims to genuine social representativeness, the magistracy is undoubtedly closer to the ideal of trial by one’s peers than can be achieved by professional judges ‘whose background, socio-economic circumstances and lifestyle is more radically different from the defendants and witnesses appearing before them’.⁷² Lay participation disrupts the notion that law is the preserve of exclusivist professional institutions (and the state) and advances the idea that law functions and is applied ‘across, through, beyond and even on the far side’ of those same institutions.⁷³ The symbolic significance of allowing laypeople to decide matters of fact and law ‘reveals a society at home with the notion that law and rights are changeless truths discoverable by lawyers and laypeople alike’.⁷⁴ In this context, ‘law is a fact like any other: all that is necessary for the resolution of a dispute is for people of good character, free from the temptations of corruption, to apply their minds to it diligently and impartially’.

However, given the current fiscal climate and government plans for reform, democratic legitimacy alone would not seem to be a sufficiently persuasive conceptual grounding for magistrates’ retention. There are in addition economic considerations which may lend further support to the

retention of lay justice. The Home Office commissioned report on *The Judiciary in the Magistrates' Courts*, which was the first study to examine this issue, found that on average magistrates were 12 per cent less expensive than District Judges.⁷⁵ A further study in 2011 initially suggested that magistrates were significantly cheaper than DJs, but concluded that when 'volunteer costs' (that is, 'the cost to the wider economy as a result of magistrates volunteering [which] reflects the "value" of their unpaid time') were included, magistrates were found to be more expensive than DJs for most cases.⁷⁶ However, this analysis was subsequently identified as methodologically weak because many magistrates are retired and so their time cannot be monetised. In response to this criticism, the Ministry of Justice undertook a revised cost based analysis, the results of which were published in December 2013.⁷⁷ The new calculations suggest that DJs are *at least* twice as expensive as magistrates.⁷⁸ The cost for a summary non-motoring case, for example, is £18 per case for magistrates and £55 per case for DJs.⁷⁹ Moreover, the study did not control for DJs' increased use of custody when compared to magistrates, therefore the ultimate cost of their work to the criminal justice system is likely to be higher still.⁸⁰ This evidence needs to be understood in the context of a four per cent rise in the number of DJs since 2008, which at the same time, corresponds to an overall reduction in magistrate numbers of more than 20 per cent. That magistrates are, in practical terms, more financially efficient, *taken together* with democratic arguments, likely provides the combination of elements most worthy of consideration in the conceptual framework of magistrates' participation in summary justice. The second part of this article will now critically examine the theoretical parameters of lay justice in the context of current discussions about reforms to the role of magistrates.

THE EROSION OF LAY JUSTICE

The status of the lay magistracy has been subject to significant scrutiny and reform particularly over the last two decades. In 1992, overall responsibility for the administration of magistrates' courts was assumed by the Lord Chancellor. A government White Paper, *A New Framework for Local Justice*, followed in the same year which outlined, amongst other reforms, government plans to alter the relationship between the lay magistracy and their legally qualified clerks.⁸¹ At this time, a number of reservations were expressed that the proposals would undermine the administration of justice and would impact upon the independence of the magistracy by centralising power in the hands of the Lord Chancellor's Department.⁸² Nevertheless, the White Paper resulted in a number of changes which were introduced by the Police and Magistrates' Courts Act 1994. These reforms considerably altered the existing landscape of magistrates' courts' administration. In particular, the number of magistrates' courts committees was significantly reduced. Magistrates' courts committees, which had been created by The Justices of the Peace Act 1949, functioned as local management boards which possessed a purely administrative function. The 1994 Act brought about a process of amalgamation whereby the committees' responsibilities for specific courts was more clearly defined, and power was conferred on the Lord Chancellor to combine committee areas and to direct committees as to their standards of performance.

These reforms coincided with statutory changes in the role of the Justices' Clerk (who act as legally trained advisors to magistrates). Their judicial powers had steadily been expanded during this period through the delegation of (what were traditionally) magistrates' functions to the Justices' Clerk, resulting in a blurring of the advisory and judicial role.⁸³ The increasing number of judicial and quasi-judicial powers conferred upon Justices' Clerks coincided with a contraction in the role of magistrates, representing a (tacit) movement towards greater professionalisation of the magistracy and a reduction in the role of lay justices. Increasing professionalisation undermines the notion of

summary justice delivered by volunteer members of the community and erodes the important overarching principles associated with lay justice. If greater professionalisation is a goal of reforms, this ought to be stated as an objective, rather than achieved by changes that displace and undermine lay participation.

Following the election of the Labour administration in 1997, further change was afoot. The government articulated its desire to ameliorate management structures and improve efficiency within the criminal justice system at both national and local levels.⁸⁴ While magistrates had been responsible for the administrative management of their own courts, they were increasingly subject to greater oversight by the Lord Chancellor's Department. A total of 42 Magistrates' Courts Committees managed the whole court system, which comprised 430 local courts disposing of 2,000,000 criminal cases annually, totalling 95 per cent of all cases coming before the criminal courts. They were by far the largest element in the criminal justice system and it was this aspect of the administration of the magistrates' courts that received particular attention in the Labour government's commissioned review of the criminal courts, undertaken by Sir Robin Auld.⁸⁵ The financial affairs and especially the auditing/accounting procedures of Magistrates' Courts Committees were described as unsatisfactory. Moreover, Sir Robin observed that, despite increasing oversight by the Lord Chancellor's Department, there were 'considerable differences' in the operation of Magistrates' Courts Committees across the country, since each possessed responsibility for developing their own procedures and their own forms of implementing legislation and government policy, thus making consistency in court practices very difficult to achieve.⁸⁶

The Labour government's response to the Auld Report was wholesale reform of the administration of magistrates' courts, aimed at increasing 'efficiency' and reducing inconsistency in court policies and practices. Following the enactment of the Courts Act 2003, Magistrates' Court Committees which previously operated autonomously from the civil service, were abolished in 2005 and replaced with a centralised administrative body (Her Majesty's Courts Service).⁸⁷ The Act also established District Judges in the magistrates' courts, replacing what were previously referred to as stipendiary magistrates. The powers of Justices' Clerks were further expanded to include functions that would ordinarily be considered judicial, such as the issuing of an arrest warrant and the discharging of the accused where the prosecution offers no evidence.⁸⁸ Although there was significant parliamentary support for the reforms, again a number of reservations were well expressed, this time concerning the abolition of Magistrates' Court Committees, and whether such significant reforms to the magistracy were necessary and appropriate.⁸⁹ While efforts to improve consistency in the work of magistrates' courts rightly required attention, greater administrative consistency could have been achieved without wholesale centralisation. Improved magistrates' training and the introduction of sentencing guidelines, for example, have both been important in promoting consistency.⁹⁰ Yet these could have been implemented instead of a process of magistrates' courts centralisation, and as part of a series of reforms which sought to retain the principle of local justice, rather than which ultimately undermined it.

Increased centralisation is but one development in a broader trend over a number of decades which has seen the magistracy stripped of many of its powers in respect of the administration and control of magistrates' courts, and which has been accompanied by an unremitting program of court closures, a significant reduction in the number of sitting magistrates, and the increasing marginalisation of JPs within the summary justice system. A crucial observation here is that court closures and increased centralisation (including magistrates' oversight by the Lord Chancellor's Department) had been a consistent feature of summary justice *for decades*, and indeed long before the publication of the Auld Report in 2001. We should recognise therefore that while current plans

for reform have been precipitated by economic decline and government requirements for 'efficiency savings',⁹¹ the reduction in the scope and significance of magistrates' work has been a feature of policy and practice on summary justice for many years. As a consequence, magistrates' courts have come to exist as part of a centralised bureaucracy. This is dangerous because it has led to magistrates' autonomy being circumscribed, and to the encroachment on and domination of summary justice processes and principles by the executive.

CURRENT PLANS FOR REFORM

Further changes to the lay magistracy are now being considered as a consequence of the Coalition government's drive to increase 'efficiency' in the magistrates' courts, resulting from current fiscal imperatives and the need to reduce expenditure in the criminal justice system more broadly. In 2012, the government's White Paper *Swift and Sure Justice*, set out proposals for single magistrates to deal with low-level, uncontested cases such as shoplifting and criminal damage offences, where the defendant has been charged with the offence and a guilty plea is anticipated.⁹² There followed, on 14 August 2013, a speech to launch the Ministry of Justice's consultation, *Reforming the Role of Magistrates*, given by the Minister for Justice, Damian Green, in which he explained that the government was currently 'exploring new roles for magistrates in cutting crime locally, for example by scrutinising the police's use of out of court disposals (such as cautions)', and in engaging with the local community through community justice oriented initiatives.⁹³ Under these proposals, an estimated 0.8 million regulatory cases such as TV licence evasion and motoring offences are expected to be dealt with by a single magistrate. An Impact Assessment has recently been published which identifies both monetised and non-monetised impacts of this proposed reform, although it does not assess the possible behavioural response of defendants seeking to have 'their day in court'.⁹⁴

While the logic of the proposed reforms to regulatory cases appears relatively obvious since cases that are proved in absence rarely contain details that warrant significant discussion across the bench (particularly TV license offences), these arrangements may not be universally fair for written pleas or for other types of cases where a discussion about the circumstances could be called for. The bench of three magistrates is an important check on fairness and moderation to ensure consistency, and which may now be affected. It should not be overlooked that sentences in motoring cases can have a very serious impact upon an individual's livelihood. The erosion of local justice through court closures means that the importance of magistrates' local knowledge in dealing with such cases will, inevitably, be much more limited. Historically, magistrates who sat on traffic cases were familiar with the routes and roads where minor road offences were committed, and so were able to provide some perspective on the defendant's mitigation. Unfortunately, many fewer magistrates now possess this local knowledge when hearing traffic cases. Indeed, the reduction in magistrates' local knowledge has a corresponding impact on a whole host of other case types, where an understanding of local cultures and demographics, as well as more specific knowledge about the contexts of crime, including opportunity for and prevalence of various types of offences, can be instructive. Moreover, the introduction of these proposals will reduce the number of magistrates required for court work still further. While the Impact Assessment estimates that that the change will achieve savings of between £49 and £67 million, it makes no mention of the impact upon JP numbers despite, somewhat abstrusely, acknowledging government work to 'strengthen the role of magistrates'.⁹⁵

In common with previous government policy reforms, there is a continued emphasis upon *retaining* the principle of local justice, with the paradoxical objective of extending local benches to cover

larger areas.⁹⁶ It is difficult to reconcile the implications of these reforms with the ability of magistrates' to delivery genuinely local justice. Yet government reforms simultaneously intend to place 'the magistrate at the heart of the criminal justice system in their communities' and to involve magistrates in 'cutting crime locally' through, for example magistrates scrutinising police use of out of court disposals, and engaging with local community initiatives. In the following sections, three of the most significant potential areas for reform of the magistrates' role will be critically examined: out of court disposals; neighbourhood justice panels; and sentencing (jurisdiction and supervision).

OUT OF COURT DISPOSALS

Although out of court penalties such as cautions have been in existence for some considerable time, it was under the administration of the New Labour government during the late 1990s that there began to be a substantial increase in the use of summary, out of court disposals. The range of available penalties presently incorporates cautions; fixed penalty notices (FPNs); penalty notices for disorder (PNDs); cannabis warnings; youth restorative disposals (YRDs); and conditional cautions.⁹⁷ These penalties aimed to address different forms of anti-social conduct and low-risk offending and were introduced in a piecemeal fashion. The primary purpose of out of court disposals is to divert a significant number of minor and undisputed matters from the court process, thereby resulting in a reduction in cases coming to court, while at the same time streamlining prosecutions for contested cases and serious offending.

Although these summary disposals are not criminal convictions, they do carry a number of important implications for those who receive them. A simple caution is an admission of guilt and forms part of an offender's criminal record.⁹⁸ Cautions and conditional cautions may influence how the offender is dealt with, should they come to the notice of the police again, and may also be cited in court in any subsequent proceedings. Although cautions become immediately spent under the Rehabilitation of Offenders Act 1974, they can still be quoted on Standard and Enhanced Disclosure and Barring Service (DBS) checks and can therefore be made known to a prospective employer.

Inconsistent and inappropriate use

In recent years, there has been a very significant expansion in the use of out-of-court summary penalties. Since 2003, the number of out-of-court disposals administered each year increased by 135 per cent from 241,000 in 2003 to 567,000 in 2008, peaking in 2007 at 626,000.⁹⁹ Although in the last five years the number of out of court disposals issued by the police has dropped by 42 per cent, out of court disposals still account for one third of all offences brought to justice in England and Wales. Correspondingly, the magistrates' court caseload has fallen by roughly an equivalent amount. In so far as the courts are being unburdened from hearing a range of more minor cases, there has been reduction in the frequency and number of low level matters before magistrates' courts. However, the courts are nonetheless involved in enforcing the significant number of PNDs that go unpaid.¹⁰⁰ For example, in 2008, only two fifths of PNDs were paid within the 21 days allowed and 52 per cent before a fine was registered, resulting in over 84,000 fines originally imposed as PNDs being enforced by the courts.¹⁰¹ Thus if the rationale for the use of out of court disposals is to reduce court business and enable magistrates to devote their attention to more serious business, there appears some irreconcilability here, although the government has not provided any data on the associated costs of PND enforcement.

The administrative convenience of summary penalties has been accompanied by wide variation in their use across police forces, as well as in the frequency with which penalties are applied for certain offences. Evidence suggests that cautions have increasingly been used for repeat offenders, and penalty notices are often unpaid and unprosecuted.¹⁰² While some commentators have suggested that concerns about inappropriate use of out of court disposals for more serious offences, especially offences involving violence against the person and rape, have been exaggerated, there is clear evidence that their use is not being limited to low level criminality. In 2012, for example, 17,000 assaults were dealt with by way of out of court disposals. Importantly, these disposals are not counted in official crime figures. Therefore, in effect, magistrate numbers are being reduced not as a consequence of a drop in offences per se, but by a shift in the domain of *where* certain offences are processed, with the police acquiring greater power for deciding the outcome of a broader range of offences including assault, burglary, theft and criminal damage, as well as persistent low-level offending.

There is a broad lack of consistency in the use of out of court penalties across police force areas, as well as an absence of any standardised supervisory or oversight mechanism. Issuing a police caution is dependent on the accused admitting his or her guilt: this raises concerns about equivocal pleas, which a court is not allowed to accept. In a speech in 2011, the previous Lord Chief Justice, Lord Judge, expressed concern about whether the convenience of avoiding the court process altogether may lead an offender to admit to something for which he or she would have a defence.¹⁰³ It may be the case that some suspects prefer to make a false admission and accept a caution in order to avoid 'going to court'.¹⁰⁴ There is also the associated issue of whether those individuals who accept the offer of a PND for example, on the basis that it does not form part of a criminal record, are indeed fully aware of, and understand, the other implications of acceptance such as consequences for foreign travel and future employment. Such ambiguity is, as Andrew Ashworth observes, 'at best a drawback, and at worst capable of leading to injustice'.¹⁰⁵

The potential problematic implications of out of court disposals for victims is also clear: for example, there is no provision for the assessment or consideration of a victim impact statement; there is no imposition of the victim surcharge for a police caution and no opportunity for the imposition of financial recompense for injury or for criminal damage; something which the courts must consider. In particular, criticism of the use of out of court disposals has often focussed upon those instances when police cautions have been used for offences which are indictable only (such as rape and serious assault). Administered in this way, the use of cautions is unlikely to satisfy the principle of proportionality of imposition. ¹⁰⁶ It follows therefore that the mechanisms of decision-making involved in the use of out of court disposals are of central importance. While few would dispute the importance of police discretion and the potential value of out of court penalties in providing greater speed and efficiency in responses to low-level offending which are of benefit to 'the police, the offender and society at large',¹⁰⁷ there are nonetheless tensions between the administration of summary disposals by police, such as cautions which require an admission of guilt, and longstanding historic concerns about the role of police in investigating and prosecuting offences, and requirements for due process safeguards and procedures.¹⁰⁸ Without an appropriate system for oversight and appeal, the police are vulnerable to the pressures associated with the discretionary decision-making of those professionals who are in direct, regular contact with those committing crimes, as well as potential arbitrary and/or inconsistent decision-making.¹⁰⁹

In 2011, the government published a White Paper which set out plans to develop a 'clear national framework for out of court disposals'.¹¹⁰ The Ministry of Justice, in 2013, then produced national guidelines for out of court penalties in the form of a one page table setting out offence types,

evidential standards, whether an admission of guilt is required and so forth.¹¹¹ Yet although government has expressed concern about the expansion in use of out of court disposals, and has introduced a new 'justice test' for police to apply when administering summary penalties, together with reforms that will remove the availability of cautions being issued for serious offences such as rape, manslaughter and robbery, they have also sought to further extend the use of fixed penalty notices to include driving without due care and attention. Given that only just over half of all detected notifiable offences and indictable offences result in a prosecution or other sanction,¹¹² it is the decision-making process itself which merits much further scrutiny together with the development of appropriate mechanisms for accountability.

Magisterial oversight function

At present, formal mechanisms for oversight of out of court disposals provide only limited opportunity for review of police decision-making. For example, those wishing to challenge the issuing of a caution must make a complaint against the police force involved or to the Independent Police Complaints Commission (IPCC). It is also possible for individuals to issue judicial review proceedings.¹¹³ Yet this can be a costly and high risk strategy and is unlikely to be accessible to all. Increasingly, however, out of court disposals are coming to be regarded as processes that require judicial scrutiny – and that correspondingly the police, as members of the executive, should not have responsibility for processes of oversight and accountability.¹¹⁴ This is particularly the case since police use of FPNs is prone to bias as a result of police performance-related targets.¹¹⁵ In *R (on the application of Stratton) v Chief Constable of Thames Valley Police*,¹¹⁶ the claimant (S) challenged a caution administered to her on the basis that she had not admitted the commission of an offence and that she was not warned of the adverse consequences to her. The court observed, *obiter*, that the consequences of a caution were significant, particularly for anyone who might wish to work in occupations where a criminal records bureau check would be necessary, and so the ramifications of a caution must be fully explained and informed consent given. The offender must be carefully taken through the implications set out in the Ministry of Justice's 2013 guidance *Simple Cautions for Adult Offenders*,¹¹⁷ and a form explaining these must also be signed by the offender.¹¹⁸ The court remarked that, while these stipulations ought to act as a safeguard in protecting against the arbitrary and inappropriate use of cautions, there exist two further available safeguards: the bringing of proceedings by way of judicial review, as well as emerging processes of magisterial review. Importantly, the court reflected that the latter system 'may well be the more efficacious and cost effective way of ensuring that the use of cautions is in accordance with law and the public interest is protected'.¹¹⁹

Magisterial oversight of summary penalties has recently begun to take shape. Scrutiny panels for out of court disposals have been created in a number of areas across the country. These have been set up on a largely *ad hoc* basis and while they do not provide an appellate function, they aim, through working closely with police, to obtain further clarity about the circumstances in which particular cases have not been brought to court; to provide greater transparency about police decision-making; to work towards greater consistency in the use of disposals; and to monitor any departures from statutory guidance indicating that cautions should be used primarily for low level non-repeat offenders. Scrutiny panels currently provide this important strategic oversight function in only a limited number of areas and could reasonably be extended across the country and to a wider number of (particularly local) areas. In order for magistrates to effectively communicate to police the appropriateness of the use of summary penalties in particular cases, it would also be useful for these panels to operate with greater regularity. Although there is now statutory guidance on the use

of out of court penalties, this needs to be much better promulgated. Magistrates can play a strategic role in helping to disseminate and clarify this information and are well placed to be able to ensure accountability, consistency and compliance with sentencing guidelines. An instructive comparison can be made with developments that have taken place in relation to hate crime, with the creation and broad proliferation across the country of Hate Crime Scrutiny Panels. These scrutiny panels review randomly and independently selected finalised cases in order to evaluate case files and make recommendations. They identify issues, common themes, and trends in the decision-making process, looking in particular at the impact of decision-making on communities. The panels provide significant and effective scrutiny of the criminal process and are a model that could similarly be utilised for the oversight of summary disposals, with magistrates playing a central role in this accountability mechanism.

The more contentious issue of course, is whether individuals should be able to apply to the magistrates' court for a review of the decision to administer a caution with the power to expunge a caution from the record in the event that a caution has been given incorrectly.¹²⁰ In the current financial climate, which is characterised by considerable criminal justice budget cutbacks, the use of out of court disposals is likely to take on additional significance as a solution for managing pressures on the court system.¹²¹ Attention therefore needs to be paid to assessing the proper roles of the police, the CPS and the magistrates' courts and to examining the variation between the policies of the police and the various regulatory agencies in relation to diversionary disposals.¹²² The formal introduction of a statutory oversight mechanism at magistrates' court level for the administration of cautions (and potentially other summary penalties), would be an appropriate judicial process in which to ensure that these disposals are issued in accordance with the law.¹²³ Moreover, the protection of the public interest is also a significant concern: in a system where only 55 per cent of detected notifiable offences and indictable offences result in a prosecution or other sanction (22 per cent are cautions and nine per cent are dealt with by way of a PND),¹²⁴ magisterial oversight would enhance accountability and go some considerable way to addressing the concern that the growth in the use of out of court disposals has led to inconsistencies in their use, in particular for persistent and more serious offending.

NEIGHBOURHOOD JUSTICE PANELS

Neighbourhood Justice Panels (NJPs) (also known as Community Justice Panels or Neighbourhood Resolution Panels) are an alternative disposal for first-time, low-level offences that would normally attract a reprimand or final warning for young offenders or a caution for adults. They can involve both criminal and anti-social incidents and are referred from agencies including police and housing/registered social landlords. The Panels are attended by the victim, offender, and anyone else affected by the harm. A 'facilitator', who is a trained volunteer from the community, and the referring agency (for example, the police) are also represented. Outcomes usually involve some form of reparation on behalf of the wrongdoer, to make good for the harm caused. The Panels only work with offenders who have admitted their guilt and in circumstances where the victim consents to be involved. The introduction of NJPs is intended to reduce delay in the criminal process, as well as giving the victim a greater 'voice' in the criminal justice system.¹²⁵ Research suggests that for wrongdoers, the main motivation for participating in Panels is the opportunity to avoid criminal proceedings since NJPs do not result in a criminal record.¹²⁶

The first NJPs in England were set up in 2005 in Chard and Ilminster (Somerset). Their introduction was a direct consequence of local courthouse closures in the area: magistrates' courts had recently

been removed from the locality and residents felt frustrated by a perceived lack of local justice.¹²⁷ Outcomes have to date been very positive with recent figures indicating that some 330 cases have been dealt with by the Panel, which has resulted in a reduction in police administration time of 75 per cent and a recidivism rate for participants of five per cent.¹²⁸ Following this initial success, NJPs were officially trialled in Sheffield, Manchester and Somerset. The Ministry of Justice evaluations of these pilots found low re-offending rates of between three and five per cent and victim satisfaction rates of over 90 per cent.¹²⁹ Although there was evidence of low numbers of referrals to the schemes at the outset, as well as other implementation problems and resistance by some police officers to the new more 'informal' arrangements, there were a number of positive outcomes from the pilots including reduced delay in processing low level cases.¹³⁰ In October 2012, the government announced, as part of the introduction of its *Swift and Sure Justice* policy aimed at increasing the number of flexible criminal justice pilot schemes across England and Wales, that they would be testing the panels in an additional 15 areas.¹³¹

The average length of time between an offence taking place and a sentence being passed in the formal criminal justice system is five months, despite most cases not going to trial or being uncontested. The administration of cases in NJPs is much quicker and a case can go from referral to Panel in two to three weeks.¹³² Cost is also another significant factor. According to recent figures published by the Local Government Association (LGA), the basic cost to police and the CPS of taking a criminal damage case to court in Somerset is £612, with a comparable cost to the NJP of £163.50.¹³³ That NJPs appear to be quicker, cheaper and more effective ways of delivering summary justice for low level offences is at the core of their appeal for government, and for communities themselves. While only the 15 identified test areas will form the basis of the government evaluation, other areas across the country have also been encouraged to set up their own Panels. However, the operation of the Panels varies according to the different locales in which they operate. Some Panels only hear cases involving adult victims and offenders, while Panels in other areas accept referrals for cases involving young people and children. The range of cases that have been brought before NJPs include neighbour disputes, criminal damage, and assault.

The comparable speed with which NJPs operate however, needs to be carefully balanced alongside existing principles of summary justice to ensure that fairness is not jeopardised in the face of administrative expediency.¹³⁴ In particular, it is important that the restorative practices delivered by NJPs are of a robust nature. Moreover, there has been no formal statistical evaluation of the impact on reoffending to date so any claims about recidivism are preliminary. The introduction of NJPs has in part occurred as a response to the closure of magistrates' courthouses, and in this way, they may offer another opportunity or an alternative avenue for the delivery of local justice which is potentially cheaper and more effective than the formal court system. However, their creation also undoubtedly provokes further issues around fairness in the delivery of justice, especially in respect of the tensions between the delivery of 'formal' and 'informal' summary justice, which will now be considered in detail.

Role of magistrates in NJPs

The formal rules and procedures of the magistrates' courts are important safeguards in the delivery of an equitable and procedurally fair system of summary justice. These formal processes appear not to be reflected in the work of some other informal modes of dispute resolution that are becoming more prevalent in the summary justice system such as youth referral panels. In the delivery of summary justice, there is evidence of some degree of polarity in respect of the work of magistrates'

courts – which are bound by the rules of the legal system, court procedure and sentencing guidelines – and, on the other hand, referral panels and local justice panels which, because they are not part of the formal justice system, do not operate according to the same legal constraints. Balancing the rights of the offender against the rights of victims is a difficult task that has been carried out in the past by the judiciary acting within the constraints of the law and court procedure. It is important to examine to what extent those same constraints exist for NJPs and to what extent they could be exploited by residents for reasons of prejudice or as a result of local disputes based on malicious rumour or other unfounded discriminatory motivations. The appropriate and principled restrictions placed upon the operation of magistrates' courts may therefore stand in opposition to the more *ad hoc*, unconventional and pragmatic way that referral and local justice panels operate.

There are clear areas of discord in creating and reconciling separate tiers or forums for the delivery of summary justice. It raises the issue of how diversionary approaches function at different levels and in different forums of summary justice and in what circumstances diversion from the judicial system is appropriate. While justice panels operate as a form of diversion from the formal court process, thereby preventing offenders from receiving a criminal record for what are often minor criminal offences, the use of such diversionary measures may also mean that an individual could subsequently appear in the magistrates' court having good character (no criminal record) when they have been repeatedly engaging in criminal or sub-criminal (anti-social) behaviour in their community for months or potentially years previously. Diversion will not always be appropriate and greater discussion needs to be had about the circumstances where, even though offences are technically minor in nature, the use of informal resolution panels is not appropriate. This is an issue that has received particular attention in the context of the use of out of court disposals such as FPNs, where the increased use of these disposals may undermine the court of first response, and is also inappropriate as a sanction for certain criminal offences. Much of the government's emphasis on the creation of NJPs has been as a way of tackling anti-social behaviour (ASB) more efficiently and effectively. Many cases of ASB concern repeated acts of nuisance behaviour (often coupled with aggressive attitudes towards neighbours) over a protracted period of time, and which are frequently perpetrated by a small number of individuals in specific neighbourhoods. To what extent NJPs are the appropriate forum for dealing effectively with the effects of this type of cumulative criminal or sub-criminal behaviour is similarly a matter of contention.

Moreover, in magistrates' courts, justices carry responsibility for the preservation and protection of the rights of individuals who appear before them including with regard to young people and children under the Children and Young Persons Act 2008, which requires magistrates to explain their judgments more fully to these categories of defendants. It will be important to ensure that locally developed and administered justice panels maintain similar protections for the rights of those (both adult and youth) who are brought before them in order that they are seen to be accountable and transparent in their approach to cases. The parents of young people may well put their children at risk of not receiving help and support from welfare services in their desire to avoid their children receiving a criminal record, or in their desire to appease the neighbours that they live alongside. Thus, greater thought needs to be given to the reconciliation of the creation of justice panels as an adjunct to the existing court system.

Lay justice involvement in the work of the NJPs, particularly through charring meetings, would facilitate an important oversight function to ensure that the process is fair to both the victim and offender; the rights of the offenders are properly protected; the solutions are fair and proportionate and correct decisions are made about whether the offender should be processed through the court system (in the same way that the magistrates' court commits to the Crown Court) rather than dealt

with outside of it. The possibility of magistrates providing an oversight and accountability mechanism in the operation of NJPs, in a similar way to how they could provide (at least) retrospective scrutiny for out of court disposals, would be the most appropriate form of involvement that they could undertake. Neighbourhood Justice Panels are an important criminal justice innovation with a realistic prospect of reducing resource demands on the police as well as potentially impacting upon rates of recidivism, particularly for low level repeat offenders.¹³⁵ By expanding the remit of NJPs to include referrals from the court, this would further reduce the pressures on the limited resources of the criminal justice system and result in a more balanced approach to offenders and victims.

SENTENCING

The extension of magistrates' sentencing jurisdiction has been an aspect of the discussion on magisterial powers which has attracted political and judicial attention for some time. In addition, there is the potential for the remit of magistrates' work to be extended to sentencing supervision as well as magistrates' routine participation in other forums such as professional/disciplinary committees. There are both advantages and limitations to the broader incorporation of these areas into magisterial functions, which are examined in the pages that follow.

Sentencing jurisdiction

In 2001, the *Auld Report* acknowledged the existence of suggestions for a general increase (or decrease) in summary jurisdiction but concluded that there was 'no wide or well-based support for a change in the general limit.'¹³⁶ Under the last Labour administration, however, magistrates sentencing jurisdiction was in fact extended up to 12 months for a single offence by the Criminal Justice Act 2003.¹³⁷ One of the main reasons for this reform was a cost based rationale premised upon the supposed financial implications of the magistrates' courts hearing more cases rather than referring them to Crown Court. Yet this part of the Act has never been implemented: powers extending magistrates' jurisdiction remain on the statute book despite an unsuccessful attempt in 2011 by the then Justice Secretary, Kenneth Clarke, to repeal the powers through provisions in the Legal Aid, Sentencing and Punishment of Offenders Bill.¹³⁸ The powers could therefore be revisited without future parliamentary debate. Indeed, there remains significant political and magisterial support for the extension of magistrates' sentencing jurisdiction which, it has been argued, would considerably reduce the number of offences that presently go to Crown Court, and would in turn substantially decrease the costs to the criminal justice system and the number of judges required over time.¹³⁹ However, if increased (financial) efficiency in magistrates' courts is the primary objective of current proposals for reform, a clear issue for consideration ought to be the relative cost of magistrates and DJs. Simply increasing magistrates' sentencing jurisdiction overlooks addressing wider issues that significantly impact upon the cost of court business.

For example, a related issue is why some 40 per cent of defendants who are convicted in the magistrates' court, are sent to Crown Court for sentence and yet receive no more than a six month custodial sentence. A primary objective of the government's review of the role of magistrates has been to address this aspect of sentencing. According to the Ministry of Justice, these types of sentences could have been passed by magistrates who 'have the skills, capability and powers to deal with most of these cases' and in courts 'which are closer to the affected communities, and where the cost of a typical sitting day is significantly cheaper'.¹⁴⁰ A simple corollary of this observation is

that magistrates are not using the powers available to them appropriately. However, these sentencing outcomes might also be explained by a number of other factors. For example, there can be a substantive difference in judicial perception of cases between magistrates and Crown Court judges.¹⁴¹ When magistrates hear a case at the most serious end of the sentencing range, they often send the case to Crown Court where judges are likely to view the case as amongst the least serious kind that they hear, and so in turn they may pass sentence at the lower end of the scale. Indeed, magistrates report that cases in which they have declined jurisdiction (either way offences), which would have been within or just slightly beyond their sentencing range, are periodically given community sentences in the Crown Court.¹⁴² In those instances where benches have sat on either way offences, the bench may decide, after listening to the evidence and the CPS view that, if convicted, the defendant would require a slightly longer sentence than 6 months' custody, to send the case to Crown Court (with the associated delays for trial and additional costs incurred including legal aid). The outcome of the case at Crown Court may then be that the defendant has not received a prison sentence although at the either way point it appeared obvious to the bench from the evidence produced by the CPS as well as the prosecutors' view, that it could not be dealt with by the magistrates' court.¹⁴³

Another possible factor in accounting for lower (or comparable) sentences in the Crown Court may be that under previous guidance, the magistrates' court had to assume for the purposes of determining mode of trial (for either way offences), that the prosecution's version of the facts was correct, so that magistrates would cater for 'worst case scenario'.¹⁴⁴ It follows that cases which are considered on the basis of 'worst case scenario' may *prima facie* appear more serious when compared with the same case in which the judge is able to hear full defence arguments. New guidelines which came into force on 11 June 2012 however, bring a change in emphasis to the way in which magistrates approach assessing the strength of a case, moving away from taking the prosecution case at its highest and instead directing courts to take all aspects of the case into account.¹⁴⁵ While it is not possible to fully anticipate how judges' sentencing behaviour will change as a result of the new guidelines, it is possible that more sentences may be adjusted downwards than upwards, or vice versa, which will result in changes in the cost of sentencing.

To what extent an increase in magistrates' sentencing powers would correspond to an increase in the use of custody is also difficult to determine. Opponents have suggested that the considerable increase in the use of custody for female offenders over the last decade, for example, provides evidence of punitive judicial attitudes and a greater willingness to incarcerate offenders, particularly in low-level non-violent property related cases such as shoplifting.¹⁴⁶ On the other hand, magistrates have argued that they are, on the whole, highly circumspect when imposing a custodial sentence, and rarely pass sentence for the maximum 26 weeks available to them.¹⁴⁷ While the inefficacy of short prison sentences in reducing rates of recidivism, together with their economic shortcomings, has attracted significant attention in recent years,¹⁴⁸ it does not necessarily follow however that sentencing limits should be increased in magistrates' courts in order to refocus attention upon cases which ought to attract more significant periods of custody. Given the potential for increased sentencing powers to substantially enlarge prison numbers, any such reforms need to be carefully considered. The introduction of new licence and supervision measures for offenders serving short custodial sentences in the Offender Rehabilitation Act 2014 includes a new role and powers for magistrates to deal with offenders who breach the conditions of their supervision. Courts have powers to deal with those who fail to comply with their supervision conditions, including being able to commit an offender to custody for up to 14 days. It will be important first to observe the effect of these changes before any reform of sentencing powers is undertaken.¹⁴⁹ Instead, a more useful way forward would be to ameliorate arrangements around sentence supervision.

Sentence supervision

Both nationally and internationally, there has been increasing interest in the value of sentence supervision, and its potential impact upon sentence compliance and offender recidivism.¹⁵⁰ When undertaken in appropriately targeted cases, evidence suggests that sentence supervision can help to reduce breaches and promote desistance from crime.¹⁵¹ The process of sentence supervision provides opportunities for the defendant to discuss with a magistrate/judge their progress on an order, exploring why they are doing well or poorly. Studies that have examined this aspect of sentencing review have found that this form of supervision can enhance procedural justice, resulting in offenders feeling that they have been treated fairly, which in turn leads to greater compliance with court orders and legal requirements.¹⁵² While other professionals could fulfil this supervisory role, research continues to support the conclusion that judicial supervision produces the most significant improvements in outcomes.

Sentencer supervision of community orders is an area in which magistrates' functions could judiciously be extended: the introduction of regular court reviews incorporating monitoring and supervision of offenders' progress would enable a single magistrate within the court to track repeat offenders through the sentencing process. There is clear constructive value in magistrates playing a greater role in reviewing community orders, especially in view of evidence which suggests that a consistent relationship between defendant and sentence supervisor is the key to effective monitoring.¹⁵³ Rather than relying upon the periodic reports of probation officers to assess the progress of an offender, a regular programme of in-court judicial sentence supervision would facilitate the provision of more detailed information to magistrates about the offender's compliance with the conditions of their community order. By insisting on regular and rigorous compliance monitoring, the justice system can improve the accountability of offenders. It can also improve the accountability of service providers by requiring regular reports on their work with offenders.

At present, sentence supervision is predominantly limited to drug rehabilitation requirements (DRRs) and it also operates in a small number of courts which have made use of specific provisions in the Criminal Justice Act 2003. The introduction of powers to provide for court review of community orders was contained in section 178 of the 2003 Act. On the face of it, section 178 powers appeared to signal an opportunity for courts to systematically adopt processes of review of offender compliance. The provisions permit powers to be granted to certain courts by the Secretary of State to enable the judiciary to make an order allowing or requiring a court to review the progress of an offender under a community order. This involves the offender returning to court at each review to discuss their progress with the judge/magistrate. Under section 178, the court also has the power to attach or remove a review provision from a community order, and regulate the timing of reviews. This has been found to work particularly well when the same member of the judiciary who passed sentence conducts the review.¹⁵⁴ Yet section 178 powers have not been widely implemented, meaning that in the majority of courts, there is no provision for regular review of offenders subject to community supervision.¹⁵⁵ There are a few notable exceptions to this practice however. Sefton Magistrates' Court, for example, utilises an innovative community sentence scheme which incorporates court reviews of community orders for medium to high risk offenders who have poor compliance histories with probation. Outcomes to date have been very positive, with police reporting a 66 per cent reduction in the arrest rate for that offender group.

It is, however, clearly not appropriate for all community orders to be subject to review. The widespread use of such powers would likely come with some associated costs (including requirements for the availability of magistrates to hear the reviews), although it is worth noting that in those courts where sentence supervision has already been deployed, it has been undertaken on

the initiative of local agencies and has utilised resources already available in the local area, thus central funding has not been required.¹⁵⁶ Where sentence supervision is targeted appropriately at those offenders who are at high-risk of reoffending and are most likely to require such monitoring processes, there are many cases that would benefit from the judicial oversight that these powers permit. An important step towards achieving this would be the repeal of section 178 powers to enable magistrates to routinely review appropriate cases.

More broadly, there are other areas of criminal justice in which magistrates' responsibilities could usefully be extended to incorporate a greater oversight function. For example, an often neglected but extremely valuable institution that would benefit from more routine involvement of magistrates, is Independent Monitoring Boards (IMBs). Every prison has an affiliated IMB, which usually meets on a monthly basis.¹⁵⁷ Magistrates have historically played a significant role in the oversight of prisons and in IMBs, although this role has been reduced as magistrates are no longer permitted to monitor their local prison: 'monitoring' was held to be incompatible with their role in sentencing offenders for breaches of disciplinary procedures.¹⁵⁸ Moreover, it is District Judges who hear cases of serious prison indiscipline (adjudications). The fragmentation of the criminal justice through payment by results (PBR) models and the increasing role of police in the management of offenders,¹⁵⁹ means that there is greater need than before for transparency and accountability in the delivery of justice. The routine participation of magistrates in IMBs could be an important step in creating more substantive oversight of offender 'management' services especially those which have been 'contracted out' to private sector agencies.¹⁶⁰ Magistrates' routine participation in IMBs would go some way to establishing an improved system of checks and balances and a thus a better mechanism for the oversight of the 'management' of offenders in a criminal justice system dominated by processes of marketisation and managerialism.¹⁶¹ There also seems no reason why magistrates' responsibilities could not be extended to permit them to sit alongside DJs on adjudications.

There are numerous other contexts in which magistrates' competences might usefully be deployed. While there is no role for magistrates as there used to be on the old police authorities, magistrates could sit regularly on other disciplinary tribunals such as those of the legal professions (The Bar Council and the Solicitors Disciplinary Tribunal), which a number of magistrates are already involved in. They could also be productive in working with the Criminal Cases Review Commission (CCRC). Independent panels could, for example, take a lay review of cases and provide a first sift and evaluation of applications. Given the reduction in magistrates' court business as a result of the use of out of court disposals, increased use of DJs,¹⁶² and the implications of the one-magistrate model for regulatory cases, it is important to think creatively and broadly about how best to strengthen the role of magistrates. This will, moreover, help to buttress the role of magistrates in summary justice, which is essential at a time when Her Majesty's Court and Tribunals Service faces a requirement to cut its budget by 37.8 per cent between 2012 and 2016. Magistrates' functions must, therefore, be seen to be integral to the delivery of effective summary justice, while offering value for money.

CONCLUSION

Almost two decades ago, Penny Darbyshire published a cautionary observation on the future of lay justice when she warned that the importance and value of summary proceedings had become widely ignored.¹⁶³ Unfortunately, the intervening years have borne witness to a broad range of policy decisions and reforms to the system of summary justice which have yet further emasculated magistrates' authority and reduced their ability to deliver local justice. The Ministry of Justice has

recently acknowledged the detrimental effects of some of these changes, noting that: 'Falling workload, and the past abuse of out of court disposals has contributed to a feeling amongst some magistrates that their position within the criminal justice system is under threat'.¹⁶⁴ Yet magistrates' disaffection is a product of a much wider range of processes, policy reforms and statutory changes that, collectively, have served to systematically undermine the lay magistracy's role in summary justice over a number of decades. Interestingly, in response to those who foresee the impending demise of the lay magistracy, the Ministry of Justice has been unequivocal in stating that: 'This Government takes a very different view. We are clear that the magistracy have a vital role to play in the courtroom, and that, more than that, they shall increasingly play a vital role in modern society by strengthening the links between courts and the communities they serve.'¹⁶⁵ There appears to be, then, some grounds for optimism.

Nonetheless, it is evident that the role of magistrates must evolve to remain relevant and sustainable, and to be able to continue to provide its 'different brand of justice'.¹⁶⁶ The government's plans for reform do indeed identify a number of salient areas in which magistrates' powers could usefully be extended. Magistrates could play an important strategic role in scrutinising out of court disposals and in helping to better promulgate the statutory guidance on their use to ensure accountability, consistency and compliance with sentencing guidelines. Moreover, the formal introduction of a statutory oversight mechanism at magistrates' court level for the administration of cautions (and potentially other summary penalties), would be an appropriate judicial forum in which to ensure that these disposals are issued in accordance with the law. Similarly, lay justice involvement in the work of NJPs would facilitate an important oversight and accountability mechanism. The development of NJPs should not be viewed as a threat to the lay magistracy but instead as a new adjunct to summary justice that could help to both enhance and bridge the gap between communities and the judicial system.

Magistrates' strategic value in our democratic system of justice ought to be reaffirmed, and the Coalition government has made some positive steps in this direction. A new All Party Parliamentary Working Group has been set up on the lay magistracy, and the Chairman of the Magistrates' Association has recently reported that there is 'an atmosphere [among policy-makers] to move these proposals further'.¹⁶⁷ However, the government's plans for further reform need to be situated within their wider policy context. Without doubt, there *remains* a policy trajectory in pursuit of efficiency savings premised upon reducing magistrate numbers and closing local courts.¹⁶⁸ Government reforms comprehensively fail to acknowledge the continuing impact of these changes upon the principle of local justice but also the clear irreconcilability of this policy position with proposals to strengthen the role of magistrates. It is this substantive disjuncture between (promising) government pronouncements to 'strengthen' the role of magistrates, and the failure to acknowledge these fundamental tensions, which is of greatest concern. This situation has led some to question whether there is an overarching, tacit agenda aimed at gradually replacing the lay magistracy.¹⁶⁹ This is unlikely, and the more feasible explanation is that there has been a lack of comprehension about the collective impact of the situation as a whole, upon local, summary justice.

In order to safeguard the involvement of lay magistrates in summary justice, a recent report has called for the recruitment of 10,000 new magistrates.¹⁷⁰ At a time of economic austerity, the resourcing and financial implications of this are not practically viable and the better way forward is to reinforce the status of magistrates in summary justice, and to bolster and consolidate magistrates' functions by expanding their role into other contexts. Cost savings can be achieved without reducing the numbers of magistrates and local courts still further. This requires that greater attention be paid to the relative costs of DJs and lay magistrates, including DJs' increased use of

custody. Furthermore, magistrates can offer better 'value for money' through the expansion of their responsibilities into other domains, such as increased sentence supervision as well as their participation in IMBs, disciplinary tribunals and the CCRC. If magistrates' roles are not revised, they risk becoming displaced by DJs and the increasingly powerful Justices' Clerks. This was essentially the experience of lay justices in New Zealand, where the work of JPs is now largely confined to the witnessing of documents. Although there was no formal decision to downgrade their functions, the increasing professionalisation of summary justice as a result of the creation of community magistrates in New Zealand (whose work substantially mirrors that of English and Welsh DJs since they do not sit with legally-qualified clerks) simply displaced JPs as these other professionals became more numerous. 171 Securing the continued existence of the lay magistracy is important for the democratic legitimacy of the criminal justice system but also, through broadening the scope of magistrates' responsibilities, the administrative efficiency of justice will be enhanced. Yet when policy-makers fail to fully recognise the legacy of previous reforms to the function of the lay magistracy and where they do not acknowledge the wider context of constraints affecting magistrates' courts, particularly the enormous decline in magistrate numbers together with continuing courthouse closures, they risk creating policy in a vacuum. As one magistrate observed in his response to the government's consultation, policymakers are: 'Ignoring the elephant in the (court)room.' 172

ⁱ ENDNOTES

1 Although there are a small number of loosely comparable examples in other countries, for example volunteer lay judges in criminal cases are denominated in German Schoeffen. For further discussion, see C. Thomas, 'Judicial Appointments in Continental Europe' in K. Malleson and C. Thomas (eds), *Judicial Appointments Commissions: The European and North American Experience and the Possible Implications for the United Kingdom* (London: Lord Chancellor's Department, 1997); J. D. Jackson and N. P. Kovalev, 'Lay Adjudication and Human Rights in Europe' (2006) *Colum J Eur L* 83. In Scotland, the Criminal Proceedings, Etc. (Reform) (Scotland) Act 2007 continued the existence of lay courts by creating the new Justice of the Peace Courts, which replaced the former District Courts, see R. M. White, 'Lay Criminal Courts in Scotland: The Justification for, and Origins of, the New JP Court' (2012) *Ed L R* 358.

2 See for example, A. Sanders, *Community justice: modernising the magistracy in England and Wales* (London: IPPR, 2001); M. Cuneen and R. Bingham (eds), *Magistrates' Courts and Public Confidence: A Proposal for Fair and Effective Reform of the Magistracy* (London: Liberty, 2002); R. Morgan, 'Magistrates: The Future According to Auld' (2002) *29 Journal of Law and Society* 308; A. Crawford, 'Involving Lay People in Criminal Justice' (2004) *3 Criminology and Public Policy* 693; M. Davies, 'A new training initiative for the lay magistracy in England and Wales – a further step towards professionalisation?' (2005) *12 Int'l J Legal Prof* 93; J. Shapland (ed), *Justice, Community and Civil Society* (Devon: Willan Publishing, 2008); A. Ames, R. Szyndler, K. Burstn, R. Phillips, J. Keith, R. Gaunt, S. Davies and C. Mottman, *The Strengths and Skills of the Judiciary in the Magistrates' Courts* (London: Ipsos Mori, 2011); D. Faulkner (ed), *The Magistracy at the Crossroads* (Hampshire: Waterside Press, 2012); R. Morgan, 'The magistracy: secure epitome of the Big Society?' (2013) *91 Criminal Justice Matters* 8.

3 Ministry of Justice, *Press Release – Damian Green: Reforming the Role of Magistrates* (2013).

4 The terms 'justices' and 'magistrates' will be used interchangeably throughout this article.

5 Ministry of Justice, *Court Reform: Delivering Better Justice* (2010); Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* Cm 8388 (2012); Ministry of Justice, *Transforming the Criminal Justice System (CJS): A Strategy and Action Plan to Reform the Criminal Justice System* (2013).

6 Poor efficiency in the work of the lower criminal courts, and the implications for confidence in summary justice, has for example been an issue highlighted in Penny Derbyshire's comprehensive study of the courts in England and Wales, which has reported on the 'chaotic' management of cases in the lower courts as a result of understaffing and the failure to establish satisfactory IT systems. The study also found that the severely underfunded nature of the agencies serving the courts has resulted in poor or inadequate case preparation or presentation, delays, adjournments and a cumulative waste of resources. The length of time that cases take to complete, particularly the number of adjournments (coupled with different judges hearing the same case at subsequent hearings) impacts upon satisfaction and confidence in the courts and criminal justice system more broadly, with victims and witnesses withdrawing their commitment from prosecutions, including their willingness to act as witnesses: P. Darbyshire, *Sitting in Judgement: The Working Lives of Judges* (Oxford: Hart Publishing, 2011).

7 n 3 above.

8 P. Gibbs, *Why has the magistracy shrunk?* (London: Transform Justice, 2014).

9 The number of magistrates fell by 8,000 from 2010 and there was a further reduction of almost 2,000 magistrates in 2013.

10 Darbyshire, n 6 above.

11 The lay magistracy is intended to be representative and inclusive of all sections of society, therefore no formal qualifications are required to apply to join the bench. The only specified requirement is that applicants be of good character. Magistrates sit for an average of 35 and a minimum of 26 half days per year. The age of eligibility for appointment is between 18 and 65 years old.

12 Due to the part-time nature of magistrates' work, they are often unable to sit on lengthier cases which are generally heard by DJs, who sit full-time. The average annual salary of a DJ is £103,950.

13 n 3 above.

14 The primary responsibility of the Justices' Clerk is to be the sole provider of legal advice to lay magistrates but they also exercise judicial functions through a range of statutory powers, most of which are set out in the Justices' Clerks Rules 2005 (SI 2005/545 (L.10)).

15 Mark Davies notes that it is important to make clear this aspect of the work of magistrates because magistrates 'are often compared unfavourably with lay juries in the Crown Court. However, in reality,

magistrates are far more often called upon to do the equivalent work of the salaried judge in his or her sentencing role, rather than the work of the jury': Davies, n 2 above, 109.

16 I. F. Reichert, 'The Magistrates' Courts: Lay Cornerstone of English Justice' (1973) 57 *Judicature* 138.

17 Ames *et al*, n 2 above.

18 n 3 above.

19 N. Padfield, 'Wither the rehabilitation revolution?' (2011) 86 *Criminal Justice Matters* 17; S. Brodie, *The Cost to Justice: Government Policy and the Magistrates' Courts* (London: Politeia, 2011); Morgan, n 2 above.

20 T. Grove, 'A Light on the Lay Magistracy' (2002) 49 *Criminal Justice Matters* 24.

21 P. Seago, C. Walker and D. Wall, 'The development of the professional magistracy in England and Wales' (2000) Crim LR 631.

22 R. Morgan and N. Russell, *The Judiciary in the Magistrates' Courts* (London: Home Office, 2000) 117.

23 White, n 1 above. For example, John Bell, in his empirical study of European judiciaries, notes that lay magistrates have historically been viewed as essential for three reasons: to guarantee effectiveness by keeping judicial decisions in line with social values; to maintain the confidence of citizens in the effectiveness of courts; and to keep the interest of the public in the effectiveness of justice by the collaboration of lay people, J. Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge: CUP, 2006) 14.

24 T. Skyrme, *History of the Justices of the Peace* (Chichester: Barry Rose Publishers, 1994).

25 For example, in medicine and social work, see M. J. Polelle, 'Who's on First, and What's a Professional' (1998) 33 USF L Rev 205.

26 n 21 above; R. D. Rotunda, 'Legal Profession and the Public Image of Lawyers' (1999) 23 J Legal Prof 51.

27 n 21 above.

28 Speech by LCJ Bingham at Mansion House, London, July 1999.

29 Davies, n 2 above, 109.

30 A. T. Kronman, 'Living in the Law' in D. Luban (ed), *The Ethics of Lawyers* (Aldershot: Dartmouth Publishing, 1994); A. T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Oxford: Harvard University Press, 1993); E. Mertz, *The Language of Law School: Learning to 'Think Like a Lawyer'* (Oxford: OUP, 2007); S. Daicoff, 'Lawyer, know thyself: A review of empirical research on attorney attributes bearing on professionalism' (1996) 46 Am UL Rev 1337; see also H. J. Glasbeek and R. A. Hasson, 'Some Reflections on Canadian Legal Education' (1987) 50 MLR 777.

31 R. A. Posner, *Law, Pragmatism and Democracy* (Cambridge, MA: Harvard University Press, 2003) 128

32 A. Vermeule, 'Should We Have Lay Justices?' (2007) 59 Stan L Rev 1589. In the English context, Boon *et al* have observed an increasingly fractured and differentiated legal profession in which specialisation and globalisation have impacted upon legal education, and resulted in the entrenchment of privileged values. They suggest that this raises questions about 'the value of legal education, and the values it should represent', A. Boon, L. Duff and M. Shiner, 'Career Paths and Choices in a Highly Differentiated Profession: The Position of Newly Qualified Solicitors' (2001) 64 MLR 563.

33 R. S. T. Chorley, 'The Unpaid Magistrate and His Future' (1945) 8 MLR 1, 6.

34 T. Ingman, *The English Legal Process* (Oxford: OUP, 2011) 50, citing Report of the Royal Commission on Justices of the Peace, Cmd 7463 (1948) para 49.

35 Vermeule, n 32 above.

36 n 33 above, 5.

37 White, n 1 above; Vermeule, n 32 above.

38 n 20 above.

39 Vermeule, n 32 above.

40 J. Jackson and S. Doran, *Judge Without Jury: Diplock Trials in the Adversary System* (Oxford: OUP, 1995); see also Sanders, n 2 above; R. Morgan, 'The Process is the Rule and the Punishment is the Process' (1996) 59 MLR 306.

41 *ibid*.

42 n 20 above.

43 Davies, n 2 above, 113.

44 The seven Bench regions are: London, Midlands, North Eastern, Northern, South Eastern, Western and Wales.

45 P. Carlen, *Magistrates' Justice* (Martin Robertson, London: 1976) 75.

46 (1989) 90 Cr App R 73.

47 [1998] EWHC Admin 138.

48 See also *Waite v Taylor* (1985) 149 JP 551.

49 (2000) 164 JP 273.

50 B. Yngvesson, 'Inventing Law in Local Settings: Rethinking Popular Legal Culture' (1989) 98 *Yale Law Journal* 1689; J. Pitts and T. Hope, 'The Local Politics of Inclusion: The State and Community Safety' (1997) 31 *Social Policy and Administration* 37.

51 Morgan and Russell, n 22 above; I. Crow and F. Simon, *Unemployment and Magistrates' Courts* (London: NACRO, 1987); S. Brown, *Magistrates at Work: Sentencing and Social Structure* (Buckinghamshire: Open University Press, 1991).

52 B. Williams, *Victims of crime and community justice* (London: Jessica Kingsley Publishers, 2005).

53 eg, R. Hood, K. W. Elliott and E. Shirley, *Sentencing the Motoring Offender: A study of magistrates' views and practices* (London: Heinemann Educational, 1972); H. Parker, M. Sumner and G. Jarvis, *Unmasking the magistrates: The 'custody or not' decision in sentencing young offenders* (Buckinghamshire: Open University Press, 1989); M. Wasik and A. von Hirsch, 'Statutory sentencing principles: the 1990 white paper' (1990) 53 *MLR* 508; A. Hucklesby, 'Court culture: An explanation of variations in the use of bail by Magistrates' Courts' (1997) 36 *The Howard Journal of Criminal Justice* 129; A. Ashworth, 'Criminal Justice Reform: Principles, Human Rights and Public Protection' (2004) *Crim LR* 516; A. Herbert, 'Mode of trial and the influence of local justice' (2004) 43 *The Howard Journal of Criminal Justice* 65; J. V. Roberts, 'Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application' (2008) *Crim LR* 264.

54 Before sitting in a court, magistrates receive induction and core training lasting the equivalent of 3 days, which is delivered by the Justices' Clerk at the local magistrates' court. Over the first year, magistrates undertake further training, including for example, visits to prisons or young offender institutions, and each new magistrate is assigned to a mentor who oversees their personal development and guides their progress in the first few months following their appointment. Although this formal training is provided to new magistrates, magistrates will build their competence further 'on the job' as they begin to hear more cases, for different offences. Further consolidation training takes place after a year which is normally the equivalent of an additional 2 days formal training and an appraisal is also undertaken where the magistrate will be observed to determine whether he/she is demonstrating competence in the role. Following successful completion of the appraisal, the magistrate is deemed fully competent. Further on-going training takes place throughout the magisterial career, including update training on new law and procedures.

55 R. Huxley-Binns and J. Martin, *Unlocking the English Legal System* (Oxford: Routledge, 2013).

56 The court system is organised around LJAs which are used to determine which magistrates' courts may hear a particular case.

57 Davies, n 2 above, 93.

58 A. Sanders, 'Core Values, the Magistracy, and the Auld Report' (2002) 29 *Journal of Law and Society* 324, 326–327.

59 C. Thomas, *Are Juries Fair?* (London: Ministry of Justice, 2010).

60 Jackson and Kovalev, n 1 above, 121.

61 *ibid.*

62 *National Strategy for the Recruitment of Lay Magistrates* (London: Department for Constitutional Affairs, 2003).

63 Between April 2004 and February 2005 the number of magistrates had increased by 527 (from 28,029 to 28,566), and showed a higher percentage of JPs from ethnic backgrounds and a small increase in the number of magistrates under 40 years of age.

64 Employment Rights Act 1996, s 50(1).

65 Employment Rights Act 1996, s 50(4).

66 Gibbs, n 8 above.

67 Ministry of Justice, *Public Confidence in the Criminal Justice System: Findings from the British Crime Survey 2002–03 to 2007–08* (London: Ministry of Justice, 2010).

68 *ibid.*, 17.

69 Further attempts are currently underway to increase awareness of the magistracy among underrepresented (younger) age groups as well as proposals for the Ministry of Justice to consider bringing into force unimplemented provisions of the Equality Act 2010, so that positive action can be used in the selection of JPs to further diversify the laity.

70 L. Zedner, *Criminal Justice* (Oxford: Clarendon, 2004) 17.

71 White, n 1 above.

72 n 22 above, 7.

73 H. P. Glenn, 'Doin' the Transsystemic: Legal Systems and Legal Tradition' (2005) 50 *McGill LJ* 864.

74 A. S. Morris, 'Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation' (1979–1980) 128 *U Pa L Rev* 829.

75 n 22 above.

76 Ames *et al*, n 2 above.

77 A. Ames, R. Szyndler, K. Burston, R. Phillips, J. Keith, R. Gaunt, S. Davies and C. Mottman, *The Strengths and Skills of the Judiciary in the Magistrates' Courts* (London: Ipsos Mori, 2013).

78 *ibid*, 56.

79 *ibid*.

80 n 8 above.

81 Lord Chancellor's Department, *A New Framework for Local Justice* (London: TSO, 1992).

82 For example, a parliamentary motion opposing the proposals was signed by 81 Labour MPs, who were concerned that the reforms would erode local justice, and which called for the Lord Chancellor's Department 'to bring forward new proposals to increase the efficiency of the magistrates' courts service and restore its morale by giving due consideration to the local ties of the magistracy and the importance of its adequate resourcing and independence of operation in the furtherance of the proper administration of justice': Early Day Motions (EDM number 2325), *A New Framework for Local Justice* at <http://www.edms.org.uk/199293/2325.htm> (last accessed 19 January 2014).

83 P. Darbyshire, 'A comment on the powers of magistrates' clerks' (1999) Crim LR 377.

84 I. Brownlee, 'New Labour – New Penology? Punitive Rhetoric and the Limits of Managerialism in Criminal Justice Policy' (1998) 25 *Journal of Law and Society* 313; A. Edwards, 'Crime and Disorder Act 1998: improving criminal procedure?' (1999) Crim LR 29.

85 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (London: HMSO, 2001).

86 *ibid*, 84–85.

87 Now renamed Her Majesty's Courts and Tribunal Service (HMCTS).

88 A. Gillespie, *The English Legal System* (Oxford: OUP, 2013) 410.

89 House of Commons Standing Committee D (Part 7), Clause 6: Abolition of magistrates' committees, 26 June 2003 at <http://www.publications.parliament.uk/pa/cm200203/cmstand/d/st030626/pm/30626s07.htm> (last accessed 19 January 2014).

90 Efforts to improve sentencing consistency continue to be paid significant attention. Under the Criminal Justice Act 2003, s 172(1), the statutory compliance requirement in England and Wales directed courts that they 'must have regard to any guidelines which are relevant to the offender's case'. The Coroners and Justice Act 2009 introduced important changes under s 125(1) which states that every court 'must, (a) in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function, unless the court is satisfied that it would be contrary to the interests of justice to do so.' This is important because previously, a court simply had to consider ('have regard to') the Council's guidelines and give reasons in the event that a different sentence was imposed. For further discussion see J. V. Roberts, 'Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales' (2011) 51 B J Crim 997.

91 For example, in December 2010, as part of its *Court Reform: Delivering Better Justice* initiative, the Ministry of Justice announced the closure of 93 magistrates' courts and 49 county courts in England and Wales. The Ministry of Justice initially claimed that the closure of one third of magistrates' courts would result in £41.5m of savings for the taxpayer across this spending period, although this figure equates to only 1 per cent of the total annual costs of civil service management of the English legal system. In addition, the Ministry of Justice suggested that there would be a possible £38.5 million to be realised from the sale of assets such as court houses. Arguably, the closure of so many courts is more likely to diminish access to justice rather than improve it, with only minimal associated financial advantage. Previously, the annual cost to the criminal justice system of the Magistrates' Courts Committees was £330 million. It has been suggested that the new national, regional and area bureaucracies created as a result of court centralisation required up to 9,000 additional civil servants to staff the bureaucratic structure created, adding an extra annual cost to the taxpayer estimated to be as much as £1.5 billion: S. Brodie, *The Cost to Justice: Government Policy and the Magistrates' Courts* (London: Politeia, 2011).

92 Ministry of Justice, *Swift and Sure Justice*, n 5 above at [119].

93 n 3 above.

94 *Streamlining high-volume, low-level 'regulatory cases' in magistrates' courts: Impact Assessment* (London: Ministry of Justice, 2014). A Net Present Value (NPV) of the quantified economic costs and benefits is estimated using market prices, excluding Value Added Tax (VAT), but taking account of non-wage labour costs where relevant. The total annual volume of magistrates' completed proceedings is assumed to be static over

the next ten years and the case mix in 2012/2013 is assumed to remain unchanged over the time horizon. The extent to which the NPV can be realised is dependent on HMCTS and prosecutors undertaking a substantial change programme. This is currently being developed at the same time as the legislation, and is subject to appropriate governance arrangements in HMCTS.

95 *ibid*, 3.

96 So that, for example, one bench may cover the whole of Birmingham or Lincolnshire.

97 The conditional caution, introduced by the Criminal Justice Act 2003 (subsequently amended by the Police and Justice Act 2006) became available in December 2007 and operates as an 'enhanced' caution, whereby offenders must comply with certain requirements in order for the caution to be completed. Conditions should fall into one or both of two categories: rehabilitation and reparation. Conditions may include, for example, attendance at 'self-help groups', or on a drug awareness and education programme; or repairing damage caused to property, restoring stolen goods, or an apology to the victim(s): Crown Prosecution Service, *Conditional Cautioning Code of Practice and associated annexes* (London: CPS, 2013).

98 If a caution is administered for a recordable offence it is retained on police systems until the offender is 100 years old. Cautions for notifiable offences are recorded on the police Niche Intelligence System (NIS) and are retained for a minimum period of 10 years.

99 Ministry of Justice, *Criminal Statistics, England and Wales 2008* (London: National Statistics, 2010).

100 K. Sosa, *Proceed with Caution: Use of Out-of-Court Disposals in England and Wales* (London: Policy Exchange, 2012).

101 n 99 above, 27.

102 n 100 above. There is also evidence to suggest that some relatively minor offences, most often shoplifting, are increasingly only being tried in court when the defendant requires an interpreter. This is because it is clearly not possible for a police officer to deal with a matter 'on the spot', when a suspect does not speak English. Magistrates have expressed concern that this may indicate that police cautions are in these cases only being made available to those who speak English. If so, they suggest that this would potentially raise issues of discriminatory practices.

103 Lord Chief Justice, Lord Judge, *John Harris Memorial Lecture: Summary Justice In and Out of Court* London, Drapers Hall, 7 July 2011.

104 *ibid*.

105 A. Ashworth, 'Penalty notices for disorder and summary justice' (2013) Crim LR 869.

106 A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: OUP, 2010).

107 n 105 above, 872.

108 See for example, Sir Cyril Philips, *Royal Commission on Criminal Procedure* (London: HMSO, 1981).

109 College of Policing, *Review of Simple Cautions* (London: HM Government, 2013).

110 Ministry of Justice, *Breaking the Cycle: Government Response* (London: TSO, 2011).

111 Ministry of Justice, *Out of Court Disposals: National Framework* (London: Ministry of Justice, 2013).

112 Padfield, n 19 above.

113 *Blackburn v Commissioner of the Police for the Metropolis* [1968] 2 QB 118; see also *R (Guest) v DPP* [2009] EWHC 594 (Admin); *T v Chief Constable of Greater Manchester Police* [2013] EWCA Civ 25; *Caetano v Commissioner of Police of the Metropolis* [2013] EWHC 375 (Admin).

114 N. Padfield, R. Morgan and M. Maguire, 'Out of Court, Out of Sight? Criminal Sanctions and non-judicial decision-making' in M. Maguire, R. Morgan and R. Reiner (eds), *The Oxford Handbook of Criminology* (Oxford: OUP, 2012) 955.

115 R. Patrick, 'Reading Tea Leaves: An Assessment of the Reliability of Police Recorded Crime Statistics' (2011) 84 *The Police Journal* 47.

116 [2013] EWHC 1561 (Admin); (2013) PLLR 091.

117 *ibid* at [53]–[64].

118 *ibid* at [56].

119 *ibid* at [58].

120 P. Hynes and M. Elkins, 'Suggestions for reform to the police cautioning procedure' (2013) Crim LR 966.

121 R. Morgan, 'Austerity, subsidiarity and parsimony: offending behaviour and criminalisation' in A. Silvestri (ed), *Lessons for the Coalition: an end of term report on New Labour and criminal justice* (London: Centre for Crime and Justice Studies, 2011).

122 A. Ashworth, 'Avoiding criminal justice: diversion and sentencing' in Silvestri, *ibid*.

123 R. Young, 'Street Policing after PACE: the Drift to Summary Justice' in E. Cape, and R. Young (eds), *Regulating Policing: the Police and Criminal Evidence Act 1984, Past, Present and Future* (Oxford: Hart Publishing, 2008).

124 n 19 above; see also N. Padfield, 'Out of Court (Out of Sight) Disposals' (2011) 69 CLJ 6.

125 Ministry of Justice, *Restorative Justice Action Plan for the Criminal Justice System* (London: Home Office, 2012) 2.

126 K. Clamp and C. Paterson, 'Rebalancing Criminal Justice: Potentials and Pitfalls for Neighbourhood Justice Panels' (2011) 9 *British Journal of Community Justice* 21.

127 L. Meadows, K. Clamp, A. Culshaw, N. Cadet, K. Wilkinson and J. Davidson, *Evaluation of Sheffield City Council's Community Justice Panels Project: Project Report* (Sheffield: Sheffield Hallam University, 2010).

128 n 126 above.

129 *Punishment and Reform: Effective Community Sentences* Cm 8334 (London: Ministry of Justice, 2012).

130 n 127 above.

131 The fifteen areas in which NJPs are currently being trialled are Barnsley (South Yorkshire), Broadland (Norfolk), Halton (Cheshire), Islington (London), Kirklees (West Yorkshire), Lambeth (London), Manchester, North Wales, Salford (Greater Manchester), Staffordshire, Stockport (Greater Manchester), Swindon (Wiltshire), Trafford (Greater Manchester), Wakefield (West Yorkshire) and Wigan (Greater Manchester).

132 n 126 above.

133 Local Government Association, *Localism – community budgets* (London: LGA, 2013).

134 Ministry of Justice, *Swift and Sure* n 5 above, 68. It is worth observing, for example, that empirical work on the operation of magistrates' courts during the English riots in 2011 suggests that in some instances they appeared to be delivering a form of 'conveyor belt' justice whereby the norms of sentencing were ignored and custody rates increased significantly, see T. Newburn, 'Disaster averted but questions remain over courts' response to riots' *The Guardian* 3 July 2012 at <http://www.theguardian.com/uk/2012/jul/03/questions-remain-court-response-riots> (last accessed 19 January 2014).

135 In England and Wales, rates of re-offending are high with around half of all crime being committed by repeat offenders. The latest government statistics show a one-year proven re-offending rate of 26.9 per cent which is a rise of 0.4 per cent compared to the previous year and only a 1 per cent fall since 2000: *Proven Re-offending Statistics Quarterly Bulletin, October 2010 to September 2011, England and Wales* (London: Ministry of Justice, 2013). In the year to 2011, more than 400,000 crimes were committed by those who had previously broken the law. For those sentenced to less than 12 months imprisonment, 58.5 per cent had re-offended within 12 months of their release up to September 2011, which is a 1.2 percentage increase on the previous year. High recidivism levels are problematic for politicians; not only because they suggest that the criminal justice system is failing to deter criminals and reduce victimisation but also because of the very significant cost associated with repeat offending. In England and Wales, the most recent official estimates suggest that re-offending costs the government between £9.5 and £13 billion annually.

136 Auld, n 85 above, 101.

137 Criminal Justice Act 2003, s 154.

138 Legal Aid, Sentencing and Punishment of Offenders Bill 2011, cl 71.

139 The previous Attorney General, Dominic Grieve, suggested that increasing the sentencing powers of magistrates would make the court system more efficient as early guilty pleas in magistrates' courts cost the justice system on average £90 a case compared with £750 when similar hearings are referred to the Crown Court. The Magistrates' Association have also stated that on average each case in a magistrates' court costs £900 compared to £3,500 in a Crown Court. 140 On average, £1,400 per day in the magistrates' court compared to £2,150 per day in the Crown Court: Ministry of Justice, *Reforming the Role of Magistrates*, n 3 above.

141 Ministry of Justice electronic resource, *What can magistrates do, outside of courtrooms, to help reduce crime and reoffending, and make communities safer?* at <http://775.dialogue-app.com/xkvzd0v27c> (last accessed 19 January 2014).

142 *ibid.*

143 *ibid.*

144 Ministry of Justice, *Part V: Further Practice Directions Applying in The Magistrates' Courts – Criminal Procedure Rules* (V.51.3 (b)).

145 Sentencing Council, *Guidelines on allocation, offences taken into consideration (TICs) and totality* (London: Sentencing Council, 2012).

146 S. Moffatt, 'Reforming Magistrates' (2012) *The Barrister* at: <http://www.barristermagazine.com/archive-articles/issue-51/reforming-magistrates.html#!> (last accessed 12 February 2014)

147 n 141 above. In those circumstances where the maximum sentence is passed however, and where a discount of a third is applied for a timely guilty plea, the sentence is reduced to 18 weeks, which may in some cases then be reduced further resulting in an offender being released on a Home Detention Curfew (HDC) after a total of 6 weeks custody. In fact it is not unusual in these cases for offenders to be released on home detention ('tagging') within hours of arriving at prison. There is some evidence to suggest that in view of the significant discounts that can be applied to maximum custodial sentences, magistrates may take the view that they prefer to send intermediate either-way defendants to Crown Court for trial or sentencing.

148 eg, C. Hedderman, 'Government policy on women offenders: Labour's legacy and the Coalition's challenge' (2010) 12 *Punishment and Society* 485; M. Tonry, 'Less imprisonment is no doubt a good thing' (2011) 10 *Criminology and Public Policy* 137.

149 A useful opportunity to ameliorate magistrates' courts functions in the delivery of youth justice arose in the late 1990s, with the government's wholesale reforms of the juvenile justice system under the Crime and Disorder Act 1998. However, rather than enacting substantive changes to magistrates' court practice to provide magistrates with responsibility for oversight of the whole process of sentencing youth offending, the government chose instead to create a new layer of bureaucracy by introducing referral orders to Youth Offending Teams (YOTs). This was a missed opportunity to fortify magistrates' sentencing remit in an appropriate and exigent aspect of their work. Magistrates were well-placed to fulfil the functions of YOTs in assessing offenders, monitoring compliance and engaging victims. However, government displayed a reluctance to divest these powers in magistrates' courts, choosing instead to create additional bureaucratic mechanisms to fulfil these functions.

150 S. Maruna and T. P. LeBel, 'Welcome Home? Examining the Re-entry Court Concept from a Strengths-based Perspective' (2002) 4 *Western Criminology Review*, 91; G. Mclvor, *Reconviction Among Drug Court Participants: Review of the Glasgow and Fife Drug Courts – Report* (Edinburgh: Scottish Government Community Justice Services, 2010); G. Berman and A. Fox, 'The Future of Problem-Solving Justice: An International Perspective' (2010) 10 *University of Maryland Law Journal* 1; G. Berman, 'Redefining Criminal Courts: Problem-Solving and the Meaning of Justice' (2004) 41 *American Criminal Law Review* 1319.

151 S. Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* (Washington, DC: American Psychological Association Books, 2001); S. Maruna, 'Judicial Rehabilitation and the "Clean Bill of Health" in Criminal Justice' (2011) 3 *European Journal of Probation*, 97. 152 T. R. Tyler, *Why people obey the law* (Princeton: Princeton University Press, 2006); G. Mclvor, 'Therapeutic jurisprudence and procedural justice in Scottish Drug Courts' (2009) 9 *Criminology and Criminal Justice* 21; T. McSweeney, A. Stevens, N. Hunt and P. J. Turnbull, 'Drug testing and court review hearings: Uses and limitations' (2008) 55 *Probation Journal* 39.

153 Mclvor, n 150 above.

154 G. Mclvor, L. Barnsdale, S. Eley, M. Malloch, R. Yates and A. Brown, *The Operation and Effectiveness of the Scottish Drug Court Pilots, Crime and Criminal Justice Research Findings 81* (Edinburgh: Scottish Executive, 2006).

155 Many magistrates are not familiar with the existence of s 178 powers, and there has also been little effort or commitment from HMCTS to see the powers more widely used in magistrates' courts.

156 P. Bowen and S. Whitehead, *Better courts: Cutting crime through court innovation* (London: New Economics Foundation, 2013).

157 IMBs derive their responsibilities from the Prison Act 1952, s 6. IMBs were known as 'Boards of Visitors' and are still referred to in the legislation under their old titles, although this is likely to change in the near future. The IMB for each establishment is made up of unpaid volunteers from the local area who monitor day-to-day life in the prison and ensure that proper standards of care and decency are maintained.

158 N. Padfield, 'Alternative Futures for the Magistracy?' in D. Faulkner (ed), *The Magistracy at the Crossroads* (Hampshire: Waterside Press, 2012).

159 Ministry of Justice, *Swift and Sure Justice*, n 5 above.

160 It would also be useful for IMBs to have more powers conferred upon them, to enable them to more closely scrutinise the new PBR arrangements.

161 P. J. Tomczak, 'The penal voluntary sector in England and Wales: Beyond neoliberalism?' (2014) 14 *Criminology and Criminal Justice* 470; C. Stacey, 'The marketization of the criminal justice system: who is the customer?' (2012) 59 *Probation Journal* 406.

162 The work of DJs is likely to increase further as trial by jury is effectively restricted to the most serious cases.

163 P. Darbyshire, 'An essay on the importance and neglect of the magistracy' (1997) *Crim LR* 627.

164 Letter to Coalition MPs on the Role of Magistrates, on behalf of Jonathan Djanogly MP,

Parliamentary Under-Secretary of State for Justice 16 April 2012 at http://data7.blog.de/media/053/6315053_70ed58b905_d.pdf (last accessed 19 January 2014).

165 *ibid.*

166 D. J. McBarnet, *Conviction: Law, the State and the Construction of Justice* (London: Macmillan, 1981) 122.

167 Comments made by Richard Monkhouse at Transform Justice's launch of *Magistrates: Representatives of the people?* London 28 February 2014.

168 Courts identified for closure in the government's initial schedule are continuing to be shut through to September 2014: Ministry of Justice, *Court Reform: Delivering Better Justice*, n 5 above. In addition, other courts not identified in this schedule are also being closed, see for example, Neath magistrates' court: <http://www.bbc.co.uk/news/uk-wales-south-west-wales-26084045> (last accessed 24 January 2014).

169 n 8 above.

170 *Future Courts: A new vision for summary justice* (London: Policy Exchange, 2014).

171 N. Cox, 'The Future of the Magistracy' (2010) *Criminal Law and Justice Weekly* at <http://www.criminallawandjustice.co.uk/features/Future-Magistracy> (last accessed 21 February 2014).

172 n 141 above.