Legal Studies (2020), **40**, 113–130
doi:10.1017/lst.2019.20

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The Society of Legal Scholars

RESEARCH ARTICLE

The mutable defendant: from penitent to rights-bearing and beyond

Rachel Gimson*†

University of Exeter, Exeter, UK
*Author email: R.M.Gimson@exeter.ac.uk

(Accepted 27 June 2019)

Abstract
Contemporary criminal justice is premised on a rights-bearing defendant safe-guarded by due process from arbitrary state punishment. The paucity of academic commentary on the role of the criminal defendant suggests that there is a common assumption that the role is static. However, the rights-bearing defendant is a relatively new concept. Through a legal history analysis, this paper demonstrates that the defendant's role can mutate in response to pressures placed on the criminal trial. Broadly, there have been three conceptualisations of the defendant: the penitent Anglo-Norman defendant; the advocate defendant of the jury trial; and the rights-bearing adversarial defendant. Importantly, the shift from one conceptualisation to another has occurred gradually, often without commentary or conscious effort to instigate change. There are many contemporary pressures that could be impacting on the rights-bearing defendant. The concept of a mutable defendant provides a new theory through which to analyse these pressures. This paper considers the introduction of adverse inferences regarding the right to silence and disclosure, and the rise of 'digilantism'. These new pressures, it is suggested, help to facilitate a rhetoric of deservingness that goes against the rights-bearing defendant and raises the risk its role could once again be mutating.

Keywords: criminal justice; modern threats; legal history; defendant

1. 'Didn't get a trial and didn't deserve one'

In the early hours of 2 May 2011, US Navy SEALs stormed a Pakistani compound in Abbottabad, near the nation's elite military training base. Five residents of the compound, four men and one woman, were fatally shot after a brief gun battle against the American troops. There were no SEAL casualties. The then US President, Barack Obama, announced the outcome of the mission during a televised conference, stating that 'justice had been done' to the leader of an organisation 'committed to killing innocents in our country and across the globe'.[1] This news resulted in jubilant Americans celebrating in the streets. The SEALs had targeted the man widely considered to have masterminded a series of terrorist attacks, the most notable of which was the coordinated plane hijackings on 11 September 2001. Osama bin Laden was dead.

Operation Neptune Spear was highly controversial and its legality has since been questioned.[2] Nevertheless, it was supported by the majority of Americans.[3] Praise for the mission came from

†The author would like to thank Rebecca Probert, Richard Volger and John Child for their contributions and comments to earlier drafts. She would also like to thank the anonymous reviewers for reading the paper and for their very helpful comments.

[1]B Obama 'Osama bin Laden dead' (The White House, 2 May 2011), available at https://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead (last accessed 29 August 2019).

[2]See for example K Ambos and J Alkatout 'Has "justice been done?" The legality of Bin Laden's killing under international law' (2012) 45 Israel Law Review 341; and the reply from D Wallace 'Operation neptune's spear: the lawful killing of Osama bin Laden' (2012) 45 Israel Law Review 367.

[3]86 per cent approved of the mission, with 87 per cent believing that it was justified: Associated Press-GfK Roper Public Affairs Poll (5-9/5/11), available at http://www.pollingreport.com/terror2.htm (last accessed 29 August 2019).

Republicans as well as Democrats,[4] and the global political rhetoric appeared to be one of approval that justice had been served. For example, then Prime Minister David Cameron described the operation as a 'great achievement for America, … [in killing] a mass murderer'.[5] Similarly, the then United Nations Secretary-General, Ban Ki-moon, stated 'that justice ha[d] been done to such a mastermind of international terrorism'.[6] The public reaction at the news, and the political approval of the mission, suggests that a criminal verdict was not needed for justice to be seen to be done. These sentiments were reflected by legal journalist Jeffrey Toobin, who commented in the New Yorker that 'bin Laden didn't get a trial and didn't deserve one'.[7] Bin Laden was not only denied due process of law but was also deemed undeserving of it.

Bin Laden is an exceptional example and this rhetoric was not universal. Nonetheless, the public reaction raises questions about the purpose of the criminal trial. The suggestion that an individual may or may not deserve due process or, indeed, a trial at all, challenges the ethos of the criminal trial. Yet it needs to be recognised that this type of trial, with the rights-bearing defendant at its centre, is relatively modern. A historical perspective shows us that the role of the defendant has mutated in response to pressures placed on criminal justice, with such adaptations going relatively unnoticed by contemporary commentators until irreconcilably changed. Moreover, these mutations have often occurred haphazardly and indirectly, and it would be naïve to assume that such developments could not be reversed. If the role of the defendant can mutate, it is possible that the influence of new pressures could serve to once again alter the criminal trial. Viewed in this context, the rhetoric that bin Laden did not deserve a trial, from commentators with knowledge of the law and due process, becomes more problematic. The public celebration of the death, and the popular discourse of justice served, suggests that we might be at the beginning of a new reconceptualisation of the defendant.

The focus here will be on the criminal procedure of England and Wales, as this is the origin of the common law system and thus can provide valuable insight into the mutable defendant in a range of jurisdictions. Although legal historians have devoted considerable attention to the development of the criminal process, the role of the defendant has largely been seen as a side issue. The contrast between the extensive academic commentary on the English jury trial, for example, and the paucity of commentary on the defendant suggests a general belief that the defendant is a passive receiver of criminal justice. Nevertheless, the literature on the historical development of criminal procedure provides a valuable insight into the development of the role of the defendant. Reading between the lines, it is possible to identify how the concept of the defendant has mutated over time. This paper accordingly aims to develop a clearer theoretical understanding of the changeable concept of the defendant.

Focusing on the role of the defendant provides a novel way through which to assess the long-term impact that pressures and procedural changes can have on the criminal trial. Whilst any amendment to the criminal justice process is usually scrutinised by academics, it is often limited to an analysis of the impact of such change on due process. Whilst this is valuable, it does not explain the long-term impact. Acknowledging the defendant as a mutable concept allows us to project into the future and assess how even small alterations may have enormous consequences on criminal procedure and the philosophy that underpins it.

To fully appreciate how the defendant mutates, it is necessary to have a long view of history. Changes to the role of the accused occurred gradually and often unnoticed by contemporary commentators. Because of this it is impossible to pinpoint exact dates of change for the defendant. As such, this paper will be divided into three conceptualisations of the accused, which follow broad timeframes but

[4]J Dao and D Sussman 'For Obama, big rise in poll numbers after Bin Laden raid' (New York: *New York Times*, 4 May 2011).

[5]D Cameron 'Bin Laden's death "justice"' (BBC, 3 May 2011), available at http://www.bbc.co.uk/news/uk-politics-13273051 (last accessed 29 August 2019).

[6]UN Secretary-General 'Calling Osama bin Laden's death "watershed moment", pledges continuing United Nations leadership in global anti-terrorism campaign' (United Nations, 2 May 2011), available at http://www.un.org/press/en/2011/sgsm13535.doc.htm (last accessed 29 August 2019).

[7]J Toobin 'Killing Osama: was it legal?' (New York: *New Yorker*, 2 May 2011).

https://doi.org/10.1017/lst.2019.20 Published online by Cambridge University Press

are not specific to one particular era. Part 2 will consider the penitent defendant as part of the communal justice mechanisms of Anglo-Norman society, designed to deter the damaging tradition of the blood feud. Part 3 will examine the advocate defendant in a jury system that focused on deservingness. Part 4 will consider the development of the rights-bearing defendant, an inadvertent consequence of the introduction of defence counsel into the felony trial, who facilitated an adversarial revolution in the eighteenth century. The final part of this paper will analyse the potential impact of new pressures on the defendant. Here, it is suggested that a performative defendant is emerging, which may be at odds with the rights-bearing defendant. The introduction of adverse inferences through the curtailment of the right to silence and the development of the duty to disclose will be considered. A discussion of the impact of the new phenomenon of 'digilantism' will follow, which will analyse the potential impact of online vigilantism on the rights-bearing defendant. It must be emphasised that this paper does not aim to provide a general history of the development of English criminal process. Rather, it seeks to provide an overview of the procedural changes throughout a substantial period in English history. By so doing it aims to establish the influences that transform the concept of the defendant.

2. The penitent defendant

Notions of guilt and innocence in Anglo-Norman society bear no resemblance to modern standards. In the small, rural communities of the time, factual guilt was normally known.[8] Indeed, the responsibility for detecting crime in Anglo-Norman society rested with the affronted community, expected to raise a hue and cry and thereby creating awareness of the act by making noise.[9] Thus, the justice system did not ascertain factual guilt,[10] and intent was not taken into account.[11] Instead, the trial was designed to restore harmony and prevent a damaging blood feud, by ensuring that the community featured heavily in the justice process.[12]

The Anglo-Norman trial is described as a process based on proofs and ordeals. The most common type of ordeal was that of compurgation, only available to defendants of good character.[13] Twelve men of good repute[14] attested under oath to the defendant's trustworthiness.[15] Another ordeal, favoured by the Normans, was the trial by battle, which pitted the accused and accuser, or their representatives, against one another in combat.[16] Perhaps the most well-known was the unilateral ordeal. Reserved for those defendants with the worst reputations (or those of lower status),[17] the unilateral ordeal involved a highly orchestrated and religious ceremony, where the supervising priest invited God to pass judgement. The rituals were widespread, varied and involved a physical and seemingly painful test, with the most common being hot or cold trials.[18]

The system of ordeals provided an indisputable verdict. The 12 individuals required for the ordeal of compurgation would have been a significant proportion of the small communities of this period

[8]J Whitman *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (London: Yale University Press, 2008) p 61.

[9]J Greenberg 'The victim in historical perspective: some aspects of the English experience' (1984) 40(1) Journal of Social Issues 77 at 85–86; J Baker *An Introduction to English Legal History* (London: Butterworths, 1990) p 574. Indeed, those who failed to raise a hue and cry risked prosecution themselves.

[10]Baker, ibid, p 85.

[11]J Hostettler *A History of Criminal Justice in England and Wales* (Hook: Waterside Press, 2009) p 15.

[12]D Stenton *English Justice Betweeen the Norman Conquest and the Great Charter 1066–1215* (London: George Allen and Unwin, 1965) pp 6–7.

[13]P Hyams 'Trial by ordeal: the key to proof in the early common law' in M Arnold et al (eds) *On the Laws and Customs of England* (Chapel Hill: University of North Carolina Press, 1981) p 93; T Green *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (London: University of Chicago Press, 1985) p 10.

[14]Known formally as *juratores* or oath-helpers.

[15]Baker, above n 10, p 87.

[16]For further detail, see Whitman, above n 8, pp 78–79; Hyams, above n 13, p 93.

[17]Hyams, above n 13, p 122; Whitman, above n 8, p 61.

[18]M Kerr et al 'Cold water and hot iron: trial by ordeal in England' (1992) 22 The Journal of Interdisciplinary History 573.

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and the process thus provided a high reconciliation threshold.[19] Those defendants that passed the compurgation did so because the community attested, in essence, to their good character. Similarly, the outcome of the trial by battle was an indisputable mechanism through which the parties could literally fight out their grievances. The unilateral physical ordeal was reserved for the most contentious of defendants, where communal reconciliation might prove difficult.[20] The fact that they were judged by the divine played into superstition and faith and provided an outcome that was difficult for the accuser to disagree with.[21] The ordeals were a process centred not around the suspect or the victim, but on the wrong caused and the disharmony that resulted as a consequence of the crime.[22] In the small rural communities of Anglo-Norman society, discord could be inherently destabilising. The ordeal provided a mechanism that reinforced the need for stability and cohesiveness by ensuring that justice remained communal.

There is convincing evidence to suggest that the ordeals were merciful, granting the accused an opportunity to atone for their sins.[23] For example, although cursory readings of trial by unilateral ordeal depict a brutal ceremony where the accused was twice damned,[24] it appears that it operated as a form of penance to allow those defendants of bad repute to rehabilitate back into the community.[25] Indeed, there appears to be consensus amongst academics that the ordeals had a high success rate,[26] something that was noted with frustration by some contemporary commentators.[27] It was not unusual in this society for religious penance to be physical and painful, something the unilateral ordeal appeared to emulate. This is not to suggest that justice in this time was fair, indeed a system that depended on the participation of the community were undoubtedly influenced by its prejudices. This could be problematic for unpopular individuals, vulnerable to false accusations.[28] It is possible that there were defendants who underwent the pains of the unilateral ordeal simply because they were disliked.

The trial by ordeal became an unsuitable mode of justice as English society developed and became less insular.[29] By the thirteenth century, society and the Catholic Church were moving away from the 'mystical expedients'[30] of the ordeal towards a philosophy based on rational proofs and natural phenomenon, rather than divine interference.[31] The ordeals were finally eliminated in 1215. For most of Europe the replacement was the forensic and systematic Roman-canon method, which gave rise to the inquisitorial methodology.[32] For English criminal justice, by contrast, the alternative was the already present jury trial.

[19]R Helmholz 'Crime, compurgation and the courts of the medieval church' (1983) 1 Law and History Review 1 at 13; Hyams, above n 13, p 93.

[20]P Brown 'Society and the supernatural: a medieval change' (1975) 104 Daedalus 133 at 138.

[21]C Radding 'Superstition to science: nature, fortune, and the passing of the medieval ordeal' (1979) 84 The American Historical Review 945 at 956.

[22]T Olson 'Of enchantment: the passing of the ordeals and the rise of the jury trial' (2000) 50 Syracuse Law Review 109.

[23]Ibid; see also Hyams, above n 13, pp 95, 98.

[24]For example, the ordeal of hot iron required the accused to hold a red-hot iron rod, blessed by the supervising priest, nine paces. The wound would then be bandaged and left for three days. If, after three days, the wound had festered, then the accused was deemed guilty by God. Either way, the accused had to suffer the pain of red-hot iron on skin. Similarly, in the most common ordeal of cold water, the accused's hands were bound behind their knees and they were then submerged in a twelve-foot-deep pool of water. If the accused floated, they were considered guilty, the holy water having expelled the individual, if the accused sank, risking drowning, they were deemed innocent: F Liebermann *Die Gesetze der Angelsachsen* (Halle (Saale): Niemeyer, 1903) p 530. Note: I am grateful to Dr Anne Wesemann for providing the translation for this text, the original of which is in German.

[25]Olson, above n 22, at 125–127, 149–152.

[26]Kerr et al, above n 18.

[27]See Whitman, above n 8, p 65.

[28]Ibid, quoting English theologian John of Wales, p 86; see also A Harding *The Law Courts of Medieval England* (London: George Allen & Unwin, 1973) p 26.

[29]Hyams, above n 13, p 100.

[30]M-D Chenu *Nature, Man, and Society in the Twelfth Century* (London: University of Chicago Press, 1968) p 5.

[31]Ibid, pp 4–18.

[32]It is beyond the scope of this paper to consider the development of the Roman-canon method. For further detail see R Vogler *A World View of Criminal Justice* (Aldershot: Ashgate, 2005); Whitman, above n 8, pp 92–124.

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3. The advocate defendant

The first juries in the twelfth and thirteenth centuries drew upon local knowledge of the crime and the defendant.[33] Thus, the jury came to the courtroom more to speak than to listen[34] and external witness testimony during the trial was rare.[35] Determining guilt for this 'self-informing jury',[36] therefore, was reminiscent of the ordeal, enabling reconciliation to remain a factor in adjudication.[37] The jury proved willing to deliver partial verdicts or acquit entirely defendants of good character, first offenders, or with dependants to support.[38] From the thirteenth and fourteenth centuries, juries were increasingly drawn from the county as a whole, rather than from the affected community.[39] Jury selection began to focus as much on the status of the juror as on his proximity to the crime.[40] The trial gradually shifted from reconciliation, to the regulation of immoral behaviour. For example, the jury frequently devalued stolen goods for deserving defendants so as to avoid an automatic capital sanction.[41] Therefore, a death sentence was reserved only for those defendants considered beyond hope of salvation, something that Parliament appeared to rely on when legislating crimes.[42] As a result, defendants accused of apparently wicked offences that were believed to instigate a slide into immorality – such as those involving alcohol, gambling or other 'corrosive temptations' – were less likely to be considered deserving of mitigation.[43] The need to assess a defendant's morality created an 'accused's speaks'[44] trial, vocally responding to the accusations made against them. In this way the defendant can be described as an advocate defendant, expected to convince the jury that they did not deserve a conviction or the maximum sentence.

The expectation that defendants would advocate their own defence was a considerable challenge in a criminal trial that was a bewildering process for most defendants 'who were for the most part dirty, underfed and surely often ill'.[45] Under such circumstances the defendant is not likely to provide a vigorous cross-examination of the evidence.[46] The pressure on the advocate defendant was further exacerbated by the supposition that they were the best person to know the facts of the crime, having been close enough to events to be accused.[47] In this way, there was a subtle but underlying presumption of guilt. Unlike defence witnesses, prosecution testimony was delivered under oath, lending considerable authority to the accusations.[48] Indeed, judges were known to instruct the jury not to put too much weight on the unsworn testimony of the accused.[49] This was exacerbated by the fact that a private prosecutor was considered to be a witness, and therefore impartial, whereas the defendant was

[33]Olson, above n 22, pp 181–183.

[34]J Langbein *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) p 64.

[35]D Klerman 'Was the jury ever self-informing?' (2003) 77 Southern California Law Review 123 at 138–143.

[36]Ibid.

[37]Olson, above n 22, at 177–181.

[38]B McLane 'Juror attitudes toward local disorder: the evidence of the 1328 Lincolnshire Trailbaston Proceedings' in J Cockburn and T Green (eds) *Twelve Good Men and True: The Criminal Trial Jury in England, 1200–1800* (Guildford: Princeton University Press, 1988) pp 47–53. See also M Macnair 'Vicinage and the antecedents of the jury' (1999) 17 Law and History Review 537 at 576–578.

[39]Langbein, above n 34, p 64; P Lawson 'Lawless juries? The composition and behaviour of Hertfordshire juries, 1573–1624' in Cockburn and Green, above n 38, p 123.

[40]For detail on the development of the jury system at this time see B Shapiro 'Religion and the law: evidence, proof and "matter of fact", 1660–1700' in N Landau (ed) *Law, Crime and English Society, 1660–1830* (Cambridge: Cambridge University Press, 2002); Lawson, above n 39, pp 123–124.

[41]Prescribed for theft of goods over 40 shillings: see J Beattie *Crime and the Courts in England, 1660–1800* (Oxford: Oxford University Press, 1986) pp 421–423.

[42]Ibid, p 421.

[43]Ibid, p 421.

[44]Langbein, above n 34, pp 48–61.

[45]Beattie, above n 41, pp 350–351.

[46]Ibid, pp 350–351.

[47]Ibid, p 241.

[48]G Fisher 'The jury's rise as lie detector' (1997) 107 Yale Law Journal 575 at 604–609.

[49]J Cockburn *A History of English Assizes 1558–1714* (London: Cambridge University Press, 1972) p 121.

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not.[50] Furthermore, unlike prosecution witnesses, defence witnesses could not be compelled to testify.[51] This was to avoid contradictory sworn testimony in the courtroom, which, it was believed, would have forced one party to perjure themselves and face eternal damnation.[52] The effect of this was to provide an inherent prosecutorial bias in courtroom proceedings.

The challenges facing the advocate defendant increased in the sixteenth century with this prosecutorial bias being statutorily entrenched by the Marian Statutes.[53] This legislation aimed to improve an investigatory deficit in English criminal law that was a consequence of the demise of the self-informing jury.[54] Acquittals due to a lack of evidence were common and sometimes there was no trial at all.[55] This created a perception that crimes were going unpunished due to a reluctance by the victim to instigate proceedings.[56] By extending the powers of the Justices of the Peace (JP)[57] to investigate crimes and compel prosecutions,[58] the statutes added an official element to the investigation of the crime and regulated the role of the private prosecutor.[59] The JPs were given no authority to investigate more widely, meaning that the increased powers were limited to prosecution evidence.[60]

There is evidence to suggest that this prosecutorial bias was unintentional.[61] It is clear from the preamble of the statute that the legislation did not aim to alter the procedure of the criminal trial.[62] Instead, the focus of the statute appeared to stem from a desire to make prosecution more effective and keep it local and cheap.[63] The fact that obviously guilty defendants were being tried at all was probably regarded as a substantial progression of defensive rights.[64] Thus, it is possible that the prosecutorial bias of the sixteenth century courtroom went unnoticed by state officials.[65]

This bias, however, made the defendant vulnerable to abuse of power, which was exploited during a period of royal authoritarianism in the seventeenth century. Judges and juries who issued verdicts that ran contrary to the will of the Crown could be investigated and punished.[66] The result was the near extinction of an independent judiciary in a criminal justice system that was influenced by state authoritarianism and an over-zealous criminal law.[67] Judges who did not wish to accept a jury verdict could question each juror individually as to the reason behind their decision.[68] During one notable trial of a group of Catholics, led by Richard White, the jury asked the judge 'whom they should acquit and

[50]Langbein, above n 34, p 38.

[51]Fisher, above n 48, at 604–609.

[52]Ibid, at 604–609.

[53]For further detail see J Langbein *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge: Harvard University Press, 1973).

[54]J Langbein 'The origins of public prosecution at common law' (1973) 17 American Journal of Legal History 313 at 317–324.

[55]Cockburn, above n 49, p 127.

[56]E Powell 'Jury trial at gaol delivery in the late Middle Ages: the Midland circuit, 1400–1429' in Cockburn and Green, above n 38, p 107.

[57]JPs had an administrative local role and were responsible for maintaining law and order in local communities. As a result of the Marian Statutes their criminal investigation became an official part of the trial. JPs could interview the accused and any witnesses. These interviews could now become part of the evidence at trial, which crucially did not have to be written down verbatim or even at the time of examination: Langbein, above n 53, p 24.

[58]Langbein, above n 53, pp 6–15.

[59]Ibid, pp 34–35.

[60]Langbein, above n 34, p 43.

[61]Langbein, above n 53, pp 11, 26, 38–39.

[62]Green, above n 13, p 110. Indeed, Langbein suggests that the drafter drew upon established practice, rather than looking to instigate a new process: Langbein, above n 53, p 65.

[63]Langbein, above n 54, at 335.

[64]Langbein, above n 34, p 65.

[65]Ibid, p 65.

[66]Green, above n 13, p 141.

[67]Langbein, above n 34, pp 80–81.

[68]Green, above n 13, p 140.

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whom they should find guilty'.[69] Juries who deliberated for an undue length of time could be denied food, drink, candles and fires until a verdict was reached.[70]

The power imbalance between the prosecutor and defendant was starkly illustrated in a series of treason trials in the late seventeenth century. The increasing use of constructive treason meant that the scope of the crime could be expanded to prosecute political defendants, rendering it very difficult for the accused to establish a defence.[71] As with felony trials, defendants were not able to see the indictment, nor were they able to compel witnesses to testify at trial.[72] The most prominent criticism of the treason trial was against the prohibition of defence counsel, which, it was argued, compounded the prosecutorial bias, particularly as the Crown invariably hired lawyers.[73]

Royal persecution of the Whigs led to repeated calls for reform of the treason trial. Abuse of royal power had ensured the conviction and execution of several defendants for treason, but who were probably innocent.[74] Eventually, the Treason Trials Act was passed in 1696, with the aim of redressing the procedural imbalance. The Act established that the underlying principle in treason trials should be equality of arms, rather than deference to the monarch. The defendant in these rare cases was now entitled to a number of pre-trial rights, such as being able to see the indictment, that embraced this new equality.

While the defensive protections of the Treason Trials Act were limited to the very rare crime of treason, it was the first example of a rights-bearing defendant. Moreover, it provides an example of a conscious effort to change the role of the accused in the criminal trial. It is important to note the limited scope of the 1696 Act; the defendant's role in felony trials remained unchanged.[75] The notion of a universal rights-bearing defendant developed over the course of the subsequent century as a result of the increasing presence of defence counsel. Despite being officially prohibited from the felony trial until 1836,[76] remarkably defence counsel facilitated the adversarial revolution that saw the advocate defendant transformed to one regarded as rights-bearing.

4. The rights-bearing defendant

The notion of a defendant deserving of rights developed over the course of the eighteenth century. Influenced by Enlightenment ideals, which championed individualism and the rationality of mankind, at the heart of the adversarial procedure was an acknowledgment of the power imbalance between the state and the defendant.[77] Thus, due process protections emerged during an adversarial revolution in the English courts,[78] as part of the recognition that the state had access to substantially greater resources.

Although scholars have traced due process-like phraseology such as 'innocent until proven guilty' as far back as thirteenth century inquisitorial jurists,[79] such terminology does not indicate defensive

[69]J Bellamy *The Tudor Law of Treason* (Abingdon: Routledge and Kegan Paul, 1979) p 169.

[70]Ibid, p 168; see also Green, above n 13, p 140.

[71]J Phifer 'Law, politics, and violence: the Treason Trials Act of 1696' (1980) 12 Albion: A Quarterly Journal Concerned with British Studies 235 at 237; A Shapiro 'Political theory and the growth of defensive safeguards in criminal procedure: the origins of the Treason Trials Act of 1696' (1993) 11 Law and History Review 215 at 221.

[72]Langbein, above n 34, pp 83–84.

[73]J Langbein 'The criminal trial before the lawyers' (1978) 45 The University of Chicago Law Review 263 at 307.

[74]Langbein, above n 34, pp 68–78.

[75]B Smith 'The presumption of guilt and the English law of theft, 1750–1850' (2005) 23 Law and History Review 133.

[76]For further information about the prohibition of defence counsel in felony trials see TP Gallanis 'Making sense of Blackstone's puzzle: why forbid defense counsel?' in A Sarat (ed) *Studies in Law, Politics and Society* (Bingley: Emerald Group Publishing Ltd, 2010).

[77]Vogler, above n 32, pp 129–130.

[78]R Vogler 'Due process' in M Rosenfeld and A Sajó (eds) *Comparative Constitutional Law* (Oxford: Oxford University Press, 2012).

[79]K Pennington 'Innocent until proven guilty: the origins of a legal maxim' (2003) 63 Jurist 106; MH Eichbauer 'Medieval inquisitorial procedure: procedural rights and the question of due process in the 13th century' (2014) 12 History Compass 72

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safeguards. These inquisitorial provisions were not concerned with safeguarding the defendant but on ensuring an indisputable verdict.[80] Indeed, the defendant was not considered to be an important component of the inquisitorial trial, which could convict and sentence without the presence of the accused.[81] It is for this reason that due process is seen here as an adversarial concept. This is not to say that the adversarial methodology was better than the inquisitorial process. Indeed, the professionalised bureaucracy of the Continental methods created a sophisticated system of evidence that ensured that the defendant could be convicted only on the highest standard of proof, something that was not afforded to the English defendant.[82]

One of the prevailing characteristics of the adversarial criminal trial is the presence of lawyers. Defence counsel drastically changed the concept of the defendant and did much to address the long-standing procedural imbalance of the trial. Initially their range of activities was severely restricted. Lawyers were allowed to cross-examine witnesses and raise points of law but they were unable to directly address the jury or argue against facts put in evidence.[83] However, lawyers had obvious incentives to challenge any and all evidence against their client, and to utilise strategy in order to win the case.[84] Despite these restrictions, over time they transformed the criminal trial from a brief and often bewildering experience for the defendant, into a zealous and combative process.[85] The introduction of due process safeguards, such as the presumption of innocence, the beyond reasonable doubt standard of proof[86] – placing the evidentiary burden on the prosecution – and the notion of equality of arms can be attributed, at least in part, to the presence of defence counsel in the courtroom.[87]

Despite their influence, there was no clear policy in the eighteenth century to introduce counsel for all defendants, or to instigate what would be a drastic procedural transformation.[88] Procedural change in the criminal courts was slow. It is likely that this 'lulled the bench into inaction until the lawyers had become entrenched'.[89] What is remarkable is that this procedural revolution, and the new conceptualisation of the accused, came about seemingly unnoticed by courtroom personnel and political elites until it was too late to change it. What had begun as the introduction of counsel in rare instances developed into a procedural revolution that simultaneously silenced and protected the accused.

The adversarial procedure was not formally endorsed until the nineteenth century. The passage of the Prisoners' Counsel Act 1836 afforded felons the statutory right to defence counsel who were empowered to address the jury directly and offer observations on the evidence.[90] Provisions such as the Indictable Offences Act in 1848, which granted the defendant a right to silence, made accessing a lawyer increasingly necessary in order to understand proceedings, let alone successfully argue a defence in court. The Criminal Evidence Act 1898 reinforced this right to silence, by stating that

at 74–75; JA Brundage 'Full and partial proof in classical canonical procedure' (2007) 67 Jurist 58; M Damaška 'The quest for due process in the age of inquisition' (2012) 60 American Journal of Comparative Law 919.

[80]J Langbein *Torture and the Law of Proof* (University of Chicago Press, 1977) p 6. An inquisitorial defendant could only be convicted if proof of guilt was 'more clear than daylight'. See also R Andrews *Law, Magistracy and Crime in Old Regime Paris, 1735–1789*, vol 1: The System of Criminal Justice (Cambridge: Cambridge University Press, 1994) p 442.

[81]Ibid, p 36.

[82]Ibid, pp 25–30.

[83]J Beattie 'Scales of justice: defense counsel and the English criminal trial in the eighteenth and nineteenth centuries' (1991) 9(2) Law and History Review 221 at 231.

[84]S Landsman 'The rise of the contentious spirit: adversary procedure in Eighteenth century England' (1990) 75 Cornell Law Review 497–1426.

[85]Ibid, at 543.

[86]The records are inconclusive as to the exact role that defence counsel played in facilitating this standard of proof, however Langbein states that 'at a minimum … the presence of defense counsel was a force for consistency, as in the development of the law of evidence, helping transform judicial practice into an expectation of routine that would become a rule of law': above n 34, p 265.

[87]TP Gallanis 'The mystery of Old Bailey counsel' (2006) 65 Cambridge Law Journal 159 at 163. See also Beattie, above n 83, at 248.

[88]Landsman, above n 84, at 502.

[89]Langbein, above n 34, p 255.

[90]Vogler, above n 32, p 145.

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the defendant could not be compelled to testify.[91] Thus, the rights-bearing adversarial defendant came to be seen as a passive receiver of justice. The need for counsel and for the prosecution to prove guilt became essential features of the English criminal trial.

The adversarial process was also physically entrenched in the courtroom, the layout of which now formally reflected the dominance of lawyers. The open court of the fifteenth century, whereby spectators were free to move about the courtroom,[92] had changed by the Victorian era. By the eighteenth century, purpose-built courthouses were emerging, separating court personnel and providing a more distinct space for counsel.[93] The accused became completely separated from proceedings, placed in a dock, on the edge of the courtroom, and enclosed.[94] This starkly highlighted their criminal status and championed the adversarial dominance of the lawyer.[95]

The rights-bearing defendant became further entrenched through codified pre-trial safeguards. These included the Metropolitan Police Regulations 1873, which prohibited the police from forcing a confession,[96] and the introduction of Judges' Rules in 1912, providing guidelines for the police investigation that ensured it respected due process.[97] However, these safeguards were largely introduced in a piecemeal and ad hoc manner. It was a series of high-profile miscarriages of justice in the 1970s and '80s that powerfully demonstrated the need to regulate the investigation stage and facilitated the passage of the Police and Criminal Evidence Act (PACE) in 1984.[98] PACE provided a raft of pre-trial safeguards such as the right to access a lawyer,[99] limits on the length of detention without charge[100] and treatment whilst in custody.[101] The concept of a rights-bearing defendant is now a fundamental component of English criminal justice, protected throughout the whole criminal justice process.

5. The performative defendant: a turning point?

As the rights-bearing defendant became entrenched, the criminal trial became more complicated, longer and more expensive. One key aspect of the rights-bearing defendant is their non-participatory role. It is for the state to bring proceedings and to prove guilt beyond reasonable doubt.[102] A desire for efficiency has influenced the rhetoric surrounding the criminal process in the latter part of the twentieth century and has led some to query whether this marks the demise of adversariality.[103] It has established new means of requiring the defence to participate in the process. This new 'participatory model of procedure'[104] is based on the expectation that an innocent defendant has nothing to hide.

[91]C Moisidis *Criminal Discovery: From Truth to Proof and Back Again* (Sydney: Institute of Criminology Series, 2008) pp 22–23.

[92]L Mulcahy *Legal Architecture: Justice, Due Process and the Place of Law* (Abingdon: Routledge, 2011) pp 87–89.

[93]Ibid, pp 31, 46, 52.

[94]For further discussion see L Mulcahy 'Putting the defendant in their place: why do we still use the dock in criminal proceedings?' (2013) 53 British Journal of Criminology 1139.

[95]There have been modern criticisms of the separation of the accused from the criminal trial which, it has been argued in a series of court cases, has the effect of eroding the defendant's presumption of innocence. See Mulcahy, above n 92, pp 73–78.

[96]Moisidis, above n 91, pp 22–24.

[97]Prior to 1912 no official guidance had been issued to police officers with regard to how to conduct the investigation, in particular the interrogation of the suspect. Four were provided in 1912, with another five being drafted in 1918. In 1930 a clarifying statement was issued to resolve some ambiguity of the nine rules issued. These issues remained in place until the introduction of PACE in 1984.

[98]Moisidis, above n 91, pp 40–46.

[99]PACE, s 58.

[100]PACE, s 41.

[101]PACE, Pt V.

[102]H L Ho 'Liberalism and the criminal trial' (2010) Singapore Journal of Legal Studies 87.

[103]J McEwan 'From adversarialism to managerialism: criminal justice in transition' (2011) 31 Legal Studies 519; J Hodgson 'The future of adversarial criminal justice in 21st century Britain' (2009) 35 North Carolina Journal of International Law and Commercial Regulation 319 at n 142.

[104]A Owusu-Bempah 'Defence participation through pre-trial disclosure: issues and implications' (2013) 17 The International Journal of Evidence & Proof 183.

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History has demonstrated how incremental changes to the criminal justice process can have profound implications for the role of the defendant. It is suggested here that these reforms could be creating a performative defendant, expected to engage with the criminal justice process as a way of demonstrating their innocence. This not only has implications for the adversarial criminal trial as a whole but could be an indication that the role of the defendant is changing once again. This section will consider two pressure points on the criminal trial that could entrench this performative defendant: the introduction of adverse inferences; and the rise of so-called 'digilantism'. In short, we are asking here whether, as in the 1730s, we are at the cusp of another turning point in the criminal justice process.

(a) Obligatory participation: adverse inferences

The requirement that the defendant must participate can be seen in the introduction of adverse inferences through the Criminal Justice and Public Order Act 1994 (CJPOA 1994) and the Criminal Justice Act 2003 (CJA 2003), Part 5 , which amended provisions in the Criminal Procedure and Investigations Act 1996 (CPIA 1996). Sections 34–37 of the CJPOA 1994 allow the jury to make inferences 'as appear proper'[105] from the defendant's failure to advance a defence within a reasonable timeframe, or from a failure to answer questions under certain circumstances, most controversially when questioned by the police (s 34).[106] Similarly, the CPIA 1996, as amended by the CJA 2003, places burdens on both the prosecution and defence to disclose any elements of their case that may assist the opposing party.[107] The prosecution has long had a general duty to disclose,[108] but for the first time the defence is now under a similar obligation. The accused must now provide a defence statement to the court,[109] stipulating the nature of their defence, the matters of fact and points of law that they intend to rely upon and any issues (and why) they have with the prosecution's case.[110]

The introduction of adverse inferences were designed to achieve parity between the prosecution and the defence, after the passage of PACE was felt to have tipped the balance too far towards the accused.[111] There was a particular fear that the new right to legal advice (PACE, s 58) would provide a major obstacle to police investigation by hindering the suspect interview.[112] There was also concern that s5 8 could lead to an increase in so-called ambush defences, whereby the accused would refuse to proffer a defence until the last minute as a strategy to undermine the prosecution's case.[113] Problematically the legislation failed to adequately assess the evidence pertaining to this area of law. This has led Quirk to state that the CPIA 1996 in particular 'appears to have been drafted in a vacuum',[114] an accusation that can also be levelled at the CJPOA 1994. By introducing adverse inferences, the reforms have had the inadvertent effect of requiring the defendant to perform or run the risk of being perceived as guilty.

[105]CJPOA 1994, s 34(2).

[106]I Dennis 'Silence in the police station: the marginalisation of section 34' (2002) Criminal Law Review 25 at 26.

[107]CPIA 1996, ss 3 and 7A, as amended by the CJA 2003, place an on-going burden on the prosecution to disclose.

[108]The Treason Trials Act 1696 provides one such example of the obligation.

[109]CPIA 1996, s 5.

[110]CPIA 1996, s 6A(1), as amended by the CJA 2003. The CPIA 1996 also provides other obligations to disclose information relating to alibis and all other defence witnesses (s 6A and s 6C), to provide information of expert witnesses sought and a duty to update the defence disclosure (the latter two are not yet in force: ss 6B and 6D).

[111]R Leng 'The right to silence reformed: a re-appraisal of the Royal Commission's influence' (2001) 6 Journal of Civil Liberties 107 at 111; S Greer 'The right to silence: a review of the current debate' (1990) 53 The Modern Law Review 709 at 724.

[112]Although the CJPOA 1994 covers a range of situations, including silence in the courtroom, Greer notes that most of the debate focused on the right to silence in the police station: ibid, at 719.

[113]H Quirk *The Rise and Fall of the Right to Silence* (London: Routledge, 2018) pp 24–49; R Leng 'Losing sight of the defendant: the government's proposals on pretrial disclosure' (1995) Criminal Law Review 704 at 705.

[114]H Quirk 'The significance of culture in criminal procedure reform: why the revised disclosure scheme cannot work' (2006) 10 The International Journal of Evidence & Proof 42 at 44.

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(b) Right to silence

The curtailment of the right to silence has been described as 'one of the most controversial reforms of English criminal law in the last century'.[115] Its introduction was based on a fear that it was being widely used to obstruct criminal justice. Research had consistently found that the right to silence was rarely exercised, and when it was used, it had little bearing on guilt.[116] Rather, there were more innocuous reasons for remaining silent, for example because of cultural hostility to the police.[117] Two safeguards were written into the CJPOA 1994, ostensibly to protect vulnerable defendants. Guilt cannot be determined based on the silence of the accused alone (s 38(3)), nor can inference be made if the accused's physical or mental condition makes it undesirable to testify at court (s 35 (1)(b)). However, as Birch notes of s 38(3), it 'is impossible to police'.[118]

Judicial interpretation has expanded the scope of ss 34–37[119] and provides a powerful demonstration of how such reforms could be transforming the rights-bearing defendant. In *Condron*[120] the Court of Appeal held that inferences could be drawn despite legal advice to remain silent.[121] This is problematic given that the curtailment of the right to silence was ostensibly because of the introduction of legal advice. As Quirk points out '[t]his means that suspects have not received the protections that Parliament intended, and that some of the protections of PACE have been weakened without direct legislative authority'.[122] Although silence should not establish a prime face case, it appears that the courts are willing to do just that. In *Hart*[123] the defendant was convicted of knowingly importing cannabis. He remained silent during interview and at trial; the only evidence against him was a piece of paper with a Spanish mobile number found in his pocket on arrest. His appeal was allowed due to poor judicial direction.[124] However, as Birch notes, 'that he was convicted in the first place suggests that juries are capable of attaching considerable, and misplaced, significance on silence'.[125] The implication of these cases is that passivity being equated with guilt.

There is evidence to suggest that the right to silence was being eroded even before the introduction of adverse inferences. In 1976 the Court of Appeal in *Chandler*[126] found that the presence of a solicitor equalised the position between the defendant and the police. As a result, the jury could infer the defendant's silence as an acceptance of the accusations. Similarly, in *Alladice*[127] in 1980 the Court of Appeal, alluding to ambush defences, stated that as a result of PACE, s 58 'the balance of fairness between prosecution and defence cannot be maintained unless proper comment is permitted on the defendant's silence'.[128] Even prior to PACE, the Court of Appeal commented that juries rarely acquitted if the defendant remained silent.[129] Parallels can be drawn between the CJPOA 1994 and the

[115]A Jennings 'Silence and safety: the impact of human rights law' (2000) Criminal Law Review 879 at 879.

[116]Leng found that 4.5% of suspects relied on the right to silence during interview and that ambush defences amounted to 'at most' 5% of trials: above n 113, p 20; 'The right to silence in police interrogation: a study of some of the issues underlying the debate' *The Royal Commission on Criminal Justice* (1993) pp 20, 58.

[117]D Dixon 'Politics, research and symbolism in criminal justice: the right of silence and the Police and Criminal Evidence Act' (1991) 20 Anglo-American Law Review 27 at 42.

[118]D Birch 'Suffering in silence: a cost-benefit analysis of section 34 of the Criminal Justice and Public Order Act 1994' (1999) Criminal Law Review 769 at 777.

[119]H Quirk 'The case for restoring the right of silence' in J Child and R Duff (eds) *Criminal Reform Now* (Oxford: Hart Publishing, 2019) pp 255–261.

[120]*R v Condron and Condron* [1997] 1 WLR 827.

[121]This was reaffirmed in *R v Beckles* [2004] EWCA Crim 2766, where the Court of Appeal reiterated that the matter was a question for the jury.

[122]Quirk, above n 119, p 256.

[123](Unreported, 23 April 1998), CA.

[124]The judge at first instance referenced s 34 and s 35 but did not make it clear to the jury if they were entitled to make inferences from both.

[125]Birch, above n 118, at 775.

[126]*R v Chandler* [1976] 1 WLR 585.

[127]*R v Alladice* (1988) 87 Cr App R 380.

[128]Per Lord Lane at 385.

[129]*R v Sparrow* [1973] 1 WLR 488.

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Marian Statutes: both being pieces of legislation that attempted to make the criminal trial more efficient, but in actual fact may have simply codified established, or emerging, practice. Crucially, the Marian Statutes eventually led to profound changes to the role of the defendant. The CJPOA 1994 could be doing the same.

(c) Disclosure

The disclosure reforms similarly make a tenuous conclusion that failure to disclose equates to guilt. As Owusu-Bempah notes, 'the defendant's failure to disclose … before trial is only suspicious because the law places an obligation on him to do so'.[130] Thus, the defendant is not only considered suspicious if they remain passive and silent, they are also suspicious if they do not perform and cooperate with the justice process. The implications for the rights-bearing defendant are clear; passivity no longer appears to be something deemed to be in need of protecting.

Initially, judges appeared reluctant to draw adverse inferences for failure to disclose. As a result, the applicability of adverse inferences under the CPIA 1996 is ambiguous, when, for example, disclosure is made late or is insufficiently detailed.[131] Unlike the right to silence, the law on disclosure has generated little case law.[132] It appears that most judges at least initially preferred to verbally chastise rather than sanction non-compliance.[133] Nevertheless, the obligation to disclose is being expanded. The amendments made by the CJA 2003, which aimed to 'give sharper teeth to the enforcement of defence disclosure',[134] extended defence (and prosecution) disclosure obligations and made sanctioning non-compliance easier. It now appears that the defence statement is being used to evidence the *actus reus* component of a crime;[135] the obligation to disclose is also not absolved by legal advice.[136] Neither of these new expansions were an intended consequence of the statutes.

The introduction of the Criminal Procedure Rules (CrimPR) has also increased the impact of the disclosure obligations. Designed to promote efficiency in the criminal trial and encourage cooperation between the parties, the CrimPR also introduces a more proactive role for the judiciary, threatening adversarialism.[137] Despite an initial reluctance to sanction failure to disclose, it appears that, as a result of CrimPR, the courts are increasingly viewing disclosure as a duty in the interests of justice.[138] Crucially, the courts have, on several occasions, perpetuated the suspicion that the defendant's failure to disclose was tactical.[139] As a result, it appears to be increasingly difficult for the defendant to appeal against their disclosure obligations.[140]

The obligations of the CrimPR also extended to summary offences. Most disclosure obligations only apply to cases in the Crown Court; the CPIA 1996, s 6, makes it clear that disclosure in the magistrates' courts is voluntary. Crucially, r 3.11 of the CrimPR states that the parties are under an

[130]A Owusu-Bempah *Defendant Participation in the Criminal Process* (London: Routledge, 2017) p 156.

[131]M Redmayne 'Criminal Justice Act 2003: disclosure and its discontents' (2004) Criminal Law Review 441 at 447; Quirk, above n 114, at 56.

[132]See for example McEwan, above n 103, at 530–531.

[133]P Darbyshire 'Judicial case management in ten crown courts' (2014) Criminal Law Review 30 at 40–41; F Garland and J McEwan 'Embracing the overriding objective: difficulties and dilemmas in the new criminal climate' (2012) 16 The International Journal of Evidence & Proof 233. However, para 3A.26 of the Criminal Practice Directions 2015 makes informal chastisement less likely, as the court must now record failures to comply with the CrimPR and could require the parties to attend a hearing to explain their lack of compliance.

[134]Redmayne, above n 131, at 446–449.

[135]For example in *R v Firth* [2011] EWHC 388 (Admin) where the defendant made a statement on a case progression form stating that the only contact made was in self-defence. The prosecution were able to rely on this statement to prove the touching element required for ABH; Redmayne, above n 131, at 450.

[136]*R v Essa* [2009] EWCA Crim 43.

[137]McEwan, above n 103.

[138]*Malcolm v DPP* [2007] EWHC 363 (Admin); *Firth v Epping Magistrates' Court* [2011] EWHC 388 (Admin).

[139]*R v Penner* [2010] EWCA Crim 1155; *R v Farooqi* [2013] EWCA Crim 1649; *R v Chorley Magistrates' Court* [2006] EWHC 1795 (Admin).

[140]See Owusu-Bempah, above n 130, pp 159–160.

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obligation to complete a case management form in which they identify the order of their evidence, including points of law and information about witnesses that are relevant to their case. This has been described as 'akin to completing a defence case statement under the CPIA'.[141] Thus the CrimPR could be an expansion of disclosure through the back door.

It is possible that this new requirement to participate is merely a recalibration of the rights-bearing defendant, rather than a new conceptualisation. However, this would only be possible if the principle of equality of arms was maintained at all stages of the criminal justice process. Unfortunately, this does not appear to be the case. For example, although the CPIA 1996, s 23, creates a disclosure officer, responsible for the cataloguing of the evidence acquired, training for this role is often poor. As a result, officers can fail to understand the importance of a job that requires value judgments of the evidence to be made.[142] Furthermore, the neutrality required from the disclosure officer contradicts a pervasive attitude amongst the police that they are 'salesmen for jail'.[143] Not only does this suggest a lack of a presumption of innocence at the pre-trial phase, it contrasts with the conduct of defence counsel who need to ensure a good working relationship with the police and are therefore less likely to be adversarial in the police station.[144] The collapse of recent cases due to police failure to disclose demonstrates fundamental flaws in the system.[145] The growing use of smartphones and other technologies means that the category of potential evidence is growing exponentially. Recent cuts to police budgets make it increasingly difficult for the police to sift through all the evidence accumulated. These factors create a perfect storm for miscarriages of justice.

The introduction of adverse inferences has impacted on the rights-bearing defendant. The erosion of the right to silence ensures that a passive defendant is perceived to be a guilty one. The introduction of the obligation to disclose, however, goes one step further by requiring the defendant to perform to expectations of what innocent behaviour looks like. As then Home-Secretary Michael Howard stated, 'I do not believe that the innocent have anything to fear from the changes'.[146] This new attitude towards the defendant, 'makes a number of untested assumptions about the "natural" behaviour of suspects'.[147] Nevertheless the view that a passive defendant is a guilty one appears to be growing. It is even perpetuated amongst some defence counsel.[148] We can see this attitude also operating outside the trial in the reporting of some crimes. Headlines such as 'Chilling footage shows "no comment" interview with killer Michael Stirling…',[149] 'The "no comment" interview with Stephen Hough that helped convince cops they had cound Janet Commins' real killer'[150] or 'Paedophile Matthew Falder's cocky "no comment" interview after finally being caught'[151] suggest a growing culture for drawing adverse inferences.

[141]E Johnson 'All rise for the interventionist: the judiciary in the 21st century' (2016) 80 The Journal of Criminal Law 201 at 211.

[142]Quirk, above n 114, at 46–47.

[143]Quote in ibid, at 48.

[144]E Cape 'The rise (and fall?) of a criminal defence profession' (2004) Criminal Law Review 401 at 470–471; Quirk, above n 114, at 93. Although Garland and McEwan note that defence and prosecution counsel are more likely to be cooperative at trial, above n 133, at 253–255.

[145]See for example T Smith 'The "near miss" of Liam Allan: critical problems in police disclosure, investigation culture, and the resourcing of criminal justice' (2018) Criminal Law Review 711.

[146]Hansard *HC Deb*, vol 235, col 27, 11 January 1994 available at https://hansard.parliament.uk/Commons/1994-01-11/debates/6a0a29f4-0aa4-4d35-8501-82c88fd0a6ff/CriminalJusticeAndPublicOrderBill (last accessed 29 August 2019).

[147]Quirk, above n 114, p 18.

[148]Ibid, at 91.

[149]K Clifton 'Chilling footage shows "no comment" interview with killer Michael Stirling one day after lover's body discovered' (*Evening Standard*, 22 February 2019), available at https://www.standard.co.uk/news/uk/john-barnes-hailed-for-best-ever-answers-on-question-time-as-he-responds-to-liam-neeson-racism-row-a4074021.html#spark_wn=1 (last accessed 29 August 2019).

[150]K Williams 'The "no comment" interview with Stephen Hough that helped convince cops they had found Janet Commins' real killer' (*Daily Post*, 17 July 2017), available at https://www.dailypost.co.uk/news/north-wales-news/no-comment-interview-stephen-hough-133423360 (accessed 25/2/19).

[151]R Burford 'Paedophile Matthew Falder's cocky "no comment" interview after finally being caught' (*Wales Online*, 19 February 2018), available at https://www.walesonline.co.uk/news/wales-news/paedophile-matthew-falders-cocky-no-14309995 (last accessed 29 August 2019).

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There are echoes here of the advocate defendant.[152] This new performative defendant, however, is expected to engage throughout the criminal justice process. Moreover, it appears that, as a result in the pervasive use of new technologies such as smartphones and social media, the performative defendant must not only convince the jury but also the wider public.

(d) 'Digilantism'

The underlying implication of guilt behind adverse inferences echoes the notions of deservingness discussed in the introduction to this paper. The reaction towards bin Laden's death appears to suggest that in some cases a criminal *trial* itself is not deserved. Were this the only example then it could be explained away on the basis of the exceptional circumstances. However, there are indications of a more subtle and widespread change in attitude towards the criminal trial. The growth of social media allows individuals to participate in crime news and to investigate. Described as 'performative communities'[153] there have been growing incidents of people taking justice into their own hands. As a result, it is possible that this notion of deservedness is more widespread, threatening the rights-bearing defendant.

Perceptions of criminal justice are heavily influenced by its reporting.[154] Although some people source crime news through social media, for most of the public the news media remains the primary source of information on criminal justice.[155] However, increased news media competition is resulting in a 'hyper-competitive "do what it takes" 24-7 news media sphere', and is leading to a more sensationalised reporting style.[156] As a result, criminal defendants are increasingly finding themselves condemned in a 'court of public opinion'.[157] Newspaper condemnation of defendants is nothing new. However, the tone of crime reporting has shifted from a rhetoric of crime as a one-off, horrific event to one that 'could happen to you'.[158] As a result criminal acts become more personalised, inviting greater reader engagement with the crime and empathy with the victims.

Social media is increasingly becoming an outlet where the public can comment on and digest crime news. This 'virtual condolence book'[159] can amplify feelings of grief, connecting individuals to crime in a way that transcends normal geographic boundaries. Online conversations may be short-lived,[160] but can increase a sense of punitiveness against the defendant. Trending hashtags after criminal events such as #RIPLeeRigby after the 2013 Woolwich killing, or the widespread use of the worker bee, a symbol of the city, after the 2017 Manchester Arena bombing, not only demonstrate widespread solidarity against the crime, but could also be amplifying feelings of anger and revenge against those accused of such crimes.

Interaction with crime is not a new phenomenon; indeed, as noted above, early forms of crime detection relied on the hue and cry and the participation of the community. Since the birth of mass media crime has captured the public imagination.[161] The growing use of smartphones allows eyewitnesses to record crime as it occurs. This footage can then be disseminated in real time via social

[152]Moisidis, above n 91, pp 39–48.

[153]E Campbell 'Policing paedophilia: assembling bodies, spaces and things' (2016) 12 Crime, Media, Culture 345 at 354.

[154]L Moran 'Mass-mediated "open justice": court and judicial reports in the press in England and Wales' (2014) 34 Legal Studies 143.

[155]N Newman et al *Reuters Institute Digital News Report* (Oxford: Reuters Institute for the Study of Journalism, 2016) pp 86–87.

[156]C Greer and E McLaughlin '"This is not justice": Ian Tomlinson, institutional failure and the press politics of outrage' (2012) 52 British Journal of Criminology 274 at 277.

[157]Ibid, p 27.

[158]C Wardle '"It could happen to you": the move towards "personal" and "societal" narratives in newspaper coverage of child murder, 1930–2000' (2006) 7 Journalism Studies 515.

[159]C Greer and E McLaughlin '"Trial by media": policing, the 24-7 news mediasphere and the "politics of outrage"' (2011) 15 Theoretical Criminology 23.

[160]A Bruns and J Burgess "Researching news discussion on twitter" (2012) 13 Journalism Studies 801 at 803.

[161]J Grossman *The Art of Alibi: English Law Courts and the Novel* (Baltimore: The John Hopkins University Press, 2002).

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media sites. Imagery has always added to the sensationalism of a crime, and CCTV footage has factored into news stories for several decades.[162] What is new, however, is that this smartphone footage, and the resultant rhetoric of the crime and the accused, is not controlled by the police. For example, the Woolwich killers were named online within 24 hours of the attack, ten days before they were officially named by the police.[163] This enabled widespread speculation and commentary about the two suspects in the news media.[164] The fact that social media enables such widespread public engagement can have significant implications for the rights-bearing defendant, particularly through the erosion of the presumption of innocence.

When the defendant is captured red-handed and almost in real time, public understanding of guilt and innocence can become blurred, which can call into question the purpose of the criminal trial. This was illustrated in the online treatment of the two teenagers tried for the murder of Angela Wrighton in December 2014. The age of the perpetrators, 13 and 14, as well as the brutality of the crime,[165] attracted media attention. However, the Wrighton case is also noteworthy for the role of social media. The children had broadcast their actions on Snapchat and Facebook Messenger, adding to the sense of callousness of the crime. Social media also provided an outlet for the public to express their horror at events. The level of vitriol directed at the defendants resulted in one mis-trial and in severe reporting restrictions, including preventing news media outlets from linking their stories to social media comments.[166] Indeed, the impact of social media in this case has resulted in the Attorney-General starting an inquiry into the impact of social media on criminal trials more broadly.[167] Similarly, the naming and shaming of the then-alleged killer of six-year-old Alesha MacPhail has resulted in a prosecution under the Contempt of Court Act 1981, after one woman named and shamed the suspect on social media.[168] The defendants in both trials had their identities protected by the court. The acts of naming and shaming, alongside the vitriolic online commentary suggests that there is a perception that the criminal trial is obscuring justice, rather than facilitating it.

Social media also allows individuals to investigate crime and take matters of justice into their own hands; the most prominent example are so-called paedophile hunters. These individuals attempt to lure paedophiles to a meeting by posing as children online. Often filmed or live-streamed to social media sites, the alleged paedophiles are then confronted by a group of people who shout accusations and insults whilst they await the police. Described as 'digilantism'[169] the motives behind these vigilante groups are illuminating. Yardley et al have found that there are a range of reasons someone might engage in web sleuthing, from being a victim of a similar crime to wanting to see justice

[162]Y Jewkes *Media and Crime* (London: SAGE, 2004) pp 61–62.

[163]The Metropolitan police had a policy of not naming a suspect for at least 10 days, something that journalist Dan Sabbagh described as 'pointless' in this instance. 'It is not always attractive but we must aim for openness' (*The Guardian* 3 June 2013).

[164]See, for example, 'Second man was the victim of knife attack at age of 16' (London: *The Guardian*, 25 May 2015); 'My ex-boyfriend, the terror suspect; "lovely, polite boy"' (London: *Daily Telegraph*, 24 May 2013).

[165]Wrighton was beaten to death using a variety of household items and suffered at least 70 slash injuries and 54 blunt force injuries and was hurt so badly that she lost control of her bowels. The attack lasted seven hours and has been described as 'torture' by some media outlets. See for example N Parveen 'Teenage girls who tortured Angela Wrightson to death given life sentences' (London: *The Guardian*, 7 April 2016).

[166]'Angela Wrightson killers: a friendship that ended in murder' (BBC, 13 June 2017), available at https://www.bbc.co.uk/news/uk-england-35977027 (last accessed 29 August 2019). This was heavily criticised in some news outlets. See for example G Allen 'This picture of Angela Wrightson's "snapchat killers" is all we will ever see of them' (London: *Mirror*, 7 April 2016).

[167]*Attorney General Seeks Evidence on the Impact of Social Media on Criminal Trials* (AG's Office, 15 September 2017), available at https://www.gov.uk/government/news/attorney-general-seeks-evidence-on-the-impact-of-social-media-on-criminal-trials (last accessed 29 August 2019).

[168]K McLeod and J Dunnett 'Woman arrested for "revealing identity" of teen charged with raping and murdering Alesha MacPhail' (*Daily Record*, 18 July 2018), available at https://www.dailyrecord.co.uk/news/scottish-news/woman-arrested-revealing-identity-teen-12890614 (last accessed 29 August 2019). Aaron Campbell was identified as McPhail's killer on 21 February 2019 after a court order to protect his identity was lifted a day after he was convicted of murder.

[169]A term first coined by J Nhan et al 'Digilantism: an analysis of crowdsourcing and the Boston marathon bombings' (2017) 57 The British Journal of Criminology 341.

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done.[170] In the case of paedophile hunters, there appears to be a strong desire for the latter, as demonstrated in interviews[171] and in the names of the groups such as 'Dark Justice' or 'Justice Will Be Served'. Trottier suggests that the rise in online vigilantism is due to a decreased faith in the criminal justice system, among other things.[172]

We are seeing growing 'digilantism' in the UK, sometime with disastrous results. Darren Kelly was fatally stabbed by Chris Carroll, who believed Kelly to be a paedophile. Kelly had gone to the meeting believing he was going to meet the mother of a 15-year-old girl.[173] Similarly, Bijan Ebrahimi was beaten to death by his neighbours Lee James and Stephen Norley, who believed Ebrahimi to be a paedophile. They then set Ebrahimi's body on fire. An Iranian refugee with learning difficulties, accusations against Ebrahimi had begun to circulate on the estate he lived in after he began to take pictures of children who were harassing him; there is no evidence to suggest he was a paedophile.[174]

Anti-paedophile violence is nothing new,[175] nor is the notion of vigilante justice. Indeed, after the *News of the World* published details of all convicted sex offenders in protest at the Home Secretary's decision not pass Sarah's Law, a mob infamously attacked those named and living in the Paulsgrove estate.[176] However, this activity is growing and becoming more mainstream in part due to the ease of access to social media. The use of evidence obtained by paedophile hunters to change suspects increased sevenfold in 2015, with 150 instances of such evidence being used in 2017.[177] If the criminal justice process allows individuals to exact justice against those they believe are guilty, the idea that the criminal trial is something we deserve and – by implication – earn becomes less exceptional. The pressures on the criminal trial are clear, the growth of apparent 'evidence' of guilt may be reframing notions of justice and, thus, the rights-bearing defendant. The hints of a performative defendant as a result of adverse inferences become more acute in this context.

6. How does the mutable defendant change our understanding of modern criminal justice?

The rights-bearing defendant is in a precarious position. As has been established, the defendant's role in the criminal trial is capable of extraordinary change. Moreover, this change can be a considerable departure from legal traditions and can occur without a conscious policy to do so. The criminal justice process reflects, in part, the needs of contemporaneous society. The issues highlighted in the final section of this paper are examples of the many potential pressures on the rights-bearing defendant. Other examples include the cuts to legal aid,[178] implementation of recent anti-terrorism

[170]E Yardley et al 'What's the deal with "websleuthing"? News media representations of amateur detectives in networked spaces' (2018) 14 Crime, Media, Culture 81 at 86.

[171]For example see J Warrington 'The controversial rise of vigilante paedophile hunters' (*Vice*, 19 Apeil 2018), available at https://www.vice.com/en_uk/article/bjpav4/vigilante-paedophile-hunters-are-doing-the-job-the-police-cant-do (last accessed 29 August 2019).

[172]D Trottier 'Digital vigilantism as weaponisation of visibility' (2017) 30 Philosophy & Technology 55 at 62–65.

[173]'Darren Kelly "killed by teenage paedophile vigilantes"' (BBC, 12 April 2016) available at https://www.bbc.co.uk/news/uk-england-northamptonshire-36027408 (last accessed 29 August 2019).

[174]'Murder victim Bijan Ebrahimi endured absue and threats' (BBC, 28 November 2013), available at https://www.bbc.co.uk/news/uk-england-25017802 (last accessed 29 August 2019).

[175]The Paedophile Information Exchange was picketed by the National Front in the 1970s. One disastrous incidence of anti-paedophile sentiment was the targeting of Yvette Cloete, a paediatrician, in 2000. It seems that the protesters had confused Cloete's profession with paedophilia: see R Allison 'Doctor driven out of home by vigilantes' (*The Guardian*, 30 August 2000) available at https://www.theguardian.com/uk/2000/aug/30/childprotection.society (last accessed 29 August 2019).

[176]Named after Sarah Payne, a schoolgirl who had been abducted and murdered by Roy Whiting, a convicted sex offender, in July 2000. This legislation proposed to grant the police the power to disclose information of known sex-offenders in the local area. See C Wardle 'Monsters and angels: visual press coverage of child murders in the USA and UK, 1930–2000' (2007) 8 Journalism 263 at 278.

[177]'"Paedophile hunter" evidence used to charge 150 suspects' (BBC, 10 April 2018), available at https://www.bbc.co.uk/news/uk-england-43634585 (last accessed 26 February 2019).

[178]'Access denied? LASPO four years on' (The Law Society, 29 June 2017), available at https://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/ (last accessed 29 August 2019).

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legislation,[179] and the potentially coercive nature of the guilty plea.[180] As this paper has demonstrated, the role of accused is changeable and subject to external pressures. This mutable defendant provides a new theoretical framework though which to assess the future impact of even apparently minor reforms to the criminal justice process.

As we have seen, during a period of sparsely populated but interdependent communities, the focus of the Anglo-Norman criminal trial was not on the defendant, but on encouraging reconciliation to prevent a blood feud. The ordeals created the penitent defendant. The de facto abolition of the ordeals in 1215 was one of only a few conscious attempts to change the procedural status quo. The English jury system was a development of the ordeal of compurgation and continued to draw upon community knowledge in order to establish guilt. A by-product of this requirement was the advocate defendant, who necessarily had a central role in the criminal trial. The Marian Statutes, aimed at addressing a perceived imbalance in favour of the accused, indirectly changed the defendant's role once again, entrenching the advocate defendant and inadvertently establishing a prosecutorial bias. This bias, exploited by the Crown during a period of authoritarianism, led to elite calls for reform for treason trials, the first example of a rights-bearing defendant. Although it occurred gradually over the course of the eighteenth century, and as a result of the mysterious increase in lawyers in felony trials, this rights-bearing defendant became entrenched as the adversarial methodology developed. Due process, a key aspect of the rights-bearing defendant, became statutorily enforced in England and Wales throughout the nineteenth century. The twentieth century saw the rights-bearing defendant established in the pre-trial investigation with the enactment of provisions such as PACE.

There are indications that we might be witnessing a move towards a new iteration of the mutable defendant; indeed, there are hints of the emergence of what is described here as the performative defendant. Certainly, the notion of deservingness evident in the reaction to the death of Osama bin Laden is not compatible with the rights-bearing defendant and a due process-adhering criminal trial designed to protect the accused from the might of the state and arbitrary punishment. Bin Laden is an exceptional example, but history has demonstrated, with the Treason Trials Act, for example, that exceptional examples can have a profound, albeit gradual, impact on the criminal trial as a whole. There is a risk that new developments to criminal justice may eventually echo these notions of deservingness. The use of adverse inferences creates a subtle presumption of guilt for any defendant who does not participate in their criminal trial. Worryingly, the statutory provisions have been judicially expanded and there are indications of a broader cultural acceptance that failure to participate equates to guilt. This notion fundamentally contradicts the rights-bearing defendant, who is entitled to be passive as a check against state tyranny. Indeed, such attitudes are more akin to the advocate defendant. However, the performative defendant goes beyond the advocate defendant, as they are expected to participate throughout the criminal justice process and even, in some cases, to convince the wider public – not just the judge or jury – of their innocence. Social media, facilitated by a hyper-competitive news media, is increasingly being used to digest and comment on crime news. This can result in intense vitriol being directed at defendants, sometimes – such as with Angela Wrighton's killers – with severe implications for the criminal trial. The rise in 'digilantism', such as in the case of paedophile hunters, is facilitating acts of individual justice. Tragically, this has resulted in the deaths of innocent people. Whilst anti-paedophile action is nothing new, it demonstrates a lack of faith in the criminal justice system. What is new is that these vigilantes are able to view, produce and disseminate apparent 'evidence' of guilt, giving greater credence to their actions. It should not be forgotten that it was a lack of faith in the criminal justice system, albeit with the Whig elites, that facilitated the adversarial revolution.

[179]See Moisidis, above n 91, pp 45–46; H Fenwick and G Phillipson 'Covert derogations and judicial deference: redefining liberty and due process rights in counterterrorism law and beyond' (2011) 56 McGill Law Journal 863.

[180]For further discussion see R Helm 'Conviction by consent? Vulnerability, autonomy, and conviction by guilty plea' (2019) 83 The Journal of Criminal Law 161.

https://doi.org/10.1017/lst.2019.20 Published online by Cambridge University Press

The mutable defendant provides a useful theoretical framework through which to better assess the capacity of reforms and societal changes to place pressure on, and indeed alter, the criminal justice system. Even though the rights-bearing defendant, through due process protections such as the presumption of innocence, has been globally entrenched, it is important to remember the damaging effects that seemingly minor erosions of procedural values can have on the overall process. Thus, this paper serves as a warning: the defendant, in short, is capable of mutating again.

Cite this article: Gimson R (2020). The mutable defendant: from penitent to rights-bearing and beyond. *Legal Studies* **40**, 113–130. https://doi.org/10.1017/lst.2019.20