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# The Future of Adversarial Criminal Justice in 21st Century Britain

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## I. Introduction

This article reflects on some of the major shifts that have taken place in British criminal justice over the last twenty years, both generally in the attenuation of defense rights and the expansion of the public prosecutor role, and in two particular contexts: the treatment of miscarriages of justice<sup>1</sup> and the legal response to terrorism. It questions the extent to which these changes are part of a broader departure from an adversarial model of justice in the roles assigned to prosecution and defense, the separation of the

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<sup>1</sup> A "miscarriage of justice," also known as a "failure of justice," is defined as "[a] grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime." BLACK'S LAW DICTIONARY 1019 (8th ed. 2004).

investigation and trial stages and the core values underlying the criminal process. To the extent that adversarialism is losing its appeal, what are the underlying causes and what will replace it? Will the adversarial be replaced by a more inquisitorial approach? Managerialist and efficiency-driven concerns? Or something less coherent and consistent?

## II. England and Wales: A Mixed System with Adversarial Roots

When we speak of England and Wales as applying an adversarial procedure, we mean this in the sense of a procedural model. Just as countries like France and the Netherlands do not use pure inquisitorial processes of justice, so too England and Wales use, in theory, a mixed system. However, this does not mean that the adversarial label is redundant. These descriptors tell us much about the roots of a system, its organizing principles and the kinds of considerations that should govern reform in order to maintain a degree of internal coherence. An adversarial process is characterized by the fact that responsibility for the investigation, as well as selection and presentation of the evidence, lies with the two parties to the case: the accuser and the accused. Trial is based on oral evidence presented before an impartial and relatively passive judge, with a lay jury delivering the verdict. In England and Wales, cases are no longer fought out between the victim and the accused. The role of accusation is passed first to the police and then to the public prosecution service, the Crown Prosecution Service (CPS),<sup>2</sup> and most accused persons have legal representation. A fully contested trial and the hearing of oral evidence is the exception—guilty pleas and alternative forms of case disposal being the norm.<sup>3</sup> However, it might still be

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<sup>2</sup> See generally The Crown Prosecution Service, <http://www.cps.gov.uk/about/> (last visited Jan. 26, 2010) (detailing the Crown Prosecution Service's responsibilities and vision).

<sup>3</sup> Just under one million cases are heard each year in the magistrates' court (the lower court) and around 80,000 in the Crown Court (the higher court in which the jury sits) of which some 65 percent are guilty pleas. Around half of all "offenses brought to justice" in 2007 (722,000 out of 1,456,000) are the result of a conviction. (In the magistrates' court; around one quarter (383,000) are the result of police cautions; the rest are offenses taken into consideration by the court (108,000), police penalty notices for disorder (144,000) and police formal warnings for cannabis possession (98,000). See

considered a broadly adversarial procedure, given the police monopoly on carrying out the investigation that will form the prosecution's case; the rights of the accused to conduct her own investigation; the relatively partisan role of the prosecutor (rather than the more neutral 'ministry of justice' function); the place of the trial, with live oral evidence as the ultimate forum for case disposal (and admissibility at trial continuing as the governing feature of what will be accepted as evidence); and the fact that avoidance of trial is only with the consent of the accused (albeit that consent may be obtained with the aid of powerful incentives).

An inquisitorial process places more emphasis on the pre-trial phase than on the trial, as responsibility for the investigation rests with a neutral figure, usually a judge.<sup>4</sup> In the pure inquisitorial model, the same person is responsible for the investigation, prosecution and trial of the accused; the case is dealt with in secret and on the basis of written evidence.<sup>5</sup> But even in more modern procedures, the pre-trial phase is heavily centralized, and much reliance is placed upon the dossier of written evidence gathered by the judge—or increasingly, the prosecutor.<sup>6</sup> The accused is simply a witness in the overall investigation and so there is little expectation that she conduct her own enquiries and present an equal and opposite case to that of the prosecution.<sup>7</sup> At trial, the judge is empowered to take on a more proactive role, calling and interrogating evidence, rather than relying exclusively on that selected by the defense and prosecution. In practice, inquisitorial-type systems have also developed abbreviated trial procedures and forms of charge bargaining in order to reduce the number of trials.<sup>8</sup> The accused will know the details of and may challenge

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MINISTRY OF JUSTICE, OFFICE FOR CRIMINAL JUSTICE REFORM, CRIMINAL STATISTICS: ENGLAND AND WALES 2007 1 (2008), <http://www.justice.gov.uk/publications/docs/crim-stats-2007-tag.pdf> (last visited Jan. 26, 2010).

<sup>4</sup> Jacqueline Hodgson, *Constructing the Pre-Trial Role of the Defence in French Criminal Procedure: An Adversarial Outsider in an Inquisitorial Process*, 6 INT'L J. EVIDENCE & PROOF 1, 2 (2002).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE 21, 111-12, 243 (2005) (detailing the accused's participation in the criminal process).

<sup>8</sup> See generally *id.* (analyzing the ways in which an inquisitorially rooted criminal process operates in practice and the factors that influence and constrain its development

the case against her at court, but greater credibility attaches to the dossier of evidence presented by the prosecutor (seen as the product of a judicial inquiry) than that of the accused; the dossier is of central importance and is evidence on which the accused can be convicted without the necessity for live witnesses and cross-examination.<sup>9</sup>

In England and Wales, the Police and Criminal Evidence Act 1984 (PACE)<sup>10</sup> was perhaps the legislative high point of modern adversarial criminal procedure. Formerly, police powers differed across the country, and were contained in various local acts. PACE sought to provide a more uniform and clearly defined legal framework, while also increasing the authority of the police in the process.<sup>11</sup> Defense rights were also strengthened in order to somewhat counterbalance this increase in police power. The statutory right to custodial legal advice was perhaps the most important reform in this respect.<sup>12</sup> Under PACE section 58, suspects arrested and held in police custody are afforded the right to consult with a lawyer in private at any time. Access to a lawyer may only be delayed in indictable offenses where a senior officer had reasonable grounds for believing that the lawyer in question will interfere with evidence, witnesses or other suspects.<sup>13</sup> Legal aid provision was made available without the need for means testing. As a result, all suspects have access to free legal advice from a lawyer, referred to as a "duty lawyer" or "duty solicitor," of their own choosing.<sup>14</sup> In addition to a private consultation,

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and functioning).

<sup>9</sup> See generally 10TH DISTRICT COURT (Koch Lorber Films 2004) (highlighting the issues of guilt, innocence, policing, and ethnicity in France by documenting several misdemeanor hearings in Paris).

<sup>10</sup> Police and Criminal Evidence Act, 1984, c.60 (Eng.).

<sup>11</sup> See *id.* (PACE was intended to define police powers and safeguards with regards to search, arrest, detention, investigation, identification, and interviewing detainees and to strike a balance between the powers of the police and the rights of the public).

<sup>12</sup> *Id.* § 58.

<sup>13</sup> *Id.* § 58(8).

<sup>14</sup> PACE also made provisions for duty lawyer schemes. *Id.* at § 59. See also Access to Justice Act, 1999, c.22, § 12 (Eng.) (establishing free legal services "for the purpose of securing that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation as the interests of justice require"). See generally LEGAL SERVICES COMMISSION, DUTY SOLICITOR

lawyers are also permitted to be present during the tape-recorded police interrogation of their client.<sup>15</sup> Suspects in police custody were given clear rights to know the charges against them and to have the support of an appropriate adult if they were juveniles or had learning or mental difficulties.<sup>16</sup> The detention period was also closely regulated for the first time. Time limits were set for the period of detention, interrogations were tape-recorded and the role of custody officer was established to ensure the proper conduct of the detention period and the treatment of the suspect.<sup>17</sup>

The CPS was established the following year, replacing the former arrangement whereby the police were responsible for both the investigation and the prosecution of crime.<sup>18</sup> Previously, police in-house lawyers or local firms had prosecuted cases, but this procedure failed to provide any independent review of the case since prosecuting solicitors were effectively instructed by their clients, the police.<sup>19</sup> For this reason, the Royal Commission on Criminal Procedure had recommended the establishment of an independent prosecution service to ensure uniformity of prosecution decision-making and a degree of legal objectivity in ensuring that weak cases were not brought before the courts.<sup>20</sup>

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ARRANGEMENTS (2008), available at [http://www.legalservices.gov.uk/docs/cds\\_main/DutySolicitorArrangements2008\\_Final.pdf](http://www.legalservices.gov.uk/docs/cds_main/DutySolicitorArrangements2008_Final.pdf) (outlining the purpose of duty solicitor schemes).

<sup>15</sup> Under PACE, legal advice is available “at any time.” Police and Criminal Evidence Act, 1984, c.60, § 58(1) (Eng.). See also PACE 1984 pt. VI, Code C, ¶ 6.8.

<sup>16</sup> *Id.* ¶ 3.2 (requiring that the detainee be given a written notice setting out the right to a copy of the custody record, which explains the offense(s) that the detainee has been arrested for and the reason(s) for the arrest on the custody record pursuant to ¶ 3.4); see also *id.* ¶¶ 11.15-11.17 (making it mandatory for juveniles or people who are mentally disordered or otherwise mentally vulnerable to be interviewed regarding their suspected involvement in a criminal offense in the presence of an appropriate adult unless certain exceptions apply).

<sup>17</sup> See Police and Criminal Evidence Act, 1984, S.I. 1985, no. 1800, pt. VI, Code C ¶¶ 1.1, 14.1, 14A, 16AB, and 17.10 (Eng.) (detailing the duration of detention); *id.* ¶ 11.20 (explaining interview documentation procedures and duties of custody officers during the detention process).

<sup>18</sup> The Prosecution of Offences Act 1985, No. 1800, c.23, § 1 (Eng.).

<sup>19</sup> See SIR IAIN GLIDEWELL, THE REVIEW OF THE CROWN PROSECUTION SERVICE, 1998, Cm. 3960 (noting skepticism about CPS’s ability to perform the task of independent review).

<sup>20</sup> See ROYAL COMM’N ON CRIMINAL PROCEDURES, 1981, Cmnd. 8092 [hereinafter

The stages of investigation and prosecution were seen as formally separated with the police enjoying autonomy in the former and the newly formed CPS in the latter. The expansion of legal aid and duty solicitor schemes had already ensured greater rates of legal representation at court and the universally available right to custodial legal advice, together with the establishment of the CPS, represented the further professionalization of criminal justice.

At the same time, the appeal courts set down a number of decisions that recognized the disadvantages experienced by defendants who faced a police and prosecution service that were better resourced and better equipped in terms of legal investigative powers. A series of cases made clear that, in order to reduce the obvious inequality of arms, the prosecution had a duty to disclose all material gathered during the investigation, including that which might undermine its case. Most notably in its final judgment in the infamous Birmingham Six case,<sup>21</sup> the court stated: "A disadvantage of the adversarial system may be that the parties are not evenly matched in resources . . . But the inequality of resources is ameliorated by the obligation on the part of the prosecution to make available all material which may prove helpful to the defence."<sup>22</sup>

All unused material<sup>23</sup> was to be preserved unless it was incapable of having an impact on the case or there were good reasons for withholding the evidence. The test of relevance was not one for the prosecution, but ultimately, for the court.<sup>24</sup> In

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RCCP REPORT].

<sup>21</sup> See *R v. McKenny*, (1991) 93 Crim. App. R. 287. Paddy Hill, Richard McKenny, Johnny Walker, Billy Power, Hugh Callaghan and Gerry Hunter were convicted in 1975 of the murder of twenty-one people in two pub bombings in Birmingham in 1974. In 1991, after sixteen years of imprisonment and two unsuccessful appeals, the Court of Appeal quashed their convictions; it found that the two main pieces of evidence against the men (forensic and confession evidence) were discredited. See also FRANK BELLONI & JACQUELINE HODGSON, *CRIMINAL INJUSTICE* 6-14, 126-28 (2000) (discussing other high profile miscarriages of justice around this time).

<sup>22</sup> *McKenny*, 93 Crim. App. R. at 312.

<sup>23</sup> "Unused material" is understood to mean any information which has some bearing on the case, such as witness statements, which is not included in the committal bundles. See BELLONI & HODGSON, *supra* note 21, at note 7.8 (citing *R v. Saunders*, Unreported, Central Crim. Ct., 29 Sept. 1989, transcript).

<sup>24</sup> See the "Guinness Advice" issued by the Director of Public Prosecutions (DPP)

several high profile miscarriages of justice, the prosecution withheld material that would have been helpful to the defense and wholly undermined the prosecution; it was only when this evidence was finally uncovered that those wrongly convicted were freed. For example, the landmark case of Judith Ward,<sup>25</sup> it became clear that it was for the court, not the prosecution, to decide whether material could be properly withheld from the defense.<sup>26</sup> As the Court of Appeal stated in a later case, “[I]n our adversarial system in which the police and the prosecution control the investigatory process, an accused’s right to disclosure is an inseparable part of his right to a fair trial.”<sup>27</sup>

### III. Miscarriages of Justice: The Royal Commission on Criminal Justice and System Rebalancing

Within five years of PACE, a steady stream of miscarriage of justice cases started to emerge, many of them relating to the Irish Republican Army (IRA) bombings in the 1970s in which scores of civilians were murdered. The Guildford Four<sup>28</sup> were convicted in 1975 of the murder of five people in a pub bombing in Woolwich in 1974, but their convictions were quashed in 1989 when the court discovered that the police had fabricated confession evidence.<sup>29</sup> The Maguire Seven<sup>30</sup> were convicted in 1976 of possessing explosive substances; their convictions were quashed thirteen years later (and after one of their number, Giuseppe

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of England and Wales in 1992, *reprinted in* JUSTICE IN ERROR 123-27 (Clive Walker & Keir Starmer eds., 1993) (reminding officers that the prosecution has a duty to disclose to the defence all “unused material” in criminal proceedings unless there are good reasons for withholding the evidence and determining whether the evidence was relevant was not a matter for the prosecution).

<sup>25</sup> R v. Ward, (1993) 96 Crim. App. R. 1 (Eng.) (detailing the appeal of Judith Theresa Ward, who was charged with twelve counts of murder and three charges of causing an explosion likely to endanger life or property).

<sup>26</sup> See *id.* at 67 (stating that material evidence should have been made available to the defense).

<sup>27</sup> R v. Brown, (1994) 1 W.L.R. 1599, 1606 (H.L.) (Steyn, L.J.).

<sup>28</sup> Paul Hill, Gerry Conlon, Patrick Armstrong and Carole Richardson.

<sup>29</sup> *Unreliability of Police Evidence Quashes Convictions*, THE TIMES (London), Oct. 20, 1989, at Issue 63530.

<sup>30</sup> Annie Maguire, Patrick Maguire, Patrick Maguire, Jr., Vincent Maguire, Sean Smyth, Guiseppe Conlon, Patrick O’Neill.

Conlon, had died in prison in 1980) when it was found that additional evidence had been withheld from the defense and that the key forensic evidence was wholly inconclusive.<sup>31</sup> The Birmingham Six had their convictions finally overturned in 1991.<sup>32</sup> In addition, the nefarious activities of Birmingham's West Midlands Serious Crime Squad led to the wrongful conviction of over twenty people.<sup>33</sup> The squad fabricated evidence and allegedly tortured suspects in order to obtain confessions.<sup>34</sup> The scale of police and prosecution wrongdoing, together with the gravity of the miscarriages of justice in which those convicted had spent many years in prison, led to something of a crisis in public confidence.<sup>35</sup> On the day that the Birmingham Six were released, the government announced the establishment of the Royal Commission on Criminal Justice (RCCJ). The Commission was asked to "examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources. . . ."<sup>36</sup> It is significant that the Commission was asked to consider the conviction of the guilty as well as, and indeed before, the acquittal

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<sup>31</sup> R v. Maguire, (1992) 94 Crim. App. R. 133 (Eng.).

<sup>32</sup> See R v. McIlkenny, (1991) 93 Crim. App. R 287 (Eng.); see also BELLONI & HODGSON, *supra* note 21.

<sup>33</sup> See Ian Burrell & Jason Bennetto, *Police Unit to Blame for "Dozens More Injustice": Miscarriages of Justice Emerge 10 Years After Break-Up of Group that Tortured Suspects*, THE INDEPENDENT (London), Nov. 11, 1999, at 8 (reporting that iniquitous behavior of West Midlands Serious Crime Squad could be responsible for dozens of wrongful convictions).

<sup>34</sup> See TIM KAYE, UNSAFE AND UNSATISFACTORY? REPORT OF THE INDEPENDENT INQUIRY INTO THE WORKING PRACTICES OF THE WEST MIDLANDS POLICE SERIOUS CRIME SQUAD 50-56 (1991) (reporting on the allegations of the Serious Crime Squad using asphyxiation in order to force confessions, as well as other forms of physical coercion in order to gain confessions); see also Burrell & Bennetto, *supra* note 33.

<sup>35</sup> See generally MIKE MCCONVILLE & LEE BRIDGES, CRIMINAL JUSTICE IN CRISIS (1994) (analyzing how the English criminal justice system has been shaken by miscarriages of justice); see also CLIVE WALKER & KEIR STARMER, MISCARRIAGES OF JUSTICE (1999) (examining the various steps within the criminal justice system which have resulted in the conviction of the innocent and suggesting remedies as to how miscarriages of justice might be avoided in the future).

<sup>36</sup> ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT, 1993, Cm. 2263, at i [hereinafter RCCJ REPORT].

of the innocent. As I have argued elsewhere,<sup>37</sup> the RCCJ's error of judgment lies in treating these two objectives as being of equal importance and as being inextricably bound together. Ensuring that only the guilty are convicted necessitates the acquittal of the innocent; but acquittal of the innocent does not require the conviction of the guilty. In this way, the RCCJ redefined miscarriage of justice to include wrongful acquittals, and efficiency (rather than justice) became a clear system goal.

The miscarriages of justice that gave rise to the establishment of the RCCJ were characterized by malpractice; in particular, instances where police, prosecution and their experts did not disclose evidence that proved key to the defense's case. In this sense, the police and prosecution were revealed to be excessively adversarial in the construction and presentation of their case, while preventing the defense from playing its properly adversarial role. However, the recommendations of the RCCJ lessened the disclosure requirements for the prosecution and for the first time imposed a burden of disclosure on the defense. Failure to comply with disclosure requirements could result in adverse inferences being drawn at trial.<sup>38</sup> Although the earlier judgments of the Court of Appeal recognized the inherent imbalance within the British adversarial procedure and sought to strengthen the principle of equality of arms, the Commission's recommendations undercut this with one stroke. Beyond the evidence of the prosecution's case against the accused, there was no automatic additional disclosure requirement. Concerned about the burden that disclosure of "unused material" was said to create in practice, the Commission proposed that the prosecution need only disclose material that the defense could establish as relevant to its case. This, the Commission said, would streamline the process and prevent the defense from using "ambush defenses."<sup>39</sup> In fact, the resulting process for primary and secondary disclosure was far more complex than existing arrangements simply allowing the defense to look through unused material and ambush defenses

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<sup>37</sup> Jacqueline Hodgson, *Adding Injury to Injustice: The Suspect at the Police Station*, 21 J. L. SOC'Y 85, 86 (1994).

<sup>38</sup> See RCCJ REPORT, *supra* note 36, at 95-100 (recommending pre-trial procedures in the Crown Court that lessen the prosecution disclosure obligations).

<sup>39</sup> BELLONI & HODGSON, *supra* note 21, at 132.

were rare.<sup>40</sup>

Second, the Commission recommended that the Court be permitted to draw adverse inferences at trial from the suspect's silence in police interrogation and in the courtroom.<sup>41</sup> Again, this proposal ran counter to the empirical studies commissioned by the RCCJ which found that silence was exercised only rarely by suspects<sup>42</sup> and, when it was, it was often not maintained and had little or no effect on the investigation.<sup>43</sup>

Third, the Commission put forward proposals to encourage defendants to plead guilty at the earliest possible moment—the earlier the admission, the greater the sentence discount.<sup>44</sup> Once again, this measure was designed to reduce the costly and time-consuming opportunity for adversarial conflict.<sup>45</sup> Plea-bargaining had long been a feature of criminal justice,<sup>46</sup> but this recommendation and subsequent legislation<sup>47</sup> placed it on formal footing. The RCCJ characterized late plea changes, or “cracked trials,” as a feature of defendants' behavior.<sup>48</sup> However, research suggests that it is the defense counsel who presses for a guilty plea (often contrary to the defendant's wishes)<sup>49</sup> and that it is the

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<sup>40</sup> *Id.* at 130-41 (discussing the complexities of primary and secondary disclosures and how the new provisions represent a move away from the due process protections of the public courtroom towards a process that maximizes the opportunities for the prosecution to obtain knowledge helpful to its case).

<sup>41</sup> RCCJ REPORT, *supra* note 36, at ch.4 (focusing on whether a defendant's silence during questioning should allow the prosecutor and judge to invite the jury to draw an adverse inference and ultimately recommending that adverse inferences be permitted).

<sup>42</sup> MIKE McCONVILLE & JACQUELINE HODGSON, CUSTODIAL LEGAL ADVICE AND THE RIGHT TO SILENCE 173-89 (Royal Comm'n on Criminal Justice, Research Study No. 16, 1993).

<sup>43</sup> ROGER LENG, THE RIGHT TO SILENCE IN POLICE INTERROGATION: A STUDY OF SOME OF THE ISSUES UNDERLYING THE DEBATE 17 (1993) (finding that “[o]f 848 cases in which interviews took place, the right to silence was exercised in 38 cases (4.5 percent),” resulting in 16 convictions).

<sup>44</sup> RCCJ REPORT, *supra* note 36, at 110-14.

<sup>45</sup> *Id.* at 110 (stating that “[t]he primary reason for the sentence discount is to encourage defendants who know themselves to be guilty to plead accordingly and so enable the resources which would be expended in a contested case to be saved.”).

<sup>46</sup> *See, e.g.*, JOHN BALDWIN & MICHAEL McCONVILLE, NEGOTIATED JUSTICE (1977).

<sup>47</sup> Criminal Justice and Public Order Act of 1994, ch.33, § 48 (U.K.).

<sup>48</sup> RCCJ REPORT, *supra* note 36, at 110-14.

<sup>49</sup> MIKE McCONVILLE, JACQUELINE HODGSON, LEE BRIDGES & ANITA PAVLOVIC,

prosecution who benefits from the conversion of a weak case into a guilty plea.<sup>50</sup> The Commission acknowledged that “it would be naïve to suppose that innocent persons never plead guilty because of the prospect of the sentence discount,”<sup>51</sup> but “[a]gainst the risk . . . must be weighed the benefits to the system and to defendants of encouraging those who are in fact guilty to plead guilty.”<sup>52</sup>

These recommendations represented a significant shift away from adversarial values. Rather than resting the burden of proof squarely on the prosecution, the accused is co-opted into participating in the construction of the case against her and promoting the wider system goal of efficiency—in some instances, with the penalty of adverse inference for non-compliance.<sup>53</sup> The recommendations were taken up enthusiastically and legislated shortly after the Commission’s 1993 report: The Criminal Justice and Public Order Act 1994<sup>54</sup> attenuated the right to silence and introduced sentence discounts for guilty pleas; and the Criminal

STANDING ACCUSED 189-98 (1994).

<sup>50</sup> Michael Zander & Paul Henderson, Crown Court Study 116 (Royal Comm’n on Criminal Justice, Research Study No. 19, 1993) (reporting that of 483 “cracked trials,” prosecutors believed the defendant had a “Good” chance and a “Fairly good” chance of acquittal in 8% and 18% of the cases, respectively). The authors concluded:

If these figures are ‘grossed up’ on an annual basis it would mean that there are over 600 Crown Court defendants a year pleading guilty when the CPS believe they have ‘Good’ chances of an acquittal and another 2,000 or so who plead guilty when their chances of an acquittal are deemed ‘Fairly good.’

*Id.* at 157.

<sup>51</sup> RCCJ REPORT, *supra* note 36, at 110.

<sup>52</sup> *Id.* at 111.

<sup>53</sup> See, e.g., *id.* at 221-23. One commission member, Michael Zander, wrote a strongly worded Note of Dissent from the defense disclosure recommendation:

The most important objection to defence disclosure is that it is contrary to principle for the defendant to be made to respond to the prosecution’s case until it has been presented at the trial. The defendant should be required to respond to the case the prosecution makes, not to the case it says it is going to make. They are often significantly different. The fundamental issue at stake is that the burden of proof lies throughout on the prosecution . . . [I]t is wrong to require the defendant to be helpful by giving advance notice of his defence and to penalise him by adverse comment if he fails to do so.

*Id.* at 221.

<sup>54</sup> Criminal Justice and Public Order Act, 1994, ch.33.

Procedures and Investigation Act 1996<sup>55</sup> introduced the new defense disclosure regime. Were recommendations such as those on disclosure and silence evidence of a shift to a more inquisitorial approach? The Commission rejected a wholesale reform of this nature, but it did make a number of proposals that explicitly sought to move in an inquisitorial direction.<sup>56</sup>

Inquisitorialism is sometimes thought of as adopting a more “cards on the table” approach and these provisions certainly involve the defense disclosing more of its case. But in many ways this is a misunderstanding. Although inquisitorial procedure adopts a more centralized pre-trial inquiry, resulting in the inclusion in the dossier of evidence information that might be helpful to the defense, this is a long way from the provisions now in place in England and Wales.<sup>57</sup> Modern inquisitorial-type procedures, such as those in France, neither require defense disclosure and participation, nor do they attach penalties for the defense’s failure to disclose evidence. Furthermore, while England and Wales may require the defense to put its cards on the table, the same does not apply to the CPS who face no penalty for failing to disclose evidence to the defense, despite the fact that this is a far greater threat to justice than defense non-disclosure. What is perhaps appealing about a more inquisitorial procedure is its perceived efficiency. While adversarialism favors lengthy and therefore expensive trials, with opportunities to challenge live evidence, inquisitorialism avoids the duplication of evidence by allowing the admission of written evidence gathered during the pre-trial investigation. It must be noted, however, that the credibility attaching to the pre-trial investigation depends, in theory at least, upon the judicial nature of that inquiry. “From this standpoint, the inquisitorial system is cheaper and quicker as it solves the issues of guilt with a single investigative effort.”<sup>58</sup> As

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<sup>55</sup> Criminal Procedures and Investigation Act, 1996, ch.25.

<sup>56</sup> RCCJ REPORT, *supra* note 36, at 3.

<sup>57</sup> It is also interesting to note that many inquisitorially rooted criminal procedural systems, such as the French system, have adopted measures that are perceived as being more accusatorial. *See, e.g.*, the discussion of the growing defense role in France and its negative reception in HODGSON, *supra* note 7, 27-29.

<sup>58</sup> Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy*, 4 WASH. U. GLOBAL STUD. L. REV. 567, 578 (2005).

we will see below, criminal justice reforms have sought to dissuade the accused from exercising her right to trial, but have also attempted to shift the weight of the proceedings and of case disposition to the pre-trial investigation.

#### IV. The Defense Under Attack

It is impossible to imagine adversarial procedure without a defense role. It is an integral part of adversarial/accusatorial procedure and an essential element of its structure and functioning. As we have seen, the adversarial model is comprised of two opposing and (theoretically) equal sides: accuser and accused, prosecution and defense. Without the defense, there would be only half a case. The practice of criminal justice is, of course, different from the theory. Nonetheless, those responsible for legal procedural reform must be mindful of the wider tenets that underpin the criminal justice process and also of the repercussions that reforming one part of the criminal process might have upon the functioning of the process as a whole. Legislative reform over the last twenty years appears to have ignored the theoretical framework of the criminal justice system in England and Wales. Instead, we see a range of changes that undercut the defense role<sup>59</sup> and introduce a form of ill-conceived hybrid criminal procedure, in which managerialist efficiency is the primary driver. Caseloads are rising, budgets are under increasing pressure and coupled with the huge growth in criminalization over this period, the system simply cannot cope. The result is more prisons, more diversion away from prosecution, more summary justice dispensed by prosecutors, police and quasi-police, and more system penalties for non-co-operation. As other countries, such as many Latin American jurisdictions,<sup>60</sup> have adopted adversarial criminal

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<sup>59</sup> See generally Ed Cape, *The Rise (and Fall?) of a Criminal Defence Profession*, 2004 CRIM. L. R. 401.

<sup>60</sup> See, e.g., Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 631 (2007) (explaining that during the last fifteen years, fourteen Latin American countries and a number of Latin American province and state jurisdictions replaced their inquisitorial codes with accusatorial ones). See also James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 MICH. J. INT'L L. 501, 520 (2008) (noting that in many Latin American countries such as Chile, the adoption of criminal procedure reform and the move from the inquisitorial to the adversarial system of criminal

procedure as part of a political democratic shift, what is signified by Britain's move away from adversarialism?

The weight of case disposition is shifting ever more away from trial and the impact of this change is further compounded by the restrictions placed on the conduct of the defense case. At the outset of the criminal investigation, the suspect's response during police interrogation is now more important than ever: What the suspect says can be put to her in evidence and even her silence may count as evidence under Section 34 of the Criminal Justice and Public Order Act, which allows the jury to draw adverse inferences in some instances where an accused has failed to disclose facts.<sup>61</sup> Legal advice is therefore crucial, because this part of the investigation is not simply preliminary but may have a determining evidential effect at the trial of the accused.<sup>62</sup> In this way, we can say that evidential significance attaches to what the suspect says and to what she does not say. As Lord Justice Laws described it in *Regina v. Howell*: "The police interview and the trial are to be seen as part of a continuous process in which the suspect is engaged from the beginning."<sup>63</sup> This is also true of the defendant's testimony at court: Should she decide not to take the stand, adverse inferences may be drawn from this too. The accused is systematically restrained from behaving in an adversarial way, with penalties attaching to the exercise of the right to put the prosecution to proof. On the other hand, the conduct of the investigation is also more inquisitorial in the sense of a single party inquiry, with evidential significance attaching to the suspect's responses before she has had full disclosure of the case against her. But significantly, unlike inquisitorial-based procedures, the investigation is conducted by an unsupervised police service, not by a judge.

The demands of managerial efficiency have led to a move away from oral and public procedures to the agreement of

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procedure is often part of the return to democracy).

<sup>61</sup> Criminal Justice and Public Order Act of 1994, ch.33, § 34.

<sup>62</sup> Remaining silent on the advice of counsel is not considered a good reason by the Court of Appeal and so does not avoid adverse inferences. *See R v. Essa* [2009] EWCA (Crim) 43 (Eng.).

<sup>63</sup> *Regina v. Howell*, [2003] EWCA (Crim) 1, [23] (Eng.).

evidence behind closed doors and the avoidance of conflict at all costs. This is not only a feature of adversarial procedure in flux—the same pressures can be seen across Europe. Countries such as France have introduced a form of guilty plea and sentence bargaining<sup>64</sup> as well as expedited and abbreviated hearings for an increasing range of offenses.<sup>65</sup>

## V. The Rise of the Public Prosecutor<sup>66</sup>

As noted above, the CPS came into being in 1986 as the first public prosecution service in England and Wales.<sup>67</sup> The CPS was established to provide an independent legal review of cases in order to determine whether to bring a case to prosecution. The “Philips principle” as it came to be known,<sup>68</sup> stood for the idea that the functions of investigation and prosecution should be kept separate. The new system was “structured . . . to recognize the importance of independent legal expertise in the decision to prosecute and to make the conduct of the prosecution the responsibility of someone who is both legally qualified and is not

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<sup>64</sup> As the ultimate expression of party control of the case, guilty pleas and sentence bargaining are seen very much as adversarial features and were criticized in France for this reason. *See, e.g.*, HODGSON, *supra* note 7, at 60-61. *See also* Illuminati, *supra* note 58 (describing similar changes in Italian criminal procedure established to counter the increased time and money required to implement a new fully adversarial process).

<sup>65</sup> Interestingly, there are counter pressures from the European Court of Human Rights to introduce more adversarial safeguards under Article 6 of the European Convention on Human Rights (ECHR), concerning the right to a fair trial. *See* HODGSON, *supra* note 7, at 32-38 for the impact on French procedure; *see also* Pishchalnikov v. Russia, App. No. 7025/04, Eur. Ct. H.R. (2009) (unpublished decision), available at [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case-Law” hyperlink to “HUDOC” database; select “HUDOC” icon to search database for Application Number 7025/04) (observing the need for custodial legal advice).

<sup>66</sup> Portions of this section are taken from my presentation at an international seminar on Latin American criminal procedure systems. *See generally* Jacqueline Hodgson, School of Law, U. Warwick, Presented to the International Seminar “Best Practices in Latin America’s New Criminal Procedure Systems”: Recent Reforms in Pre-Trial Procedures in England and Wales (May 22-25, 2007), available at [http://www.cejamerica.org/doc/eventos/Recentreformsinpre-trialprocedureinEngland\\_doc.pdf](http://www.cejamerica.org/doc/eventos/Recentreformsinpre-trialprocedureinEngland_doc.pdf) (last visited Jan. 26, 2010).

<sup>67</sup> *See supra* notes 18-20 and accompanying text.

<sup>68</sup> The recommendations of the Royal Commission on Criminal Procedure, chaired by Sir Cyril Philips, led to the Prosecution of Offences Act of 1985, which established the CPS. *See* Prosecution of Offences Act 1985, ch.23.

identified with the investigative process.”<sup>69</sup> This fell short of establishing a public prosecution service along the ‘ministry of justice’ model seen in other European countries. In contrast to systems rooted in the inquisitorial tradition, such as those in France or the Netherlands, the prosecutor was not authorized to oversee or to direct the police investigation; her role was limited to the post-investigation and post-charge periods.<sup>70</sup> It should be noted that the CPS shares the same professional status as the defense lawyer; she has no judicial training or status in the way enjoyed by the *procureur* in France and by prosecutors in other European countries.<sup>71</sup> This is significant for the role that is assigned to her, as it is the judicial or quasi-judicial status of the *procureur* that defines her authority in overseeing the investigation. This functional separation was again considered by the 1993 RCCJ and was again affirmed as the key feature enabling the CPS to independently exercise its judgment.<sup>72</sup>

However, the development of police and CPS roles in practice have attracted two main strands of criticism. First, a number of empirical studies demonstrated the extent to which the CPS was both functionally and structurally dependent upon the police.<sup>73</sup> The decision to prosecute was based upon a file constructed by the police, severely limiting the extent to which the prosecutor could go beyond the police investigation of the case and thus making it unlikely that she would come to a different conclusion unless there were obvious evidential deficiencies. In addition, the police retained the power of initial charge and therefore functioned as gatekeepers for bringing a prosecution. This meant that if the police thought there was sufficient evidence, they would charge the suspect and pass the case file to the CPS for review; if the police considered that there was insufficient evidence, they would

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<sup>69</sup> RCCP REPORT, *supra* note 20, ¶ 7.3.

<sup>70</sup> *Id.* ¶ 7.7.

<sup>71</sup> The *procureur* is the public prosecutor in France, but she also enjoys judicial status as a *magistrat*, together with the other two branches of the judiciary, the trial judge and the investigating judge (*juge d'instruction*). The defense lawyer belongs to a different profession as an *avocat*. See, e.g., HODGSON, *supra* note 7, at 65.

<sup>72</sup> RCCJ REPORT, *supra* note 36, at 69.

<sup>73</sup> See, e.g., MIKE MCCONVILLE, ANDREW SANDERS AND ROGER LENG, THE CASE FOR THE PROSECUTION 141-47 (1991).

release the suspect and the CPS would have no knowledge of the case and no opportunity to review it.

The second criticism centers on the high rates of discontinued (or no further action (“NFA”)) cases, as well as of judge-ordered and judge-directed acquittals in the Crown Court—what the 1997 Narey Report called the “dislocation” between the police and CPS roles.<sup>74</sup> The Narey Report considered the two-part post-investigative process in which the police prepared the file and the CPS reviewed it to be “inevitably . . . combative and time-consuming.”<sup>75</sup> Narey proposed a ‘co-location’ in which CPS lawyers were placed in police stations to advise the police and to deal with straightforward guilty pleas on the following day.<sup>76</sup> The Glidewell Review of the CPS the following year took this idea of building complementary rather than combative roles further, establishing Criminal Justice Units (CJUs) based at police stations to strengthen the collaboration of police and CPS.<sup>77</sup>

Thus we have a concern to ensure that the CPS plays a role sufficiently independent of, but not overly distanced from, that of the police investigation. The response has been to bring the police and CPS roles closer together, placing Crown Prosecutors in police stations to determine charge in all but the most minor cases (and so avoid the problem of over-charging and the subsequent discontinuation of the case),<sup>78</sup> to advise on evidential requirements and pre-charge procedures, and to ensure that cases are better prepared for trial. The objective is for the CPS to inject some

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<sup>74</sup> HOME OFFICE, REVIEW OF DELAY IN THE CRIMINAL JUSTICE SYSTEM, REPORT, 1997, ch.3.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See GLIDEWELL, *supra* note 19, at 127-34.

<sup>78</sup> See HOUSE OF COMMONS JUSTICE COMM., THE CROWN PROSECUTION SERVICE: GATEKEEPER OF THE CRIMINAL JUSTICE SYSTEM, REPORT, 2008-09, H.C. 186, at 5, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/186/186.pdf> (last visited Jan. 26, 2010) (finding that it is the prosecutor’s duty to limit minor cases “both to ensure that the time of the court is not wasted when there is little prospect of conviction and that innocent people are not unnecessarily put through the strain of a court process.”); Press Release, The Crown Prosecution Service, Charging Scheme Already Making a Significant Contribution to Narrowing the Justice Gap (June 28, 2004) available at [http://www.cps.gov.uk/news/press\\_releases/129\\_04/](http://www.cps.gov.uk/news/press_releases/129_04/) (discussing the benefits of the CPS making charging decisions in all but the most minor cases).

legal guidance into the process of case investigation and preparation, similar to the requirement for the French *procureur* to oversee the detention and interrogation of suspects held in police custody.<sup>79</sup> Many aspects of counter-terrorism law and procedure are exceptional to ordinary criminal justice measures and, interestingly, this also appears to be the case in recent developments in the prosecution role. In counter-terrorism investigations, there is a formally established police-CPS relationship. The Counter Terrorism Command branch of the Metropolitan police and the three regional Police Counter-Terrorism Units work with a specialist counter-terrorism division within the CPS, consisting of some twenty lawyers.<sup>80</sup> Unlike ordinary cases, the parties are able to work together during the investigation and it is noteworthy that the CPS, not the police, will ask for an extension of pre-charge detention beyond fourteen days in terrorism cases.<sup>81</sup> While bringing the police and prosecution roles closer together, each retains an autonomous role and so these developments stop short of altering the functional separation between the police and CPS. The increased and earlier contact between CPS and officers means that there is undoubtedly greater scope for influencing the course of all types of criminal investigation, and closer contact may even result in the CPS playing a pedagogic role vis-à-vis the police. However, the English/Welsh prosecutor, unlike her French counterpart, still lacks any formal authority over the police, who remain legally

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<sup>79</sup> Jacqueline Hodgson, *The Police, the Prosecutor and the juge d'instruction: Judicial Supervision in France, Theory and Practice*, 41 BRIT. J. OF CRIMINOLOGY, 342-61 (2001).

<sup>80</sup> See HM CROWN PROSECUTION SERVICE INSPECTORATE, REPORT OF THE INSPECTION OF THE COUNTER TERRORISM DIVISION OF CPS HEADQUARTERS 2 (Apr. 2009), *available* *at* [http://www.hmcp.si.gov.uk/documents/services/reports/LCT/CTD\\_Apr09\\_rpt.pdf](http://www.hmcp.si.gov.uk/documents/services/reports/LCT/CTD_Apr09_rpt.pdf).

<sup>81</sup> For information on the CPS' ability to request a fourteen day extension to detention *see* Terrorism Act, 2006, ch. 11, § 25; THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07 H.L. PAPER 157, H.C. 394, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm. 7215, at 2, *available at* <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf> (last visited Jan. 24, 2010).

autonomous in the conduct of the investigation.<sup>82</sup> In practice, it may be that there is little difference: If the prosecutor refuses to charge a suspect because there is insufficient evidence, the effect will likely be that the police will try to obtain that evidence just as if they had been directed to do so.

The danger in this shift is that as the CPS (whose professional training and ideology is not that of a judge) works more closely with officers, it will come to identify increasingly with the police perspective on a case and sacrifice the independence of review that underpinned its very establishment.<sup>83</sup> The Attorney General explained when the statutory charging scheme was launched: “It will bring police and prosecutors together as never before.”<sup>84</sup> Based at the station, working alongside the police, will the Crown Prosecutors be able to resist becoming enveloped by the pervasive “canteen culture” that so many researchers have identified as characterizing the police occupation?<sup>85</sup> Will they become increasingly conviction-oriented as they lose some of their independence and begin to identify with the police?

It is a fine balance—allowing for sufficient involvement to have a positive influence on the investigation and related evidence gathering, with sufficient professional distance to ensure an independent review of the case in determining whether to bring a prosecution.<sup>86</sup> The CPS claims that the scheme has led to fewer cases being discontinued and higher numbers of defendants pleading guilty,<sup>87</sup> though statistics show that discontinuances have

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<sup>82</sup> See Hodgson, *supra* note 66.

<sup>83</sup> Jacqueline Hodgson, *Recent Reforms in Pre-Trial Procedure in England and Wales*, Warwick Sch. of Law, Working Paper No. 2009/02, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1494391](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1494391).

<sup>84</sup> CROWN PROSECUTION SERV., EVALUATION OF STATUTORY CHARGING (2006).

<sup>85</sup> See, e.g., DAVID DIXON, *LAW IN POLICING* (1997); ROBERT REINER, *THE POLITICS OF THE POLICE* (2000).

<sup>86</sup> See HOUSE OF COMMONS JUSTICE COMM., *supra* note 76, at 15 (noting the issue of maintaining the independence of the CPS when working so closely with the police).

<sup>87</sup> Shortly after the program was initiated, statistics indicated that “the overall discontinuance rate in magistrates’ courts has reduced to 16% from a baseline of 36% before Charging was introduced. This represents a 56% improvement overall. The guilty plea rate has risen to 68% from a baseline of 40% - a 70% improvement . . .” See Press Release, The Crown Prosecution Service, First Phase of Statutory Charging Goes Live a Year Ahead of Schedule (Feb. 4, 2006), available at

been falling by at least a percentage point per year, since 2000-2001, five years before the new charging arrangements were put in place.<sup>88</sup>

However, the story does not end there. In addition to the statutory charging procedure, and despite the non-judicial training or status of the CPS, recent reforms have gone further still in allocating to the CPS a quasi-judicial function—not in overseeing investigations, but by empowering prosecutors to dispose of cases before they reach court. The police have long had the power to caution suspects rather than charging them, but this applies to cases that would not otherwise be prosecuted. The government set out to reduce the load of the magistrates' court (where some 95% of cases are dealt with) by 25%,<sup>89</sup> which meant dealing alternatively with cases that would otherwise be prosecuted.<sup>90</sup> To this end, the CPS may caution an adult offender who has admitted her guilt and require her to carry out certain conditions; failure to comply with these conditions will result in prosecution and the caution being rescinded.<sup>91</sup> The government has announced its intention to extend this scheme to juvenile offenders.<sup>92</sup> Although the conditions were originally intended to rehabilitate the offender or ensure reparation for the offense, they may now be attached for explicitly punitive purposes,<sup>93</sup> e.g., twenty hours of unpaid community work or the payment of a financial penalty of up to

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[http://www.cps.gov.uk/news/press\\_releases/118\\_06/](http://www.cps.gov.uk/news/press_releases/118_06/).

<sup>88</sup> See The Crown Prosecution Service, *Narrowing the Justice Gap* 8 (2002), available at <http://www.cps.gov.uk/Publications/docs/justicegap.pdf> (noting that the number of charges brought has declined sharply since March 2000).

<sup>89</sup> NAT'L AUDIT OFFICE, CROWN PROSECUTION SERV., *EFFECTIVE USE OF MAGISTRATES' COURTS HEARINGS, 2005-06*, HC 798, at 1, available at [http://www.nao.org.uk/publications/0506/crown\\_prosecution\\_service\\_eff.aspx](http://www.nao.org.uk/publications/0506/crown_prosecution_service_eff.aspx) (last visited Jan. 26, 2010) (noting the goal of reducing the magistrates' work load).

<sup>90</sup> HOME OFFICE, *REBALANCING THE CRIMINAL JUSTICE SYSTEM IN FAVOUR OF THE LAW ABIDING MAJORITY* ¶ 4.24 (2006).

<sup>91</sup> See HOUSE OF COMMONS JUSTICE COMM., *supra* note 76, at 25-26 (discussing conditional cautions).

<sup>92</sup> See CROWN PROSECUTION SERV., *IMPROVING PERFORMANCE IN THE MAGISTRATES' COURTS, ANN. REP. AND RESOURCE ACCOUNTS, 2008-09*, H.C., available at [http://www.cps.gov.uk/publications/reports/2008/performance\\_magistrates\\_court.html](http://www.cps.gov.uk/publications/reports/2008/performance_magistrates_court.html) (last visited Jan. 26, 2010) (discussing applying this cautioning scheme to youths).

<sup>93</sup> Police and Criminal Justice Act, 2006, § 17(2).

£250. Arguably, this gives the CPS the power to impose a form of sentence upon the suspect, without any of the proper safeguards that we associate with a fair trial. Although the accused will know details of the case against her and have access to defense counsel, one cannot help remarking that this fusion of prosecution and trial roles resembles something of the pure inquisitorial model in which a single figure is responsible for investigation, prosecution, and judgment. Serious reservations were expressed in Parliamentary debate. Baroness Linklater objected to:

[T]his extension of administrative justice to punishments imposed by the police and prosecutors rather than the courts because we believe in a principle of justice that sentencing and punishment should be imposed by an entirely independent tribunal and not a biased prosecutorial authority. There is a real risk that these proposals could be seen as allowing the police and the CPS to act as investigators, prosecutors and judges. In addition, there is a further risk that the powers could be used to deal with high-level offending. My concern is how the proposals could affect younger people or those with special needs, who are very unlikely to understand or fully appreciate the implications of what is being offered and will have little idea of where to go for legal advice. Such people are, by definition, vulnerable, and a fear of prosecution and, in particular, the idea of having to go to court is enough for them to agree to anything, whether they are guilty of anything or not.<sup>94</sup>

The CPS role has evolved from that originally established over twenty years ago. For those most familiar with an inquisitorially rooted criminal procedure, these changes may seem a logical and sensible way of encouraging better investigations. But it should be remembered that this is different from the model of prosecutorial supervision, in that it is not backed up by a hierarchy of police accountability to the prosecutor, but relies instead upon good working practices towards a common goal.<sup>95</sup> Neither does

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<sup>94</sup> 685 PARL. DEB., H.L. (5th ser.) (2006) 128, available at <http://www.publications.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds06/text/61010-0003.htm> (last visited Jan. 26, 2010).

<sup>95</sup> See HOUSE OF COMMONS JUSTICE COMM., *supra* note 76, at 14 (describing the

the prosecutor have any judicial or vocational training in her role—she is simply a lawyer who has chosen a career as a prosecutor. In some ways, this may be a good thing. In France, while the judicial status of the *procureur* is different from that of the *juge d'instruction* and the trial judge,<sup>96</sup> she is still considered the judicial supervisor of the police investigation in the ninety-five percent of cases with which she deals.<sup>97</sup> It is this supposed judicial supervision of the investigation that is held to protect the rights of the suspect and to justify the diminished role of the defense lawyer, who may see her client for thirty minutes and who is not permitted to be present during the police interrogation of the suspect. The extent to which prosecutorial supervision can regulate effectively the police inquiry is doubtful (certainly within European jurisdictions), and so it may not serve us well to go down that route, given the risk to prosecutorial independence and the possible attenuation of defense rights that might also result.

## VI. Prosecutorial and Judicial Supervision of Investigations<sup>98</sup>

It is instructive to consider how systems of investigative supervision work in practice when evaluating changes in this direction in the United Kingdom. The appeal in countries such as England and Wales is the belief that a centralized inquiry conducted by a neutral judicial figure will ensure that all relevant information is channeled into the decision-making process,

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relationship between the police and the CPS).

<sup>96</sup> All three are *magistrats*, but the prosecutor is part of the standing judiciary, accountable to and under the orders of the Minister of Justice; the trial judge and *juge d'instruction* together make up the sitting judiciary, with greater political independence. See HODGSON, *supra* note 7, at 65-85.

<sup>97</sup> This is likely to be 100 percent because the Léger Commission has recommended that the prosecutor supervise all investigations. See RAPPORT DU COMITÉ DE RÉFLEXION SUR LA JUSTICE PÉNALE (2009), available at [http://www.justice.gouv.fr/art\\_pix/1\\_sg\\_rapport\\_leger2\\_20090901.pdf](http://www.justice.gouv.fr/art_pix/1_sg_rapport_leger2_20090901.pdf) (last visited Jan. 26, 2010).

<sup>98</sup> Portions of this section are taken from my presentation at an international seminar on Latin American criminal procedure systems, as well as my recent report for the Home Office. See generally Hodgson, *supra* note 66; Jacqueline Hodgson, The Investigation and Prosecution of Terrorist Suspects in France (Nov. 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1321868](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321868) [hereinafter Report for the Home Office].

avoiding the police tunnel vision that characterized so many miscarriages of justice and which has been identified by empirical researchers as a feature of police behavior.<sup>99</sup> Once a suspect is caught up in the revolving door of police suspicion, it becomes difficult to escape, and evidence that casts doubt on this initial view tends to be disregarded. It is assumed that the involvement of a judge with vocational training, whose professional ideology centers on the neutral values of truth and justice, will avoid the excessive conviction orientation of the more partisan police and prosecution.

Like the CPS, the *procureur* in France is responsible for reviewing the evidence and determining whether or not to pursue a prosecution.<sup>100</sup> But unlike the CPS, the *procureur* exercises a supervisory function over the police investigation. As a *magistrat*, she plays a more neutral and wide ranging role than that of a simple (more partisan) prosecutor. She is a judicial officer, responsible for directing the police investigation and overseeing the detention of suspects in police custody, including the protection of their due process rights.<sup>101</sup> My own empirical research into the investigation and prosecution of crime in France demonstrates that despite her judicial status, the French *procureur* is very much a prosecutor and comes to identify with the objectives of the police.<sup>102</sup> Seeking the “truth” in a case frequently means seeking a confession. In part, this is a result of the interdependence of the police and *procureur*: The *procureur* depends upon the police in carrying out her responsibility to investigate and prosecute crime and the police depend upon the *procureur* in order

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<sup>99</sup> See MIKE McCONVILLE, ANDREW SANDERS & ROGER LENG, CASE FOR THE PROSECUTION (1991).

<sup>100</sup> See Jacqueline Hodgson, *The Detention and Interrogation of Suspects Detained in Police Custody in France: A Comparative Account*, 1 EUR. J. CRIM. 163, 171 (2004) (discussing the duties of the *procureur*).

<sup>101</sup> The broad nature of her function is underlined by her representation of the wider public interest in civil as well as criminal matters. A *procureur* in Area D explained:

“I would act in society’s interest if, for example, a large organization was going into liquidation; I would consider the position of the employees. Or, if there was a take-over bid, I would scrutinize the offers made. Or, if a company wanted to replace all of their employees with machines.”

HODGSON, *supra* note 7, at 75.

<sup>102</sup> See HODGSON, *supra* note 7; see generally Hodgson, *supra* note 100.

to carry out their inquiry. The *procureur* needs a coherent file that she can prosecute in court; the police need legal sanction to conduct their investigation. The *procureur* is required to oversee the period of police custody, but perhaps unsurprisingly given this mutual dependence, this is a working relationship built upon trust, not conflict. The result is a form of oversight that is conducted from the prosecutor's own office and even announces any visit to the police station beforehand. It is largely bureaucratic, paper based, and retrospective. It is concerned with the output and the form, rather than the process, of the criminal investigation.<sup>103</sup> There is almost no pre-trial defense role in these cases. The lawyer may consult with her client for thirty minutes in private prior to the interrogation,<sup>104</sup> but may not be present during police questioning, which is neither tape recorded nor conducted under caution.<sup>105</sup> This is of greater significance with the increasing number of cases dealt with by the rapid trial procedure (*comparution immédiate*) that takes place immediately following police detention, with no real time for defense preparation.<sup>106</sup> There are rarely any witnesses, and the court places great emphasis on the (police constructed) prosecution dossier of evidence, which is seen as the product of a judicially supervised inquiry.<sup>107</sup>

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<sup>103</sup> HODGSON, *supra* note 7, at 151-52; *see also* Hodgson, *supra* note 100, at 179-85 (noting that "in depending upon the police to conduct the investigation for which she is responsible, the interests of the procureur are inextricably linked with those of the police").

<sup>104</sup> C. PÉN. arts. 63-64, available at [http://www.legifrance.gouv.fr/html/codes\\_traduits/cpptextA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm) (last visited Jan. 26, 2010).

<sup>105</sup> Report for the Home Office, *supra* note 94, at 20. *See also* Hodgson, *supra* note 96, at n.52 (discussing limited defence rights); Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform*, 51 INT'L & COMP. L. Q. 781, 813 (2002) (finding that "in a majority of cases, [the lawyer] is neither expected nor allowed to play any significant role in the pre-trial process").

<sup>106</sup> *See* HODGSON, *supra* note 7, at 130-31; Hodgson, *supra* note 105, at 795 n.62. *See also* C. PÉN. Art. 395 (official translation available on the website of the French government at [http://www.legifrance.gouv.fr/html/codes\\_traduits/cpptextA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm)) (last visited Jan. 26, 2010) (discussing the *comparution immédiate*).

<sup>107</sup> *See* Hodgson, *supra* note 105, at 798 ("Given that interrogations are not tape recorded and neither *magistrates* nor lawyers are present, the *procureur* is wholly

The *instruction* represents the paradigm model of investigation within French inquisitorial procedure, but its role has declined such that today, less than five percent of cases are dealt with in this way.<sup>108</sup> This procedure is mandatory for the most serious offenses (*crimes*) and at the discretion of the *procureur* for middle ranking and trivial offenses (*délits* and *contraventions*).<sup>109</sup> In her task of investigating evidence for and against the suspect, the *juge d'instruction* (JI) is empowered to undertake any lawful investigation that she considers will assist in the discovery of the truth and the victim, accused, and *procureur* may also ask for certain investigative acts to be carried out. The JI is authorized to delegate much of her investigatory power to the police through the use of the *commission rogatoire*, and in practice the majority of the investigation is carried out by the police through this mechanism. The JI personally conducts only those acts of investigation that the law prevents her from delegating—primarily the questioning of the suspect.<sup>110</sup> As a *juge du siège*, the *juge d'instruction* is not subject to the same hierarchical control as the *procureur* who, ultimately, is answerable to the Minister of Justice. In theory, this means that JI investigations are more independent of political scrutiny and control. However, the *procureur* remains implicated in all stages of the *instruction*. She oversees the original police inquiry; she determines whether and on what basis to refer the case to the *juge d'instruction* who has no power to investigate on her own initiative;<sup>111</sup> she has access to the

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dependent upon the dossier of evidence assembled by the police.”).

<sup>108</sup> Of cases formally pursued by the prosecutor (668,946 *poursuites*) 3.49% (23,409) are handled by the *juge d'instruction*. See MINISTÈRE DE LA JUSTICE ET DES LIBERTÉS, LES CHIFFRES-CLÉS DE LA JUSTICE 14 (2009) available at [http://www.justice.gouv.fr/art\\_pix/1\\_stat\\_chiffrescles09\\_20091116.pdf](http://www.justice.gouv.fr/art_pix/1_stat_chiffrescles09_20091116.pdf).

<sup>109</sup> This makes the *procureur*'s discretion very important. In 2007, of 28,122 new cases passed to the *juge d'instruction* 7,605 were for *crimes*, 20,478 were *délits*. See MINISTÈRE DE LA JUSTICE, LES CHIFFRES-CLÉS DE LA JUSTICE 16 (2008), available at [http://www.justice.gouv.fr/art\\_pix/1\\_stat\\_chiffrescles08\\_20090318.pdf](http://www.justice.gouv.fr/art_pix/1_stat_chiffrescles08_20090318.pdf).

<sup>110</sup> See C. PR. PÉN. art. 151 (official translation available on the website of the French government at [http://www.legifrance.gouv.fr/html/codes\\_traduits/cpptextA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm)) (last visited Jan. 26, 2010). See also HODGSON, *supra* note 7, at 212-13.

<sup>111</sup> This applies even once an *instruction* has commenced: if during the course of an inquiry the JI uncovers evidence relating to a separate offense, this may not be investigated under the existing *instruction*. Instead, the matter is referred back to the

dossier throughout the *instruction* inquiry; she may ask for specific acts of investigation to be carried out. The accused and the victim have the same rights to participate in the inquiry but this does not displace the supremacy of the *procureur* in this process. As a fellow *magistrat* sharing the same professional training and judicial status, the *procureur* is set apart from the other parties, including the defense lawyer whose status as an *avocat* rather than a *magistrat* ensures that she remains a professional outsider.<sup>112</sup>

The ideology of the JI as a neutral judge acting in the public interest provides an external justification for her dual investigative and judicial functions, but it is also internalized by the JI and forms an important part of her self-image. Her status as a *juge du siège* and her belief in her own ability to define the public interest renders unproblematic (for her) the potentially conflicting roles that she is required to perform. They enable her to consider the previous convictions of the *mis en examen* (MEE) without any fear that they might prejudice her view of the case; until recently, to determine the pre-trial detention of those she is investigating (this role is now carried out by another judge, the *juge des libertés et de la détention*); to discuss the investigation with the *procureur* without recognizing the possibility that this might compromise her independence; and to view as unproblematic the absence of any corresponding dialogue with the defense. These claims to neutrality are undermined in practice by the close working relationships that she enjoys with the police and *procureur*, in contrast to the defense lawyer who remains an outsider in the inquiry.<sup>113</sup> As a result of the JI's dependence upon the police and the *procureur*, her view of the case often comes to mirror theirs and the investigation can become the construction of a prosecution

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*parquet*, who must open a separate or supplementary *information* in order that evidence relating to the second offense may be investigated. See C. PR. PÉN. art. 151 (official translation available on the website of the French government at [http://www.legifrance.gouv.fr/html/codes\\_traduits/cpptextA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm)) (last visited Jan. 26, 2010).

<sup>112</sup> See Hodgson, *supra* note 4; Jacqueline Hodgson, *The Role of the Criminal Defence Lawyer in an Inquisitorial Procedure: Legal and Ethical Constraints*, 9 LEGAL ETHICS 125, 134 (2006).

<sup>113</sup> See Report for the Home Office, *supra* note 94, at 27-28. See generally Hodgson, *supra* note 4.

case, rather than an inquiry that examines both exculpatory as well as incriminating evidence. Although evidence was verified, the JI did not seek to challenge findings or assumptions with the kind of vigor that a defense lawyer might; once a case theory was in place, there was little incentive for the JI to prove herself wrong.<sup>114</sup> Most JIs agreed that the guilt of the MEE was clear from the outset and while some considered it important to more closely investigate evidence obtained from the preliminary inquiry, others regarded this as an unnecessary burden, a result of the suspect “playing the system” and refusing to face up to the evidence. As one JI said:

The presumption of innocence exists in theory but not in practice . . . The search for the truth is quite easy, but they [MEEs] just refuse to confess. They hide behind the presumption of innocence and exploit any doubt in the evidence.<sup>115</sup>

The obvious danger of this approach was demonstrated in the Outreau affair, a high profile miscarriage of justice case concerning accusations of child sexual abuse made by a number of children and adults in the town of Outreau in Northern France.<sup>116</sup> When the case came to trial in July 2004, two of the accused retracted their statements against their co-accused and the prosecution case collapsed.<sup>117</sup> Seven of the seventeen defendants were acquitted in the *cour d’assises*, six more by the *cour d’appel* in December 2005.<sup>118</sup> Between them, they served almost twenty-six years in *détention provisoire* (detention during the investigation) while the *juge d’instruction* carried out his investigation and one suspect, François Mourmand, died in custody.<sup>119</sup> The subsequent parliamentary inquiry uncovered a

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<sup>114</sup> See HODGSON, *supra* note 7, at 225.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 225-26; see also Dean Chapman, *Suppressing Dissent: The Pivotal Role of the Prosecutor in Criminal Defamation Proceedings in Countries Subject to the European Court of Human Rights*, 14 COLUM. J. EUR. L. 597, 601 (2008) (stating that “[t]hese sorts of misguided prosecutions are inevitable in a system that values prosecutorial discretion”).

<sup>117</sup> See Craig S. Smith, *French Court Rejects Pedophilia Convictions*, N.Y. TIMES, Dec. 2, 2005, at A12.

<sup>118</sup> Four of the original seventeen remained convicted and in prison, and they did not appeal. *Id.*

<sup>119</sup> HODGSON, *supra* note 7, at 127-28, 225-26.

litany of errors and bad practice on the part of the investigating judge and those responsible for reviewing his decisions.<sup>120</sup> It was almost impossible for the defense to participate in or contribute to the inquiry; suspects and their lawyers were not listened to and their requests were not acted upon—in short, the *juge* was engaged in case construction rather than investigation, influenced by the views of the *procureur* and ignoring evidence that did not fit with the initial accusations.<sup>121</sup> In addition, the checks and balances of extensive judicial oversight were not effective. The handling of the case was strongly criticized by the accused, who alleged that both the JI, the psychiatrists, and the psychologists evaluating the evidence of the children (some of whom were between two and five years of age), failed to act in an impartial way, seeking to strengthen the case against them, rather than to conduct a more thorough and wide ranging inquiry as the law requires. The *instruction* remained captive to the accusations made during the initial police inquiry, failing to challenge or displace the original case theory. The report suggested that JIs should not work alone in their first post, and that complex and sensitive cases such as the Outreau affair should be handled by two JIs rather than one.<sup>122</sup> Before these recommendations were been implemented, they were overtaken by President Nicolas Sarkozy's decision to establish a commission chaired by Philippe Léger to review French criminal procedure. The commission reported on September 1, 2009 and as expected, it recommended that the *procureur* oversee all investigations, with the JI playing a purely judicial role adjudicating on issues affecting the individual's liberty.<sup>123</sup> There has been no corresponding recommendation to strengthen the political independence of the *procureur*.

In the earlier case of Patrick Dils,<sup>124</sup> prosecutorial judicial

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<sup>120</sup> *Id.*

<sup>121</sup> See generally *id* (the Parliamentary inquiry found that many of the errors were not restricted to this case, but were endemic).

<sup>122</sup> See France: Recommendations on Justice Reform Fall Short, Human Rights Watch, (Sept. 3, 2009), <http://www.hrw.org/en/news/2009/09/02/france-recommendations-justice-reform-fall-short> (last visited Jan. 26, 2010).

<sup>123</sup> RAPPORT DU COMITÉ DE RÉFLEXION SUR LA JUSTICE PÉNALE (Sept. 2009) available at [http://www.justice.gouv.fr/art\\_pix/1\\_sg\\_rapport\\_leger2\\_20090901.pdf](http://www.justice.gouv.fr/art_pix/1_sg_rapport_leger2_20090901.pdf).

<sup>124</sup> See HODGSON, *supra* note 7, at 181-85.

independence from the police was again seen to be wanting.<sup>125</sup> Dils was convicted of murdering two eight-year-old boys.<sup>126</sup> He initially denied any involvement but then made a confession to the *gendarmes* after spending a night in custody, which he retracted one month later.<sup>127</sup> He was sixteen at the time, with a social age of eight; psychiatrists noted his high levels of suggestibility.<sup>128</sup> Two other men had been detained and had confessed to the same officer, but their statements were discarded as not credible; and he was interviewed alone and was (unlawfully) not provided with a lawyer when interviewed by the JI.<sup>129</sup>

These cases demonstrate the ways in which more inquisitorial procedures generate miscarriages of justice in similar ways to adversarial procedures. Cases are dominated by a police and prosecution perspective, the effect of which is magnified by a judicial tunnel vision that comes to mirror that of the accusation. All of this takes place in the context of a weaker regime of defense rights, despite the best efforts of the European Court of Human Rights.<sup>130</sup> Correctives have been brought forward under the banner of a *contradictoire* rather than adversarial procedure<sup>131</sup>—that is, the accused's right to hear and respond to the case against him or her. This has resulted in reforms such as public bail hearings and greater opportunities for defense involvement. However, as the Outreau affair so pointedly demonstrated,

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<sup>125</sup> See Report for the Home Office, *supra* note 94, at n.27; Hodgson, *supra* note 100, at 193-96.

<sup>126</sup> Susan Bell, *Innocent Man Free After 15 Years*, THE SCOTSMAN, Apr. 26, 2002, at 13.

<sup>127</sup> *Id.*

<sup>128</sup> See Hodgson, *supra* note 7, at 181-85.

<sup>129</sup> See *id.*

<sup>130</sup> See Jacqueline Hodgson, *Human Rights and French Criminal Justice: Opening the door to Pre-Trial Defence Rights*, in HUMAN RIGHTS BROUGHT HOME: SOCIAL-LEGAL PERSPECTIVES ON HUMAN RIGHTS IN THE NATIONAL CONTEXT 185-208 (Simon Halliday & Patrick Schmidt eds., 2004); see also Hodgson, *supra* note 100, at 173-79 (discussing the defence rights in regards to the ECHR).

<sup>131</sup> The first sentence of the preliminary article to the French code of criminal procedure states that criminal procedure must be fair and *contradictoire* and must ensure equality of arms between the parties. See C. PÉN. Preliminary Art., available at [http://www.legifrance.gouv.fr/html/codes\\_traduits/cpptextA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm) (last visited Jan. 26, 2010).

professional legal cultures and ideologies pose a greater obstacle to change.<sup>132</sup> In order for the defense to be able to participate in the inquiry in a meaningful way, a cultural shift is required on both sides. The defense must come to see her role as an active one, rather than simply ancillary to that of the judge, and the JI must recognize the legitimacy of defense input into the inquiry.

Modern inquisitorial/mixed systems offer the benefit of some scrutiny of the police investigation and while the judicial status of the *procureur* and even the *juge d'instruction* does not, in practice, guard against an excessively prosecutorial orientation, it does make the police fabrication of evidence unlikely. However, the cost of such a procedure is a defense role with no teeth and few guarantees as to the production and reliability evidence.

## VII. Terrorism

We have seen some of the shifts in criminal procedure in England and Wales as they impact the roles of the defense and of the prosecutor and have considered the nature of modern inquisitorial/mixed procedure. I move now to consider at two discrete areas within the criminal process where there has been a retreat from the principles or procedures of adversarialism: terrorism and miscarriages of justice. In contrast to the broad changes outlined above, the criminal process has responded to terrorism and miscarriages of justice by putting in place measures that are more narrowly context-specific.

The legal response to terrorism is perhaps not so much a clear retreat from adversarialism, as a mixed response, with a focus on prevention and disruption, rather than simply deterrent and punishment. Although there is a desire to continue to treat terrorism within ordinary criminal law, the ways in which this is done are often exceptional. The new criminal offenses relating to terrorism tend to be broad and imprecise, allowing the police and prosecution maximum leeway in the grounds for detention, questioning, and prosecution. Police powers have been extended to an even greater extent than was the case during the conflict with Northern Ireland. The continuing prohibition on the use of

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<sup>132</sup> On the opposition of judges to Italian legislative reform, see Illuminati, *supra* note 58.

intercept evidence<sup>133</sup> and the increasing resort to undisclosed, secret evidence (along with the problem of returning home a person believed to be a security threat if they are likely to face torture or death there) has led to a system of indefinite detention and then control orders.<sup>134</sup> This is an administrative response to prevent a perceived criminal threat. Traditional adversarial procedure has no place in control orders; much of the evidence is secret and seen only by the control order subject's "special advocate"—a security vetted lawyer who may not discuss the "evidence" with her "client."<sup>135</sup>

Prior to 9/11, the United Kingdom's preoccupation with terrorism focused on the "troubles" in Northern Ireland, as they came to be known, and in particular, with the IRA's campaign of bombing in England.<sup>136</sup> Terrorism legislation was in place to address this situation—providing the police with wider powers of detention and questioning and a set of criminal offenses aimed specifically at the preparation and perpetration of terrorist acts.<sup>137</sup> By the turn of the century, the threat of Irish terrorism was significantly lower, and the government turned its attention to other forms of domestic terrorism.<sup>138</sup> The legal definition of terrorism under the Terrorism Act of 2000 was amended to reflect this shift, so that it no longer required violence to be for political ends, but was simply designed to put a section of the public in fear.<sup>139</sup> Since 9/11, a number of new counter-terrorism statutes

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<sup>133</sup> Regulation of Investigatory Powers Act, 2000, § 17 (Eng.) (prohibiting the use of evidence from intercepted evidence or related communications data in criminal trials).

<sup>134</sup> See Prevention of Terrorism Act, 2005, c.2, §1 (Eng.) (defining "control order" as "an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism").

<sup>135</sup> For the most recent discussion of this procedure, see the JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (SIXTEENTH REPORT): ANNUAL RENEWAL OF CONTROL ORDERS LEGISLATION 2010, 2009-10, H.L. 64, H.C. 395, ¶ 16, 20.

<sup>136</sup> See generally LAURA K. DONAHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000 (Irish Acad. Press 2001).

<sup>137</sup> See LAURA K. DONAHUE, THE COST OF COUNTERTERRORISM 35-57 (Cambridge Univ. Press 2008).

<sup>138</sup> *Id.* at 57-61.

<sup>139</sup> Terrorism Act of 2000, c. 11, § 1.

have been passed, extending police powers still further and creating a range of new criminal offenses—some of which are modeled on those formerly applying to Northern Ireland.<sup>140</sup> Criminal law and procedure relating to terrorism is exceptional in many respects. In the United Kingdom, terrorist suspects can be held for twenty-eight days,<sup>141</sup> the police have broader stop and search powers,<sup>142</sup> suspects have fewer rights,<sup>143</sup> and there new criminal offenses that push back the boundaries of criminalization yet further to pre-preparatory acts.<sup>144</sup> Furthermore, in both law and procedure, the emphasis is on a generalized policy of prevention and disruption, rather than the more traditional criminal law aims of repression and punishment, which generally require a more specifically identifiable harm.<sup>145</sup>

Under Section 58(1) of the Terrorism Act of 2000:<sup>146</sup>

A person commits an offence if—

- (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
- (b) he possesses a document or record containing information of that kind.<sup>147</sup>

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<sup>140</sup> See generally DONAHUE, *supra* note 125.

<sup>141</sup> Terrorism Act of 2000, c.11, sched. 8. In ordinary criminal cases, suspects may be held for a maximum of four days.

<sup>142</sup> Terrorism Act of 2000, c. 11, § 44. The need for individualized suspicion—or indeed any suspicion—is removed. *But see* Gillan v. United Kingdom, App. No. 4158/05, Eur. Ct. H.R. (2010) (unpublished decision), available at [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case-Law” hyperlink to “HUDOC” database; select “HUDOC” icon to search database for Application Number 4158/05) (holding that the police power to stop and search an individual under Section 44 of the Terrorism Act of 2000 breached Article Eight of the European Convention on Human Rights).

<sup>143</sup> *Id.* Access to a lawyer can be delayed for up to forty-eight hours and may take place within the sight and hearing of a police officer.

<sup>144</sup> *E.g.*, Terrorism Act of 2006, c.11, § 5. See also Anti-Terrorism, Crime and Security Act, 2001, c.24 (including measures for the retention of emails and telephone logs).

<sup>145</sup> See generally DONAHUE, *supra* note 125.

<sup>146</sup> It should be noted that the Terrorism Act of 2000 is based upon the Prevention of Terrorism (Temporary Provisions) Act 1989, c.4, which targeted terrorism related to “the affairs of Northern Ireland.”

<sup>147</sup> Terrorism Act of 2000, c.11, § 58(1). The offense carries a maximum prison

Section 58(3) provides that: "It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession."<sup>148</sup> This provision is extremely broad and lacks the precision and clear definition that we expect and require of the criminal law, leaving the courts with broad discretion in how to interpret the statute. For example, to determine what kinds of information are likely to be helpful to terrorists and what constitutes a reasonable excuse.<sup>149</sup>

Sections 1 and 2 of the Terrorism Act of 2006 create new offenses: the encouragement of terrorism, and the dissemination of terrorist publications (both punishable by up to seven years imprisonment), which are described by some commentators as part of the "new global McCarthyism."<sup>150</sup> Like the Terrorism Act of 2000 offenses, these have also been criticized as being vague in their definition and scope, and of constituting an unnecessary extension of the current criminal prohibitions on incitement to violence.<sup>151</sup> These sections go further than the Council of Europe Convention on the Prevention of Terrorism 2005 on which the legislation is based; the offenses include reckless as well as intentional encouragement and do not require any danger that someone will be encouraged to commit an act of terrorism.<sup>152</sup> The Joint Committee on Human Rights concludes that the offense does not comply with the permitted restrictions to the right to freedom of expression under Article 10 of the European Convention on

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term of fifteen years.

<sup>148</sup> *Id.* § 58(3).

<sup>149</sup> See Jacqueline Hodgson & Victor Tadros, *How to Make a Terrorist Out of Nothing*, 72 M.L.R. 985-99 (2009) (discussing *R v. G* [2009] UKHL 13, in which the House of Lords held that possession of information for a non-terrorist purpose was no defense to the charge; this did not necessarily provide a "reasonable excuse" as set out in the Act).

<sup>150</sup> See, e.g., HAYNES JOHNSON, *THE AGE OF ANXIETY: MCCARTHYISM TO TERRORISM* (Harcourt Books 2005); see also *GOOD NIGHT AND GOOD LUCK* (Warner Independent Pictures 2005), which captures well the ease with which, with echoes of fear, a creeping enemy is created, despite the absence of hard fact or evidence.

<sup>151</sup> See Adrian Hunt, *Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism*, 2007 CRIM. L. R. 441.

<sup>152</sup> Terrorism Act of 2006 § (5)(b). This is to guard against undue interference with freedom of expression, particularly in 'indirect encouragement' cases. See Council of Europe, Convention on the Prevention of Terrorism, Art. 5, 2005, C.E.T.S. No. 196.

Human Rights,<sup>153</sup> as the “glorification” requirement is too vague, the definition of terrorism is too broad, and the offense may be committed with no awareness that the defendant’s statement is likely to encourage the commission of a terrorist act—objective recklessness will suffice.<sup>154</sup>

Broadly drafted criminal offenses and wider police powers to stop, search, detain, and question are justified as exceptional measures necessary to counter an exceptional threat. They also reflect a wider strategy of prevention and disruption that has seen the use of executive action as well as criminal law. The 2001 Anti-Terrorism, Crime and Security Act authorized detention without trial. It applied only to foreign nationals suspected of international terrorist involvement<sup>155</sup> (and thus operated within civil immigration powers, rather than a criminal process framework)<sup>156</sup> who could not be deported because of the ill-

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<sup>153</sup> See also JOINT COMMITTEE ON HUMAN RIGHTS, THIRD REPORT, 2005-06, H.L. 75-I, H.C. 561-I, ¶ 20 (stating that an indirect incitement to commit violent terrorist offenses is capable of being compatible with Article 10 of the European Convention on Human Rights provided that it is necessary, defined with sufficient precision to satisfy the requirements of legal certainty, and proportionate). See also Convention for the Protection of Human Rights and Fundamental Freedoms art.10, Nov. 4, 1950, ETS No. 5, 213 U.N.T.S. 222. Article 10 of the European Convention of Human Rights relates to freedom of expression.

<sup>154</sup> See JOINT COMMITTEE ON HUMAN RIGHTS, THIRD REPORT, 2005-6, HL 75-I/HC 561-I, at 3-6. The standard was changed from subjective to objective recklessness at the report stage of the bill. Showing remarkably little faith in the jury’s ability to assess the evidence at trial, Hazel Blears MP said, “If we have only a subjective test, people will be able to say that they did not realise what the effect of their actions would be. We would then find it incredibly difficult to prosecute people who genuinely were encouraging other people, indirectly, to commit terrorist acts.” 439 PARL. DEB., H.C. (6th ser.) (2005) 390.

<sup>155</sup> See generally The Anti-Terrorism, Crime and Security Act, 2001, c.24. Detainees did not need to be affiliated to a proscribed organization, but they were required to pose a risk to national security. *Id.*

<sup>156</sup> This was criticized as turning the Special Immigration Appeals Commission (SIAC):

“[F]rom a specialist immigration tribunal to a de facto counter-terrorism court . . . While the guarantees offered by SIAC’s procedures were appropriate to its original civil function (reviewing deportation decisions on national security grounds), the use of the same tribunal to judicially review the Home Secretary’s decision to indefinitely detain suspected terrorists has been inadequate to the task of protecting those detainees’ rights to liberty.”

treatment they were likely to suffer in their home country and could not be prosecuted because of the sensitive nature of the intelligence against them. While the landmark House of Lords decision in *A and others v Secretary of State for the Home Department*<sup>157</sup> upheld the government's claim that there was sufficient public emergency to warrant derogation from Article 5 of the European Convention on Human Rights,<sup>158</sup> the court went on to find that detention without trial was not a proportionate response. In its application only to deportable aliens, it ignored the threat posed by British citizens, and as a "prison with three walls" it allowed foreign terrorists to leave the jurisdiction and continue to be a security risk by plotting abroad.<sup>159</sup>

The Home Secretary responded by establishing control orders under the Prevention of Terrorism Act of 2005 in order to protect members of the public from a risk of terrorism, where there is either insufficient evidence for a criminal prosecution or the evidence is of such a sensitive nature that it might endanger operations or the lives of agents or informants.<sup>160</sup> The permissible scope of control orders was defined in a number of House of Lords decisions (e.g. confinement of the controlee to their residence for twelve hours was acceptable;<sup>161</sup> but confinement for eighteen hours was not),<sup>162</sup> but the most recent decision called into question the whole procedure by which control orders are imposed. In *Secretary of State for the Home Department v. AF and others*,<sup>163</sup> all nine judges held that the use of secret evidence against control order subjects where those subjects did not know the case against

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JUSTICE evidence to Select Committee, quoted in Andrew Boon & Susan Nash, *Special Advocacy: Political Expediency and Legal Roles in Modern Judicial System*, 9 LEGAL ETHICS 101, n.34 (2006).

<sup>157</sup> [2004] UKHL 56, [2005] 2 AC 68.

<sup>158</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art.5, Nov. 4, 1950, ETS No. 5, 213 U.N.T.S. 222.

<sup>159</sup> See *A v. Sec'y of State for the Home Dept.*, [2004] UKHL 56, [2005].

<sup>160</sup> See Prevention of Terrorism Act, 2005, c.2, §1 (Eng.) (granting the Secretary of State the power to issue control orders).

<sup>161</sup> See *Sec'y of State for the Home Dept. v. E* [2007] UKHL 47, [2008] 1 AC 499; *Secretary of State for the Home Department v. MB* [2007] UKHL 46, [2008] 1 AC 440 .

<sup>162</sup> See *Sec'y of State for the Home Dept. v. JJ*, [2007] UKHL 45, [2008] 1 AC 385.

<sup>163</sup> [2009] UKHL 28.

them was unfair. Unless the person was given sufficient information about the allegations against her to enable her to give effective instructions to her representative, there would be a breach of Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial.<sup>164</sup> As a result, the control order against AF has been revoked.<sup>165</sup> Interestingly, this appeal to the adversarial values of what constitutes a fair trial may spell the end of control orders.<sup>166</sup> The Home Secretary, Alan Johnson, has instructed the independent reviewer of counter-terrorism legislation, Lord Carlisle, to review the continued viability of control orders in the light of the decision in AF.<sup>167</sup>

The legal response to counter-terrorism, particularly post 9/11, has been to retreat from many of the core adversarial and due process values of the criminal process. Offenses are defined so broadly it is unclear which harms they criminalize; arbitrary stop and search is permitted; defense rights are greatly reduced; detention without charge is greatly increased; and a form of internment is sanctioned. And while political rhetoric concentrates on the political "other," the extreme Islamic Jihadist terrorist, these exceptional pieces of legislation clearly have wider application as a result of the redefinition of terrorism under the 2000 Act. Even animal rights protestors are part of the new terrorist threat.<sup>168</sup> More worryingly, these powers are applied to increasingly broad sections of the population, including those engaged in legitimate protest.<sup>169</sup> Even the recession has become

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<sup>164</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art.6, Nov. 4, 1950, ETS No. 5, 213 U.N.T.S. 222.

<sup>165</sup> A v. Sec'y of State for the Home Dept., [2004] UKHL 56.

<sup>166</sup> This was a source of regret for Lord Hoffman who considered the relevant case law, A v. United Kingdom, no. 3455/05 Eur. Ct. H.R. 2009, to be wrong. See Sec'y of State for the Home Dept. v. AF, [2009] UKHL 28, ¶ 70.

<sup>167</sup> See *Review of Control Orders Sought*, BBC NEWS, Sept. 16, 2009, available at <http://news.bbc.co.uk/1/hi/uk/8258644.stm> (last visited Jan. 26, 2010).

<sup>168</sup> See Alan Travis, *Two-Thirds of UK Terror Suspects Released Without Charge*, THE GUARDIAN, May 13, 2009, available at <http://www.guardian.co.uk/uk/2009/may/13/terrorism-suspects-britain-uk> (last visited Jan. 26, 2010). The United States has the Animal Enterprise Terrorism Act, 18 U.S.C. 843 (2006). *Id.*

<sup>169</sup> See, e.g., Tracy McVeigh, Rajeev Syal & Gaby Hinsliff, *G20 Protests: How the Image of UK Police Took a Beating*, THE GUARDIAN, April 19, 2009, at 12.

the subject of terrorist legislation. Most recently, terrorist asset-freezing powers were used against Iceland.<sup>170</sup>

### **VIII. Correcting Miscarriages of Justice: The Criminal Cases Review Commission**

A final example is the response to miscarriages of justice following the shameful treatment of the so-called Birmingham Six. As noted above, the CCRC was set up on the recommendation of the RCCJ, which was itself appointed in the wake of several high profile miscarriages of justice. Although the term inquisitorial is not used, the RRCJ report is clear that the Commission is to have an independent staff who are part of neither the prosecution service nor the defense and whose role is to investigate whether there has been a miscarriage of justice (including at the request of the Court of Appeal),<sup>171</sup> to supervise police investigations where necessary<sup>172</sup> and to commission experts.<sup>173</sup> The role of the CCRC is inquisitorial in that it works on behalf of neither the applicant nor the prosecution, though both of these parties are kept informed during the course of the investigation and are given an opportunity to make representations before a case is referred to the Court of Appeal. Triggered by an application from a convicted person whose appeal, or leave to appeal, has been turned down, the Commission decides on the lines of Inquiry, conducts its investigations, and makes a judgment about whether to refer the case back to the Court of Appeal where there is new evidence that was not available at trial. In one sense, this represents acknowledgement of the need for something non-adversarial to investigate effectively the errors of the adversarial

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<sup>170</sup> See Tom Braithwaite, Alex Barker, Michael Peel & Jimmy Burns, *Terror Law Used for Iceland Deposits*, FINANCIAL TIMES, Oct. 8, 2008, available at [http://us.ft.com/ftgateway/superpage.ft?news\\_id=fto100820081808155144](http://us.ft.com/ftgateway/superpage.ft?news_id=fto100820081808155144).

<sup>171</sup> CRIMINAL CASES REVIEW COMM'N, Annual Report and Accounts, 2008-9, HC 857, at 8, [hereinafter Annual Report 2008-09], available at [http://www.ccrc.gov.uk/CCRC\\_Uploads/ANNUAL\\_REPORT\\_AND\\_ACCOUNTS\\_2008\\_9.pdf](http://www.ccrc.gov.uk/CCRC_Uploads/ANNUAL_REPORT_AND_ACCOUNTS_2008_9.pdf) (last visited Jan. 26, 2010).

<sup>172</sup> See *id.* at 34-35.

<sup>173</sup> *Id.* at 71. The CCRC may also refer a sentence for review. Criminal Appeal Act 1995, c. 35, § 9-12 (UK). Of the thirty-nine cases referred to the Court of Appeal in 2009-2010, six related to sentencing. Annual Report 2008-09, *supra* note 171, at 18.

process, such as those caused by non-disclosure or poor defense lawyering. But in some instances, these errors are not a failing in adversarial procedure; the new evidence may be material that has only come to light subsequently and could not have been put forward at trial, such as changes of law or new information about a witness' credibility.

So, how does this body operate? The Commission has been in existence for twelve years and has recently appointed its third chairman.<sup>174</sup> It is staffed by case review managers, who research those applications thought to have some merit, and Commissioners, who oversee the investigation and make decisions on the level of investigation needed, if any, and whether to refer the case to the Court of Appeal.<sup>175</sup> There are two in-house legal advisers and two investigation officers: both are former police officers.<sup>176</sup> The Commission has broad powers to require public bodies to provide them with any information relevant to a case under review<sup>177</sup> and may appoint a police officer to conduct specific investigations where necessary.<sup>178</sup> The CCRC occupies a unique position within the criminal justice process: it is neither fully adversarial nor inquisitorial. It does not act for the applicant, nor is it concerned with ascertaining the truth. It conducts an investigation into the case and specifically into the points raised in the application, with a view to verifying whether there is anything that suggests that the conviction is unsound and that there is a real possibility that it could be quashed by the Court of Appeal.<sup>179</sup> Unlike the French system, this is a post-conviction rather than pre-trial investigation and so consists largely of reviewing existing

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<sup>174</sup> See Press Release, Justin Hawkins, Head of Communication, Criminal Cases Review Commission, Richard Foster CBE appointed as new Chair of the Criminal Cases Review Commission (Nov. 4, 2008) *available at* [http://www.ccr.gov.uk/news/news\\_500.htm](http://www.ccr.gov.uk/news/news_500.htm).

<sup>175</sup> See Jacqueline Hodgson & Juliet Horne, The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC) para. 1.5 (October 6, 2009) (unpublished working paper, on file with the Legal Services Commission), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1483721](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483721).

<sup>176</sup> *Id.* para. 1.5.

<sup>177</sup> Criminal Appeal Act, 1995, c.35 § 17(UK).

<sup>178</sup> *Id.* § 19.

<sup>179</sup> *Id.* § 13.

material, though it may also include interviewing witnesses, commissioning expert reports, sifting through the prosecution files, or researching recent case law. If the CCRC uncovers evidence that affirms the applicant's guilt, or confirms the unreliability or non-existence of potential new evidence, no referral is made and the applicant is informed.

Unlike a defense lawyer, the Commission will not continue searching in order to find evidence supporting the applicant, though it will continue investigating until it is satisfied that all "referable" issues have been resolved.<sup>180</sup> However, the Commission does not restrict itself to the grounds raised by the applicant; in many instances, the points raised in the initial application are symptomatic of underlying problems with the case. Applicants are lay people and cannot be expected to understand the context and implications of prosecution evidence; the Commission may translate a concern about the non-appearance of a witness into an inquiry into defense competence, or a review of the prosecution material disclosed. In other cases, material is uncovered by chance in the course of the investigation—evidence that casts serious doubt upon the reliability of the victim or a key witness—which was not disclosed to the defense.<sup>181</sup> The CCRC is not an innocence project. It is, by law, concerned with investigating whether there is a real possibility that the sentence or conviction will not be upheld if the case is referred.<sup>182</sup> This is about the safety of the conviction or sentence and the integrity of the process—not about guilt or innocence.

Once a case has been referred to the Court of Appeal, the CCRC drops out of the picture and the ordinary adversarial process resumes; the applicant becomes the appellant and is represented by her lawyer and opposed by the prosecution. The Commission has no standing and makes no representations in court, but it does provide a detailed and comprehensive statement

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<sup>180</sup> See Criminal Cases Review Commission, How We Review Your Case, [http://www.ccr.gov.uk/canwe/canwe\\_33.htm](http://www.ccr.gov.uk/canwe/canwe_33.htm) (last visited Mar. 3, 2010) (detailing the case review process).

<sup>181</sup> See Hodgson & Horne, *supra* note 175, at 4. In fifteen percent of the cases referred in 2005-07, the grounds had not been identified by either the applicant or her representative, but by the CCRC itself. *Id.*

<sup>182</sup> See *id.* at 6.

of reasons to accompany its recommendation, which is also disclosed to the prosecution and to the applicant. The court will also have copies of the evidence gathered by the CCRC, but we do not know how it treats this material—whether it considers it inherently more reliable than that put forward by the parties.<sup>183</sup> In some judgments there is little or no mention of the Commission's previous inquiry and findings; in others, they pay tribute to the work that has been done.<sup>184</sup> It might be argued that a high degree of credibility should attach to the evidence gathered by the CCRC, as it is the product of a neutral (and publicly funded) inquiry, in contrast to that advanced by the parties which is designed to support their own case. We have seen that over-reliance upon a centralized investigation presents dangers in jurisdictions such as France, but the CCRC is not dependent on the police to carry out its work. The CCRC shares the occupational culture of neither the prosecution nor defense, nor does it have close contact with either of the parties. But the Commission is not a court. It makes a recommendation based on a real possibility; it does not make a judgment based on material that has been subject to external interrogation. It gathers material to rigorous evidential standards, but it does not open this to scrutiny by either the applicant or the CPS. This will be done, if necessary, in the appeal court.

Given the Commission's more inquisitorial role, what is the appropriate role of the defense lawyer during the CCRC review

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<sup>183</sup> We may surmise that it does consider such material to be more reliable, given that the Court of Appeal itself asks the CCRC to investigate cases, generally those of jury tampering allegations. CCRC referrals are successful in around 70% of cases, compared with overall Court of Appeal figures showing 38% of convictions being overturned and 73% of sentences varied. See HER MAJESTY'S COURT SERVICE, RECEIPTS AND COURT RESULTS (1998-2009), <http://www.hmcourts-service.gov.uk/cms/1405.htm> (last visited Jan. 27, 2010).

<sup>184</sup> See, e.g., *R v Warren* [2005] EWCA (Crim) 659, para. 17 (Eng.) (praising the work of the CCRC); *R v David Carrington-Jones* [2007] EWCA (Crim) 2551, para. 15, 25 (Eng.) (same). No mention of the Commission's work is made in cases such as *R v Adetoro* [2006] EWCA (Crim) 1716 (Eng.). Only the mechanism by which the case came before the court is referenced. In other cases such as *Mark Darren Day v R* [2003] EWCA (Crim) 1060, the Court of Appeal openly disagreed with the approach and conclusions of the CCRC investigation. And in the well publicized case of Ruth Ellis, the last woman in England to be hanged (in 1955), the Court questioned the usefulness of referring a case that the convicted person had herself chosen not to appeal. *Ruth Ellis v R* [2003] EWCA (Crim) 3556, para 90 (Eng.).

process? The success rate of referrals over the past twelve years is seventy percent.<sup>185</sup> Although some critics argue that this indicates an over-cautious approach, it does mean that referrals by the Commission have a much higher chance of success than ordinary appeals.<sup>186</sup> What role should the (usually adversarial) defense lawyer have during this process, given the significance of obtaining a referral decision? An adversarial and partisan role does not seem appropriate, given that the applicant is not in opposition to the Commission. Yet, neither is the Commission working for the applicant. Its goal is to review the safety of the conviction. Once the conviction is in doubt and there is sufficient evidence to demonstrate this in court, the Commission's work is done. Yet the CCRC's investigation and grounds for referral are crucial to the defense case as, to a great extent, they also define the defense grounds of appeal. This is not what was envisioned by the RCCJ, which made clear that the Commission's recommendations were no substitute for the defense case, stating that "it should continue to be open to the appellant to raise before the Court of Appeal any matter of law or fact, or mixed law and fact, as he or she wishes, regardless of whether or not it was included in the papers sent to the court by the [Commission]."<sup>187</sup> Section 315 of the Criminal Justice Act of 2003<sup>188</sup> goes directly against this: the defense may advance additional grounds to those put forward by the CCRC only with the leave of the Court of Appeal. It seems all the more crucial, therefore, that the defense should be provided with some opportunity for input into the investigation and the potential grounds on which the case might be referred.

The role of the defense lawyer is necessarily different from that of the Commission. A defense lawyer may wish to explore more avenues and in different ways, conscious of how the case will be presented in the appeal court. Lawyers in my own research were clear that applicants needed an advocate—though in a

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<sup>185</sup> Annual Report 2008-09, *supra* note 171, at 19.

<sup>186</sup> See MINISTRY OF JUSTICE, JUDICIAL AND COURT STATISTICS 2007, 2008, Cm. 7467, available at <http://www.official-documents.gov.uk/document/cm74/7467/7467.pdf>. The Ministry of Justice found that 37% of appeals against conviction and 73% of appeals against sentence are successful. *Id.* at 7.

<sup>187</sup> RCCJ REPORT, *supra* note 36, at 183-84.

<sup>188</sup> Criminal Justice Act, 2003, c. 44, § 315 (UK).

different role from that played in the ordinary criminal process—serving not as an adversary, but as a counter-reflex to ensure that all angles have been covered.<sup>189</sup> They felt this was necessary to ensure that the applicant's interests were represented and to prevent the Commission from acting as the final judge on matters that would be of enormous significance at appeal. This is very much the theoretical role of the lawyer in the French *instruction*; the judge is in charge, but the lawyer provides a check that improves the overall quality and reliability of the inquiry. It should also be remembered that case review managers and Commissioners are drawn from a variety of backgrounds—only some are lawyers, and until relatively recently, there was very little defense lawyer expertise at the Commission. This has been highlighted as a significant gap in the effectiveness of the CCRC's operation and its ability to interrogate the strength of the trial lawyers' work as well as that of the police and prosecution.<sup>190</sup> Lawyers who were interviewed gave us examples of cases that had been rejected when the applicant was unrepresented but which had been successfully referred and the conviction overturned when resubmitted with the input of a defense lawyer.<sup>191</sup> For their part, the majority of Commission staff were in favor of *good* legal representation, appreciating that this can make their job of case review and investigation easier. However, poor legal representation was considered worse than none at all, as it tended to delay matters.

## IX. Conclusion

Criminal justice in England and Wales has moved away from adversarialism because it is costly in terms of time and of money, at a time when government wants to be tough on crime and when the trend is towards greater criminalization as a response to social problems. The result has been the attenuation of defense rights and new pressures on the defense to co-operate in the investigation

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<sup>189</sup> See Hodgson & Horne, *supra* note 175, at 23-24.

<sup>190</sup> See, e.g., Memorandum from the Criminal Appeal Lawyers Association to the Select Committee on Home Affairs in 2004, available at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmhaff/289/4012710.htm> (last visited Jan. 26, 2010).

<sup>191</sup> See Hodgson & Horne, *supra* note 175, at 23.

and assembly of evidence against them; this weakens the presumption of innocence and requires the suspect to account for herself in the absence of full knowledge of the case against her. It has also led to a narrowing of the separation between the police and the prosecution, and so between investigation and prosecution—and even case disposal. This brings advantages such as better-prepared cases and more accurate charging decisions, without the dangers of supervision and mutual dependence as seen in France and elsewhere. However, it also risks compromising the independence of the CPS as their role becomes entwined with that of the police, and increasingly, the court. A close examination of the French criminal process reveals the limitations of prosecutorial and judicial supervision when those responsible for the investigation must, necessarily, work closely with the police.

The change is driven not by a desire to move to a new procedural model such as the inquisitorial process (indeed this is explicitly rejected), but simply by efficiency and managerialism in the form of keeping cases out of court.<sup>192</sup> The danger, of course, is that criminal justice is an unruly beast of many inter-linked parts and piecemeal change without regard to the overall consequences or wider structural model will weaken established procedural guarantees. In specific contexts such as terrorism, we see changes with the politics of exceptionalism, as it is claimed that traditional safeguards must be abandoned to counter a new threat to order. Broad and imprecise offenses, police powers defined so widely that their use borders on the arbitrary, periods of detention without charge measured in weeks, rather than hours or days, and even a form of long term house arrest with no prospect of prosecution,

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<sup>192</sup> This efficiency consists of fewer cases being disposed of at court, but the same number of cases (in the sense of people charged and prosecuted) overall. The result is ever-widening, with behavior that was previously unsanctioned being punished through formal police summary measures. See Richard Young, *Street Policing After PACE: The Drift to Summary Justice*, in *REGULATING POLICING: THE POLICE AND CRIMINAL JUSTICE ACT 1984 PAST, PRESENT, AND FUTURE* 149 (Ed Cape & Richard Young eds., 2008). The Metropolitan Police Commissioner, Sir Paul Stephenson, has criticized the use of on-the-spot penalties for half of all crimes as undermining the authority of the courts. See Sadie Gray, *Metropolitan Police Chief Says Fixed Penalties Undermine Courts*, *THE TIMES ONLINE*, Sept. 25, 2009, available at <http://business.timesonline.co.uk/tol/business/law/article6848265.ece> (last visited Jan. 26, 2010).

using control orders, are all potential pitfalls. Finally, we see a very different procedural model in place for dealing with potential miscarriages of justice—a kind of post-conviction inquisitorial review. Although this model sits somewhat awkwardly with adversarial legal actors, the CCRC has been successful in identifying errors of justice. But, just as the approach to terrorism is likely to be generalized because it is not costly and is perceived as efficient<sup>193</sup> in producing convictions by removing safeguards, so the CCRC model is unlikely to gain wider currency; it too is successful, but with less politically saleable achievements—overturning convictions and revealing mistakes and wrongdoing, while requiring greater resources in terms of time and money.

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<sup>193</sup> It is difficult to measure whether it is in fact efficient. The arrest and charge rate following stops and searches under terrorism powers is extremely low; few people have been convicted of the new terrorist offenses. The government, however, might argue that there is less visible success in terms of prevention.