LEVESON, JUDGE-ALONE TRIALS AND THE MOJ

Submissions to the Justice Committee by His Honour Geoffrey Rivlin KC

SUMMARY

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INTRODUCTION

I have been asked by the Justice Committee of the House of Commons to present a paper which covers:

- my views on the reforms;
- how I think they will affect the judiciary;
- the planned increase in magistrates' sentencing powers and changes to appeals process from the magistrates' court; and
- what alternative reforms I would propose.

(Unless otherwise stated, all opinions expressed in this paper are mine. I do not claim to speak on behalf of any serving judge. All underlining denotes my emphasis.)

Sir Brian Leveson's Review of the Criminal Courts (2025), referred to hereafter as 'the Review', or 'Leveson', contains a raft of recommendations some of which collectively involve the abolition of jury trial in certain circumstances. These proposals appear to have been recently overtaken by a proposal of the Ministry of Justice (MOJ) that cases carrying a *likely* maximum sentence of 3 years imprisonment (a week or so earlier, it was 5 years) are eligible for trial by 'judge-alone'. Whether Leveson's proposals remain available for adoption is unclear. They will therefore be examined in detail below, as will the MOJ proposal.

That an issue of jury reform should arise at all is to be regretted. This is being, albeit unconvincingly, advanced as a significant solution to the 'crisis' in the criminal justice system (by saving time, money and reducing the size of the backlog of cases awaiting trial); but it has inevitably become a major distraction from the fundamental problem – namely, the grave and prolonged underfunding of the system over at least 20 years. The remedy for that problem is too obvious to state. A dilution of the availability of trial by jury – an age-old and revered cornerstone of the criminal justice system, which functions so well – has been attempted and decisively rejected in the past (for example, following a Review of serious fraud by Lord Justice Auld in 2001). The immediate, strong adverse reaction to the current proposals was entirely foreseeable. Indeed, it was inevitable.

The latest MOJ proposal/s presage one of the most radical and revolutionary events in English legal history. Yet it has not appeared in any manifesto; it has not been put out for consultation; it has not been recommended by Leveson. As far as I am aware, the proposal has been 'published' with virtually no notice to anyone, and without any published reaction by the MOJ to Leveson's own proposals. Even as I prepare this paper, I am uncertain as to which aspect(s) of the Leveson proposals, if any, relating to trial by 'judge-alone' or trial by 'judge with two magistrates' have survived MOJ scrutiny.

I contend and hope to demonstrate that judge-alone trials in our *adversarial* system (as opposed to non-Common Law *inquisitorial* systems, or any version thereof) will be unworkable and cause serious harm to the reputation of the criminal justice system in general, and the judiciary in particular. We live in a multi-racial society, with all that entails. Each year, thousands of men and women throughout the country are drawn to serve as jurors, taking part in the administration of justice and determining the guilt or innocence of their fellow citizens. Their verdicts command the respect and confidence of the public. It could be argued that this alone provides sufficient justification of the system, although the true value of trial by jury is far greater than that.

Fundamental cause of the crisis – insufficient funding

Nobody can seriously suggest that the utterly scandalous backlog of around 80,000 cases now awaiting trial, let alone the many other failings within the system, can be attributed (even in part) to the use of juries as 'judges of fact' in the more serious criminal cases. I am unaware of any published analysis of the current backlog total (how many homicides, how many burglars, how many shoplifters? etc.) Even if all the Leveson and MOJ proposals for judge-alone trial were implemented, it would not have the slightest impact on the backlog.

Has any effort been made to weed out the weak cases among the less serious allegations? Some defendants, fearing imprisonment and aware that the system is broken, plead not guilty in the hope either that cases take so long to come to court that the evidence against them will have disappeared, weakened, or their personal circumstances will have so radically altered as to require a complete re-evaluation in the judge's approach to sentencing. Many of these cases may be ripe for non-custodial sentences; they may run into many thousands. In this connection, surely everything said about the urgent need for the use of non-custodial outcomes (see below, under 'Recommendations') deserves very serious consideration.

The Lord Chancellor's oath of office bears a promise unique in content and purpose:

> *'I, , do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God.'*

Nevertheless, in the past 20 years, under one Lord Chancellor after another, legal aid has been run down, courts have been closed and sold off, others have been allowed to deteriorate, and those that are left have been denied thousands of sitting days. Cases have been delayed and disrupted by the many shortcomings of the CPS, or the court system's inability to have defendants on remand available at court on time. Yet Government scratches its head, wondering how there comes to be such a shocking backlog, and how matters can be put right. It is against this background that I fear that the appalling backlog in the Crown Courts is being used as a convenient and expedient excuse to resurrect the old (and failed) 'judge-alone' arguments.

As it happens, I consider that the positive case in favour of retaining jury trials, on social, general 'justice' and safety grounds, is in any event far stronger than any advantage that might be gained by judge-alone trials – even if they might be workable. But there is a preliminary consideration – and it is a momentous one, made so by Leveson himself:

The Constitution

The following statement forms the entire basis of all that Leveson recommends in relation to juries – see Review page 143, para 42:

> *'Most often, the resistance to reforming the right to elect has centred on whether a defendant has a constitutional 'right' to a jury. I make clear my position that there exists no such constitutional or common law right to a trial by jury, with the result that there is no basis for this to limit any approach to necessary reform. It is on this premise that I proceed with my subsequent recommendations in this chapter on the Restriction of the Right to Elect (RRTE) model and recommendations in subsequent Chapters 8 (Crown Court Structure) and 9 (Trial by Judge-Alone).'*

This statement of the constitutional position, let alone the common law, is seriously flawed. For Leveson's premise to be accepted, whether in the letter or the spirit, it must survive the following:

> Lord Erskine (1705-1766): *'Criminal justice in the hands of the people is the basis of freedom. While that remains there can be no tyranny, because the people will not execute tyrannical law against themselves. Whenever it is lost, liberty must fall along with it. . .'*
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> In May 2017, Baroness Hallett, then a Lady Justice of Appeal, delivered a lecture entitled *Trial By Jury – Past and Present*. Dealing with jury trials, she said "For Lord Camden (1714-1794) it was '*the foundation of our free constitutio*n'. For Lord Eldon (1801-1827) the '*greatest blessing which the British Constitution had secured to the subject*.' "
>
> Sir William Blackstone (1723-1780) *'These inroads [taking away rights to trial by jury] upon this sacred bulwark of the nation are fundamentally opposed to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern'.*
>
> Lord Denning (1899-1999) in *Ward v James* [1966] 1QB 273, a civil appeal where the court was concerned with the ability of a jury to assess damages: '*Let it not be supposed that this court is in any way opposed to trial by jury. It has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime … then trial by jury has no equal.'*

Lord Devlin (1905-1992) – Leveson (Review page 144) quotes Lord Devlin, but not his most famous statement, in his book *Trial by Jury* ' … *So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.'*

Lord Hope (*R v Connor and Mirza* [2004] UKHL 2. para. 144): *'The jury trial has been adopted in all the main common law jurisdictions. It is rightly regarded as a bastion of the criminal justice system against domination of the state and a safeguard of the liberty of its citizens. This is an affirmation of human rights principles. The detail in each country may differ in order to suit their own culture … For the public it is a highly valued part of our unwritten constitution. The present lack of public confidence relates to the defective enforcement of the criminal law both before and after the trial.'*

Professor Sir J.H. Baker, the distinguished legal historian, in *An Introduction to Legal History*: '*It [jury trial] was to become a constitutional principle sacred to generations of Englishmen, and later to a new world as well, that men should be tried by their peers, and that judges should not meddle with questions of fact.'*

Lord Hodge, Deputy President of the Supreme Court, in a speech at the University in Shanghai, China: '*The right of a citizen charged with a serious criminal offence to be tried by a jury of fellow citizens is a powerful tradition in the United Kingdom and in other common law countries.'*

JUSTICE, the highly respected cross-party legal reform charity contends that in England and Wales jury trial for all but minor offences *'has acquired the status of a constitutional right'*.

Sir Keir Starmer, in the Socialist Lawyer Magazine (1992), argued that juries should try *all* criminal cases! He wrote: '*The right to trial by jury is an important factor in the delicate balance between the power of the state and the freedom of the individual.'*

Phrases such as 'bulwark of liberties' and 'constitutional principle sacred to generations' can still resonate in our world today. Our jury system may not be beyond change – over the years it has been adjusted a number of times. Parliament may have the power to abolish it, but the great tradition of trial by jury has an honoured place in the constitution, and its place is at the top table. It gives us far more than protection against state oppression. It provides an irreplaceable leavening of the inflexibility that trials by judge-alone would necessarily involve. Any proposals to change it, therefore, demand very close scrutiny; any proposals to remove it – extreme caution.

Four uniquely valuable features of a Jury's verdict

1. It is based upon the collective assessment of a body of evidence by 12 citizens. Each has been involved in a collective enterprise – sworn to try the case and return a true verdict in accordance with the evidence.

2. A jury's verdict (certain very special exceptions and grounds of appeal apart) is regarded as sacrosanct. The verdict of a jury is almost always accepted and respected by Press and public alike.

3. The verdict reflects a shared responsibility for it, among the jurors who agree to it. All jurors have an equal right / obligation to contribute both to the discussion of the evidence and the application to it of the relevant law.

4. Each juror's contribution to the verdict is cloaked in anonymity. After completing their service, jurors returns to their everyday lives, sure in the knowledge that their anonymity is secure.

These features, characterising the verdict of a jury, cannot be replicated in a verdict by a judge sitting alone. They are entirely different entities, born of entirely different processes. Jurors, for example, are immune from comeback. This immunity is the source of the second of their two great functions: (a) trial of our fellow citizens; (b) guardians of our freedoms.

Sir Harry Ognall, an experienced criminal judge, in his book '*A Life of Crime'* gave bold expression to this immunity – one that, perhaps, dare not speak its name, but is so precious in our justice system*: 'Trial by jury remains the best vehicle for determining guilt in major criminal cases. A judge sitting alone or with assessors is bound by the letter of the law; a jury is not. A jury can simply cast aside a legal principle and conclude, "We don't care what the law says; this is not fair.'"* These thoughts no doubt were in Lord Bingham's mind when he – a former Chief Justice and Senior Law Lord – insisted that the *right* of the jury to return the verdict it *'collectively believes is the true one, must be inalienable – even if the verdict might appear perverse or contrary to what an experienced judge or lawyer thinks.'*

Jurors put an unseen, but vital brake on excess of power. When some types of legislation are being considered by Government or decisions are taken by prosecutors, one thought in their minds will be: 'Could we ever get this past a jury?' It is a logic of the MOJ's latest proposals (see below) that if a Government wishes to pass a law that whittles down the freedom of its citizens, it merely has to ensure that the *statutory maximum* sentence for any transgression will be one of three years.

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LEVESON'S PROPOSAL THAT A DEFENDANT SHOULD HAVE THE RIGHT TO *CHOOSE* BETWEEN 'JURY TRIAL' AND 'JUDGE-ALONE' TRIAL (pages 294-299)

The first jury recommendation in the Review is that in most criminal trials, subject to the judge's approval, a defendant should have the right to choose to be tried either by a jury or by a judge-alone. The MOJ appears to have taken what it wants from the Leveson Review (i.e. cutting down the number of jury trials), and jettisoned the rest. However, much of what I have to say about this idea of cases being tried by judges-alone applies equally to what is now being proposed.

The first of Leveson's suggestions when it comes to removing juries is to be found in that part of the Review entitled *'Jury Waiver (Defendant's Choice to be Tried by Judge-Alone)'.* This proposal, which would have huge consequences if it becomes law, takes up only a tiny part of the Review. Of 378 pages, only six are given to it, and two of these six outline systems in other jurisdictions. The Review contains no consideration as to how the system, or the two systems – trial by jury and trial by judge-alone – might work, or sit together side by side. Leveson provides only the bare bones of an idea, and, as we shall see, a few questionable selling points.

The Proposal

The 'bare bones' of the idea is that in the Crown Court, a defendant charged with an indictable offence, preferably after taking advice, should have the option to elect trial by judge-alone. The judge must determine the answer on a case by case basis, deciding what is in the best interests of justice. The prosecution would have no right to elect; nor would their consent be required. The judge should seek the views of the prosecution and any co-defendants in the case. As to offences excluded from the scheme, the Review reads: *'There are likely to be some cases where it is always in the public interest that there is a jury trial. That is likely to be so in relation to homicide and some terror-related offences; and there may be other types of offence.'* Trial by jury would be the default mode of trial, and once the judge has made his or her decision and directed the mode of trial, there can be no right of appeal.

Leveson's suggested 'Attractions' of electing a Judge-Alone Trial

Trial by jury has long been recognised and lauded as the fairest and most acceptable mode of trial. When and why would defendants be likely to choose trial by judge-alone, and when might judges allow it? In both Reviews – for there was an earlier *'Review of efficiency in criminal proceedings'* by Leveson in 2015 – he refers to the advantages of judge-alone trials. Referring to other common law jurisdictions, he says: *'The popularity of the approach appears to be because it is a simpler, speedier and cheaper procedure than trial by jury and there may be reasons why judge-alone trials might also be an attractive option for defendants.'*

Applying each of these 'advantages' to this country:

1. *Popularity* – Presumably, the Review is claiming this is popular abroad. In this country I am not aware of anyone pressing for judge-alone trials, and we are not told of any. Talking about our justice system, in his book *The Business of Judging*, Lord Bingham said *'I stress … the very deep popular attachment to jury trial.'*

2. *A simpler, speedier and cheaper procedure* – Where is the evidence for this? There is none. When it comes to saving sitting days, the Review forecasts that if many of the reforms are introduced in a quite different context, it will result in a saving of at least 9,000 sitting days each year. However, this does *not* include judge-alone trials. Leveson claims that they would have a 'considerable impact upon the case workload', but admits (page 263) *'Due to time and/or evidence constraints, there is no assessment of trial by judge-alone, jury waiver or wider recommendations made throughout this Review. Some of these are extremely challenging to model. As evidenced throughout this Review, I would consider these to have a considerable impact on the open caseload/workload.'*

Where, then, does the forecast of possible substantial savings of time – up to '20 per cent or more', come from? Without more information, at best the answer seems to be little more than optimistic guesswork.

3. *An attractive option for defendants* – This important, and we should consider the reasons given for judge-alone trials being an attractive option, for it will not work if defendants do not choose it, or if judges do not to agree to it. On page 294 (Para 44) of the Review, Leveson states:

> '*The situations in which such an election might be permitted have been suggested to include cases where: (1) a highly technical defence depends upon the legal interpretation of agreed facts, or where (2) the defendant's conduct would generate substantial adverse publicity, or (3) in cases turning on confession or identification.'*

However, taking each of these in turn:

> *(1) 'Cases where a defendant is advancing a highly 'technical' defence such that the case turns on the legal interpretations of agreed facts.'*

I do not know what the Review has in mind, and there is no explanation. Juries have *never* been involved in legal interpretation – this is and always has been a matter for the judge to decide; and having made that decision it is for the judge to direct the jury accordingly, explaining precisely (a) what the law is, and (b) what this means in terms of the issues of fact they must decide. If the facts are truly agreed the judge's ruling might put an end to the case.

> *(2) 'Cases where a defendant's conduct would generate substantial adverse publicity or opprobrium.'*

No examples are given in the 2025 Review, but the 2015 Review says: Defendants might choose judge-alone in *'cases such as sexual / sadistic violence, or from minorities or sects who may consider the Judge to be a more objective tribunal than a jury.'* But these

undoubted dangers are not ignored; we already cater for them by insisting: (i) on careful judicial directions to disregard emotions or potentially prejudicial information; and (ii) that the prosecution must not present highly emotive or gruesome evidence if it is not strictly necessary for proving their case.

(3) 'Cases turning on alleged confessions or identification.'

The Review suggests that *'judges might be expected to be more rigorous in their evaluation of the weight afforded to such evidence.'* But what is the problem here? Under the jury system a defendant has the added protection of two bites of the cherry. In cases of confessions or identification, if the evidence is challenged on the ground of admissibility, the judge first hears evidence in the absence of the jury. Only if the judge is sure that it may safely be left to the jury do they hear it, along with an additional mandatory exhortation to exercise rigour and care. Under any judge-alone system the defendant would lose these protections – that of two bites of the cherry, and that of the judge acting as 'referee' rather than 'inquisitor' (see below).

These examples are therefore very weak. Interest, however, lies in their origin. In the recent 2025 Review, nothing is said about this; but in the 2015 Review (page 88) they appear, along with a footnote that reads *'With gratitude to the work of Professors John Jackson and Sean Doran in their book Judge Without Jury*, *(Clarendon Press,1995)*'. However, it should be noted that the *full* title of the book is: *Judge without Jury: Diplock Trials in the Adversary System.*

Many might wonder what, if anything, should be taken from a 30-year-old book about the judge-alone 'Diplock' courts, which held trials during 'The Troubles' in Northern Ireland – where Republican defendants routinely refused to participate in the trial process, and judges, trying cases in the most wretched circumstances, were protected by armed guard round the clock. Leveson seems to agree (Review, page 320): *'It is difficult to rely on data from the judge-alone courts in Northern Ireland where the trials in the 'Diplock courts' were not by defendant election, and must be seen in the particular context of the sectarian conflicts and the types of offence that would be tried in that forum.'*

Nevertheless, these reasons are solemnly presented to Government in support of a proposal which would, if implemented, have a profound, irreparable impact upon our heritage of trial by jury.

The Review makes two more observations:

1. 'Jury waivers have been utilised successfully in several common law jurisdictions.'

The Review refers to three Commonwealth jurisdictions, Australia, Canada and New Zealand. Each of these countries allows judge-alone trials. They all have different qualifications for this, although the offence of murder and other offences attracting heavy sentences must be tried by juries.

One feature of the system in Australia, where some states have judge-alone trials and others do not, is that statistics show that where 'judge-alone' is in operation, a significantly greater percentage of defendants are acquitted than in jury trials. The high level of judge-alone acquittals in one state, the Australian Capital Territory, including (at one time) trials for murder, caused such concern that a Bill was introduced, and now a long list of serious offences, including sexual offences, previously tried by judge-alone must be tried by juries.

Canada is said to represent a further alternative. The Lord Chancellor has referred more than once to Canada as an exemplar. But why? Such very limited information as I have been able to obtain again suggests that the courts experience a significantly higher proportion of acquittals in judge-alone trials than jury trials. Where is the detail of the Canadian experience which could possibly justify our adopting their system?

It should not surprise us that judges sitting alone trying serious offences might tend to acquit more often than juries. It is far more burdensome for one person, however experienced, alone and isolated from discussion and reassurance, with the full weight of the case, the future of the defendant and the expectations of justice on their shoulders, to have the confidence of being sure of facts. These burdens are very significantly eased when 12 ordinary and largely anonymous people come together to decide the case as a body. They are able to discuss and argue about the evidence and support one another in their conclusions.

Our jury system has been painstakingly developed by Parliament and the courts over very many years. We have a settled, deeply embedded culture of trial by jury. I am not sure that we need look to other jurisdictions to make fundamental alterations to ours. Lord Bingham in his book said*: 'I simply do not think that human institutions can be lifted out of one society, which has grown up round them and adapted itself to them and transplanted into another quite different society whose organs are not adapted to receive them.'* (He was referring to the continental inquisitorial system, where a judge directs enquiries into the case, but the principle remains.)

These statistics of seemingly disproportionate acquittals could, of course, be attractive to defendants, even though they might be disturbing for the rest of us. When legislation is contemplated, the disparity of outcomes between these two quite different types of trial should be considered very carefully by Government and Parliament as a matter of fundamental importance and *policy.*

2. The defendant's enhanced participation in the criminal process.

The final selling point of the 'right to choose' might well be called Leveson's 'John Lewis Customer Service Offer'. The passage (Review page 295), reads:

> *'Allowing a defendant, particularly if they have had professional legal advice, to elect a trial by judge-alone can be seen as an enhancement of the defendant's effective participation in the criminal process. I am well aware of the compelling literature on how litigant confidence in the process enhances perceptions of satisfaction in the*

> *outcome of the trial. Research by Tom Tyler has found that people are more likely to have confidence in a decision when they believe it has been made fairly.'* (Perhaps we do not need any research to agree with this last sentence. Tom Tyler's research is in his 2007 study *Procedural Justice and the Courts*. I am not sure it helps.)

'Enhancing' a defendant's effective participation in the process'. What does this mean? We have a defendant, who is properly before the court charged with crime. We have many years of common law and the Criminal Procedure Rules, all carefully designed to offer the defendant all the protections required for a fair trial. These are or should be the same for all, and defendants must participate in the process like everyone else. They already have advantages. They have legal representation to guard their interests; evidence will only be admitted if it is relevant and probative; the prosecution must make the jury sure of guilt; the judge must ensure a fair trial. How many more advantages are to be given, or are needed? Leveson appears to believe all this is not enough. He offers something extra – *a choice* for defendants as to how they should be tried.

But what about victims, and *their* perception of a fair trial? Surely, any defendant who is given the choice will base it on the forum more likely to result in an acquittal. What other consideration would motivate them? Where does this leave the victim, who is given no choice in the matter, and would face the trial knowing, or believing *or at least perceiving*, that the system has already given the defendant an extra unfair advantage – a choice as to *how* he / she is to be tried. A victim, particularly in a case of indecency, might well wish to have their evidence evaluated by a jury. Their sole right is to be consulted by the prosecution, Where is equal justice here?

We might also spare a few thoughts for solicitors and counsel, and perhaps even some for the judiciary. Leaving aside the inevitable problems of 'judge-shopping' and the proclivities of the judge who you think is going to hear your case – a box even Pandora might forebear to open – we need to consider what would happen under this system.

Solicitors and Counsel: How are they to advise when it comes to mode of trial? Each one will have their own views, and their own prejudices, as to mode of trial. They will have to consider and advise the client of all the pros and cons of the two options (and then, no doubt, when the trial gets under way, be at risk of wondering if it has all gone wildly wrong).

Judges: How are they to decide? The judge must determine the answer on a case by case basis, by deciding what is in the best interests of justice. Judges are very different from one another, in personality and experience. How can the judge be confident in knowing what is in the best interests of justice – 'his' or 'her' justice, or 'jury' justice? This question will be thrown into sharp relief when we come to consider the latest MOJ proposals.

As to the general conduct and manageability of judge-alone trials, these will be considered in greater detail in the following chapters.

MANDATORY JUDGE-ALONE TRIAL IN SERIOUS / COMPLEX FRAUD (Pages 300-318)

Among the many recommendations in his Review, Leveson proposes only two *mandatory* modes of trial. At one end of the scale, he says, 'jury trial' is a must for 'homicide and some terror-related offences'. This is based, no doubt, on a very understandable gut reaction that the public would stand for nothing less. At the other end, he recommends mandatory 'judge-alone' trial for serious and complex fraud.

As regards 'serious and complex' fraud, for which the Review provides only a vague, unworkable definition, I believe that these proposals hang on the thread of Leveson's personal, long-held belief that judges sitting alone can be relied upon to do a better and more efficient job than trials with juries. However, I consider the evidence and arguments upon which he relies to be unfounded, and misguided. Moreover, when it comes to the backlog, juries hearing fraud are not and never have been the problem.

The proposal

The Review does not offer a clear definition of fraud cases which would be tried by judge-alone. This is the proposal:

> *'I recommend that serious and complex fraud cases should be tried by judge-alone. Eligible cases should be defined by their hidden dishonesty or complexity that is outside the understanding of the general public. The allocation decision should be made at a Preparatory Hearing. The limits of and process for these powers should be set out in a Practice Direction by the Lady Chief Justice.'*
>
> He also says: *'This would involve frauds where the dishonesty is not immediately obvious, the area of business lies outside the understanding of the general public and the defendant is an expert in the field.'*

A brief recent history

Currently, we have jury trial for all indictable, normally the more serious criminal offences. Section 43 of the Criminal Justice Act 2003 was intended to create an exception to this. Had it been implemented, it would have permitted the prosecution (not the defence) to make an application to the court for an allegation of serious fraud to be tried without a jury, provided the complexity or the length of the trial (or both) was likely to make the trial *'so burdensome to the members of the jury hearing it that the interests of justice require that serious consideration be given to a judge-alone trial'.* Such an order could only be made with the approval of the Lord (or Lady) Chief Justice, or a judge nominated by the Chief Justice.

In 2007, the Frauds (Trials without a Jury) Bill sought to implement section 43. It was passed in the Commons but rejected three times in the Lords. The Attorney General, Lord Goldsmith QC, solemnly threatened that the Government would have the Bill pass into law, even if it meant invoking the Parliament Act – a threat which he never removed. In that same year, as Resident Judge at Southwark, I delivered a paper at Middle Temple, entitled *The Duty of*

Decision in which I argued against the Bill. I was then able to say:

> *'At Southwark Crown Court, which I have the honour of heading, every one of the full-time judges with experience of trying cases of serious and complex fraud, well knowing the arguments advanced against jury trials, have given me authority to state unequivocally on their behalf that they wished to retain them.'*

Section 43 scudded across the Parliamentary skies until the next general election, when the Liberal Democrats insisted that their Coalition Agreement with the Conservatives include its removal – *'We will protect historic freedoms through the defence of trial by jury'*. It was altogether repealed by section 113 of the Protection of Freedoms Act 2012.

However, when Leveson conducted his 2015 Review, he lamented the fact that section 43 had been repealed. He said (page 91, para 356):

> *'In the event, in 2003, legislation was passed which did implement this recommendation although affirmative resolutions were required before it could be brought into effect. No such resolution was ever tabled and the provisions were repealed. While I hesitate to suggest that further consideration be given to a proposal which has been the subject of recent Parliamentary scrutiny, it is clear that the very real expense of exceptionally long trials would be reduced if Judges (with assessors) conducted these trials'*

And so, as far as serious fraud is concerned, it will therefore be seen that the 2025 Review re-states views he has held for a long time. As there was no troubling backlog in 2015, one might be forgiven for thinking that he is on a mission, now taking advantage of the backlog to revitalise a pet project. In neither review does he provide any evidence, let alone convincing evidence, that the course he proposes would in any way enhance the quality or efficiency of the justice system, or reduce the current backlog.

Judges at the coal face

I exclude from all that follows cases in which defendants show contempt for the jury system by tampering or attempting to tamper with a jury. Further, when I refer to *judge-alone* trials in the context of serious fraud, I do so deliberately, for we should understand that whereas in 2015 Leveson (like Lord Justice Auld) favoured 'judge with assessors', he now – without advancing any reason – favours judge-alone.

Where does the Review's support come from? What do the judges who actually try these cases think?

The Review relies heavily upon two old cases for the argument that serious fraud is not suitable for jury trial. It refers in particular to *Blue Arrow* (1991-2) and *R v Rayment and others*, otherwise known as *Jubilee Line* (2003-5). But within the profession it is very well known that the problems in these cases, to put it delicately, had nothing to do with juries. Perhaps Lady Justice Hallett had them in mind and was being equally discreet when, in her

lecture, she said *'Critics of juries in long fraud trials blame the collapse of some high-profile trials on the jury system. Yet, if you analyse what went wrong, the fault for the most part seems to have lain not with the jurors but elsewhere.*' *R v Hayes* [2025] UKSC 29, the recent Libor case, provides a further dramatic illustration, if one were needed, that when it comes to long and complex trials going wrong (which rarely happens) one should be very careful indeed before pointing the finger at juries.

As regards judge-alone trials, the Review goes back a long way to find support. It relies upon the reviews and recommendations of Lord Roskill (1986) and Lord Justice Auld (2001). It is right to say that other senior judges, including a former Chief Justice, have expressed an interest in judge-alone trials for serious fraud, but as far as I am aware none of these proponents have descended to the detail of explaining precisely how they would work. I intend to concentrate upon the nuts and bolts of the system and the work of the judges who actually try these cases, for there the position is very different.

If the champions of judge-alone trials were right in their claim that juries cannot be expected to understand these cases, and judge-alone trials will be more efficient and take less time, who might we expect to find at the front of the queue with evidence to support them, but the very judges who try them? They try indictable crime day by day and would surely have the greatest interest in a change if this was a genuinely improved system.

In the Review, Leveson refers to Southwark Crown Court, which he describes as 'the leading Crown Court centre in England and Wales for long and complex trials principally involving economic crimes.' He singles out the judges at Southwark as examples of those qualified by experience and ability to try these cases without a jury. At the end of the Review, in a long list of acknowledgements, he refers to 'judges', but having (presumably) engaged with them, there is hardly a word about *the opinions* of judges who try these cases. I can only say that my experience and understanding, unless attitudes have dramatically changed, is that the vast majority of judges 'at the coal face' trying indictable crime are strongly in favour of the jury system and strongly against the prospect of trial by judge-alone.

Most judges are aware of their limitations; and they are also aware of the many practical and procedural implications of judge-alone trials, some of which I will outline below. Why is it that over very many years neither the judiciary nor the professions have campaigned to do away with jury trials? Leveson gives a nod to some of their reservations, only to dismiss them, but he does not give us the benefit of their views.

Dealing specifically with serious fraud, Leveson says *'I remain of the view that it is difficult for the jury to understand or assess the complexity of some of the evidence in these cases.'* Of course this is right, and it applies to judges too! These cases are not easy. In *R v Thompson and others* [2010] 2 Cr App R 27, Lord Judge said: *'Jury service is not easy; it never has been. It involves a major civic responsibility. Among individual jurors there will be a vast range of personality and characteristics. By their very nature some trials require jurors to address deeply sensitive human problems*.' Surely the questions that matter are: if evidence is properly presented and trials are properly conducted, can the jury be relied upon to take

their responsibilities seriously, grasp the evidence and decide whether a defendant is guilty as charged? I believe the answer to each of these questions is a resounding 'Yes'.

The Review confines mandatory 'judge-alone' cases to 'serious or complex *fraud'*. However, these days many criminal cases are serious or complex, and potentially burdensome to a jury, and they are by no means all cases of fraud. Some multi-handed terrorist, murder, gang grooming and rape, and drugs trials now last for many months – far longer than most fraud trials, and they can be just as complex, if not more so. Should a long murder trial involving several defendants, cut-throat defences and a myriad of issues, and which also involves detailed, contested expert evidence, be regarded as any less complex or burdensome than a serious fraud case? Who could ever say that a '*Lucy Letby'* type case is less onerous and demanding? It seems to me that the only true logic of Leveson is that if we had judge-alone trials in fraud cases, this would be a step along the way to saying that *any* case regarded as burdensome to a jury should be tried by a judge-alone.

It is not often that a serving judge says anything in public about mode of trial, but in 2005, when the section 43 proposals were very much in the news, Sir Stephen Mitchell, a former Hight Court Judge, was constrained to do so. At the conclusion of an eight-month murder trial at the Central Criminal Court, he had cause to compliment and thank the jury. Uniquely experienced in the criminal law – at the Bar, he had been a Senior Treasury Counsel and had edited the criminal law bible, Archbold, for 18 years – he took the opportunity to express his concern at the current proposals to withdraw juries in cases of serious fraud. He said: *'But once the thin end of the wedge is driven home, the erosion of the system will have been initiated, and the next short and much easier step will be to add another class of long trials to the list.'* Shortly, we will see the range of offences which is now being proposed for mandatory judge-alone trials.

Length of fraud trials

It is true that the demands upon a jury in any long case, although attainable, can sometimes appear surreal. In cases of fraud, some have a traditional and touching faith in a jury's instinctive ability to 'sniff out' dishonesty, but of course there can be no substitute for the tribunal of fact in any major trial being able to sustain concentration over a period of many weeks and, in some cases, understand and assimilate difficult evidence.

These days, complex fraud cases are usually prepared and presented to a very high standard, with excellent, simple graphics to aid understanding. Clarity of exposition, patient explanation and repetition have their rewards, with juries often becoming absorbed in the process. Experience shows that juries do get involved, and generally cope very well. This is particularly so in long trials, when those who work day by day alongside juries often gain respect and admiration for their commitment, industry, good will and good sense. The result of this careful and conscientious approach is especially apparent when juries have to work through evidence relating to different offences in relation to a number of defendants, some of whom are jointly charged, others charged alone.

The real difficulty in these cases is that of *length* rather than complexity – the burden of a trial which has actually lasted far longer than was necessary. It is the length of *any* trial, let alone fraud trials, that is most likely to give rise to what would, perhaps, be the strongest argument in favour of judge-alone trials – that of unrepresentative juries, where jurors may have to be excused serving due to their personal circumstances. But length is constantly being addressed. For example, Southwark has its own comprehensive *Practice Note for the Judicial Control and Management of Heavy Fraud and Other Complex Criminal Cases* (and so, it relates to *all* complex cases). It begins:

> *'Trial Date and Length: Where pleas of not guilty are entered, the Court should set a date for trial leaving sufficient time for preparation and to allow the Court to set a realistic timetable. Trials should not be scheduled to last longer than three months save in exceptional cases and where the length can be justified by the parties. Trials can usually be kept to three months by following the guidance given in paragraph 5.1 below … '*

There follows detailed guidance of steps recommended to ensure a fair and efficient trial. I am also grateful to Southwark Crown Court for their figures of 'actual outcomes' (as opposed to estimates of length) for the six years 2019-2024.

1. The great majority of cases, fraud or otherwise, lasted less than three months.

2. Cases over 3 months
   2019 – 1 case.
   2020 – 2 cases.
   2021 – 2 cases.
   2022 – 2 cases.
   2023 – 1 case.
   2024 – 1 case.

3. Cases over 6 months:
   2022 – 1 case (c.12 months).
   2024 – 1 case (c. 8 months).

The two long cases in 2022 and 2024 were both of 'heavy fraud', and the fact that they overran meant that they had to be managed to accommodate the pre-existing commitments of some jurors. But looking at the picture of the past six years (which include Covid), we can see that there were very few fraud cases which lasted as long as three months, a small number of cases which lasted more than three months, and, in six years – only two cases over six months. These figures, although confined to Southwark, are data, and they tell a story; but it is a story that seems to have been studiously ignored by Leveson and the MOJ. It is impossible to see how length of trial in these few cases can have anything to do with the backlog of cases. The evidence of these figures do not begin to justify the removal of one of the most trusted and cherished hallmarks of public life.

This may well be supported by the Lord Chancellor's letter to the Chair of the Justice Committee, dated 15 December, 2025. On page 2 he says *'Note that a policy for judge-alone trials for technical and lengthy fraud and financial cases is expected to impact only a small*

number of cases.' I am not sure what he means by adding the words 'financial cases', but it is clear that the MOJ does not expect these cases to make any impact on the backlog.

By way of footnote to the question of length, it so happens that one genuine, if entirely fortuitous, advantage of jury trial is that it actually imposes an inherent discipline to reduce length. The length of a civil trial before a judge alone will to a significant extent be driven by costs. A criminal trial before a judge-alone would have neither of these incentives. Judges would be expected to cope with more, not less. In some cases, the burden would be intolerable. In this connection, we might recall that a former Chief Justice, Lord Phillips, who has tried a case of serious fraud (*Barlow Clowes*) said: *'even those who favour judge-only trials recognise that they may last just as long, if not much longer, than jury trials*.'

Complexity of fraud trials

As to the Review's statement that *'Eligible cases should be defined by their hidden dishonesty or complexity that is outside the understanding of the general public',* I cannot say that a case 'outside the understanding of the general public' has never existed; I can only say that in a long career I have never encountered one. Of course, cases of all descriptions are outside the *experience* of the general public (often the same may be said of judges), but that does not make them outside their *understanding* – if, as I say, they are presented and conducted properly. It is the very process of presentation, explanation, and calling and bringing evidence to life that takes the jury and judges alike, into the world in which they must make their decisions.

At the end of the Review we find (page 378) there is an *'Indicative list of Offences in Scope of Judge-Only trials for Fraud.'* There are seven:

> *'Money laundering, Fraud, Fraud by company director etc., Acting with intent to defraud the Public Revenue, Conspiracy to defraud, Insider Trading and Bribery.'*

All of these offences are regular fare at Southwark and have been for years. Most of them take less than three months to try. All of them necessarily involve the element of dishonesty (except possibly bribery, where dishonesty may not be a formal ingredient, but is inherent). I do not accept that of any of these offences could only be tried by or are best suited to judge-alone trial.

In any fraud trial a jury almost always is going to have to decide two things: whether the prosecution has proved (a) that a fraud has been committed and (b) a defendant has been a dishonest party to it. In 2007, I wrote: *'Dishonesty is and ought to be a simple concept. People who commit fraud face imprisonment. Surely, if the ordinary man in the street cannot be expected to understand that some course of action is criminally dishonest, then it ought not to be a crime.'* I am encouraged that in her 2017 lecture, Lady Justice Hallett echoed this sentiment:

> '*One also has to question – why, if a prosecution of a criminal offence is so complex that only a highly educated and trained professional will follow – has it been brought? Fraud offences are defined by the standards of ordinary people and prosecutions should be intelligible to the public. If the prosecution cannot explain in sufficiently simple terms why they say someone has behaved dishonestly, is a prosecution for a criminal offence punishable with imprisonment justified?'*

Dishonesty

This passage applies equally to all cases of indictable crime involving an element of dishonesty, whether under the Leveson or the latest MOJ proposals.

In *R v Barton & Booth* [2020] EWCA Crim 575 the Court of Appeal confirmed that in criminal cases the *Ivey* test for dishonesty should be followed. We still have a two-stage test, but now each is objective: (1) What was the defendant's actual state of knowledge or belief about the facts? (2) Applying the standards of ordinary, decent people, was the conduct dishonest – regardless of the defendant's own understanding of dishonesty?

In *Ivey* [2017] UKSC 67, the Supreme Court once again emphasised that the question of dishonesty was for *juries* to decide. Indeed, in para 53 of their judgment they say:

> *'… This reflects the view of the Criminal Law Revision Committee that dishonesty was a matter to be left to a jury; it said at para 39 that "Dishonesty is something which laymen can easily recognise when they see it".'*

And so, when it comes to dishonesty, the law places at its heart, the standards of the layman/woman – the 'ordinary man and woman in the street' (*not* the standards of individual judges). In this context, we might bear in mind that a significant advantage of this is that juries have been prepared to condemn as dishonest highly questionable conduct even though it is represented as that to which institutions have become accustomed, and therefore 'honest'. Give this task to a judge-alone, applying their own varied experience and standards (for how could they do otherwise?) – 'dishonesty' may be in new and dangerous territory.

As for the notion that serious fraud might be tried by judges with the aid of assessors, I have mentioned that the 2025 Review decides against this model. But either model would be the very antithesis of all we believe to be of value of our present system. In the case of *Thompso*n (cited above), Lord Judge said: *'The verdict must be reached, according to the jury oath, in accordance with the evidence. For this purpose each juror brings to the decision-making process, his or her own experience of life and general knowledge of the way things work in the real world; that is part of the stock in trade of the jury process, and the combination of the experience of a randomly selected group of twelve individuals, exercising their civic responsibility as a collective body, provides an essential strength of the system.'*

*

JUDGE-ALONE TRIALS – BURDEN ON JUDGES AND JUSTICE SYSTEM

The following observations will also be seen to apply to the latest MOJ proposals:

It is trite that to say of someone that he or she has acted as 'judge and jury' is to accuse them of bias or unfairness. No such accusation is levelled at the judge in civil proceedings, but one can see why: First, the standard of proof is significantly lower, the fact-finding exercise is therefore likely to be simpler, and easier to explain and justify, and, most importantly, easier to accept. Second, the public is not normally involved in the same way. Third, the consequences of their decisions are of a different order. An adverse finding in a case of serious crime will be loss of liberty, quite possibly for years, with the threat, in subsequent confiscation proceedings, of much more to come.

All the Crown Court judges who presently try crime have signed-up to trial by jury – leaving all the ultimate decisions of fact to a body of citizens free of the spotlight and free of criticism. In indictable cases, if we had judge-alone trials, the burden on a single judge both in terms of fact-finding and trial management will be hugely increased. They will become a quite different species of judge.

Judges will be expected to shoulder the enormous responsibility alone. This will put a very considerable extra strain on them. On a purely personal note, which may or may not resonate with serving judges, I remember well how arduous and exhausting the conduct of a long trial could be. It is hardly unrealistic to speculate that in some judge-alone cases, and not necessarily long ones, the burden on the trial judge could be crushing. Surprisingly, for all his experience in the criminal law, Leveson does not seem troubled by this. He acknowledges the concern, but dismisses it. Relying on judges' obligations and abilities to make decisions in other areas, he says (pages 292-3):

> *'Whilst I acknowledge that some judges might be concerned about the responsibility of making decisions on fact and on the ultimate verdict, I am unconvinced that these concerns carry significant weight … They are professional judges, having been appointed and trained to deal with all criminal matters arising in the Crown Court. They are used to delivering many rulings during the course of a case. These include:*
>
> 1. *decisions about the admissibility of evidence;* (more of this below)
>
> 2. *decisions on the sufficiency of the evidence at the close of the Crown's case;*
>
> 3. *the appropriate legal framework including routes to verdicts;*
>
> 4. *analysing the necessary directions of law and fashioning a review of the facts in such a way as to assist the jury;*

5. the factual basis for sentencing;

6. sentencing remarks (within a complex framework of sentencing law) justifying their personal decision on the penalty; and

7. orders in confiscation proceedings which require decisions of fact and law.'

I believe this list is flawed and misleading; it tells us nothing. In only three of these cases, 1, 5 and 7, might *factual* decisions have to be made, and in No.7, confiscation proceedings, the standard of proof is merely the balance of probabilities. Each of these seven decisions may be important in its own context, as is a judge's duty to sit with magistrates on appeal from Magistrates Courts, but I anticipate that no one accustomed to making them would claim that they are in the same league as making the findings of fact in the more serious cases of violence, sexual offences and dishonesty that will be required of judges who are made responsible for reaching verdicts.

Judges failing to agree: In his book *The Judge*, Lord Devlin described the difficulties of fact finding. He said in terms what we no doubt already know, that *'In difficult cases he [the judge] cannot be right every time.'* He quotes colleagues: '*Two reasonable people can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable'* and '*History is replete with genuine accusations of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people.'*

The fact is that judges do not always agree with one another either when it comes to fact-finding or interpretation of facts, as anyone having the privilege of sitting in the Court of Appeal will be aware. (This will be a particularly important consideration when we come to examine the MOJ's latest proposals.) For example, what if under the *judge-alone* system, a High Court Judge or judges in the Court of Appeal say in their judgment they are sure that certain proven conduct is dishonest (or not) by the standards of ordinary, decent people. If the same facts are heard in another judge-alone or jury trial, must they say so too?

Trial management

One of the most serious problems with the prospect of judge-alone trials is that of bias – or perceived bias. Far too little weight (if any) has been given to the fact that we operate under an *adversarial system* in which the parties are responsible for laying the evidence before the court, *not* the judge. A judge is not ordinarily expected to step into the arena, but in some circumstances they must have at least some input into the trial process; in others they may have to make decisions which will affect the whole shape of the trial.

There is Court of Appeal authority for each of the following: if judges sees that the charge is wrong, they are entitled to have it put right; if they believe that an essential piece of documentation should be exhibited, they are entitled to call for it; if they feels that the prosecution has neglected to ask a vital question, they are entitled to ask it. Indeed, the

Court of Appeal (*R v Saville*, Unreported, 1992. 4181/W2/91) went so far as to express it in terms of the judge's *duty*. Lord Justice Simon Brown said:

> "*If the presiding judge perceives the risk of a case going off on a wholly wrong basis, whether because of some legal technicality which has been overlooked, or because of some lacuna in the evidence, it is not incumbent on him to grit his teeth, remain silent and watch justice miscarry - for it is no less a miscarriage of justice when an accused person escapes conviction through inefficiency or carelessness on the part of the Crown than when he is convicted as a result of a comparable error on the part of the defence. Rather it is the duty of the judge to ensure that criminal proceedings are tried fairly and efficiently, and to intervene as necessary to ensure that goal is achieved."*

The point is a serious one, for although criminal judges should not enter the arena to take sides, they are not expected to sit back and ignore matters such as these. However, if they intervene in this way in a judge-alone trial, how could this not be interpreted as bias rather than impartiality, and desiring that the outcome should be a conviction?

It should be remembered that a defendant has the right to turn his back on the judge and choose to represent himself. And, what if the judge trying the case alone, decides the court cannot come to any conclusion without the aid of a witness whom neither party wishes to call? We should be clear in our understanding that judge-alone trials (certainly as envisaged by Leveson) have within them the seeds of a new 'inquisitorial' system. If that is what Parliament wants, let it say so, and let a new set of Rules be made to cater for it.

Everything becomes so much worse when one goes on to consider the admissibility of evidence. Judges must exercise a very wide range of discretionary powers in their conduct of criminal cases. These powers are numerous and extensive. Below is a list of some of the important decisions which, in a criminal trial, a judge is habitually called upon to make:

1. Applications by the prosecution not to disclose evidence to the defence on the grounds of Public Interest (PII applications)
2. Defence applications for the disclosure of material in the possession of the prosecution, but which it chooses not to use or disclose. (The 'Unused')
3. Abuse of process hearings.
4. Trial management, and in particular powers of severance, of counts and defendants.
5. The well-known ('section 78') decisions, balancing the relevance and probative value of evidence against its prejudicial effect.
6. Evidence of bad character, and 'similar fact' evidence,
7. Hearsay.
8. Applications to read evidence under the Criminal Justice Act 1988.
9. Applications to adduce 'additional evidence' coming to light after the trial has started.
10. Confessions and evidence of identification.

In each of these cases, or, more serious still, in any combination of them, a judge routinely sees material which is prejudicial – sometimes, highly prejudicial – to a defendant. All of this has the potential to compromise their fact-finding responsibilities – or at the least, will be *seen* as doing so; and justice must be *seen* to be done.

The public has considerable and justifiable faith in the professionalism of the judiciary, and their ability to decide cases on admissible material only; but even judges do not believe that this capacity is infinite. Does anyone really subscribe to the conceit that when deciding grave issues of fact, judges can *always*, at will, completely disregard whatever they may see or hear, and erase it even from their sub-conscious? Even if some of them do possess this remarkable facility, they can hardly expect that those who appear as lawyers, or the public, or – most importantly – defendants, will believe it too.

Very few cases will be entirely free of all these potentially prejudicial influences on a judge's decisions. And how quickly might defendants, whether those who have chosen to be tried by a judge-alone (Leveson) have second thoughts about their election, or those who must now be tried by judge-alone (MOJ), come to lose confidence in their entitlement to a fair trial?

The issue of bias was considered in the House of Lords appeal of *Abdroikof and Ors* [2007] UKHL 37. Their Lordships held that where the jury's verdict depended upon a decision as to whether a police sergeant or the defendant was telling the truth, and one of the jurors was a policeman who shared the same local service background as the sergeant, it could not be said that the defendant was being tried by a tribunal which was and appeared to be impartial. In the course of his judgment, Lord Bingham said *'The criminal trial jury has now, as it has had for centuries, the immense responsibility of deciding the all-important issue of guilt in the most serious criminal cases coming before the courts of England and Wales. Upon its integrity, that of the trial process to a large extent depends. Upon its reputation for independence and impartiality public confidence in the integrity of the system also, to a large extent, depends.'* The all-important test adopted by the court was this: *'whether a fair-minded and informed observer would conclude that there was a real possibility that the trial was biased'*. It is difficult to see how very many judge-alone trials, involving the features of judicial discretion and decision-making to which I have referred, could hope to survive this test.

When a past Law Commissioner, later a High Court Judge, discussed judge-alone trials for serious fraud, he felt constrained to offer a solution to this very problem – *'a judge who has ruled, pre-trial on admissibility in respect of other matters, should withdraw from the trial if he has had sight of material which has been ruled inadmissible'*. But could this ever be realistic? First, the law is that one trial judge cannot bind another on a re-trial, and who could prevent the very same matter being aired once again before the new trial judge? Then, I suppose a judge could withdraw from a case at any stage (however unsatisfactory and costly that may be), but many of these problems often arise well into the trial, which could all too easily be disrupted or de-railed. This will undo all the good work in progress to make them manageable.

Referring to the Review's proposals for election (above), a very obvious problem will arise when co-defendants are involved. Leveson's solution (page 298) is this:

> *'One factor that the judge will consider would, obviously, be the views of the prosecution. Another would be the views of any co-defendants in the case. My recommendation is that in relation to 'election' for trial by judge-alone, the judge would only be in a position to order such a trial where every defendant on the indictment had expressed the preference for trial by judge-alone. In some instances, the judge will therefore have decisions to be made about severance (as an example where the main defendants seek trial by judge-alone and a co-defendant who played only a minor role seeks a jury trial).'*

There is a confusing contradiction between the last two sentences in this statement. For many years it has been the general rule that save in exceptional circumstances, when charges involve the same set of circumstances, all defendants should be tried together. The answer to any application for severance must surely lie first in the decision of the judge as to what is *in the interests of justice*. The granting of an application for a judge-alone trial following an earlier ruling against the severance of any defendant would be impossible to justify. Therefore:

> Stage 1. Must always be whether severance is in the interests of justice. It would make little sense for a defendant to raise a right to elect trial by judge-alone before the form and scope of the trial have been determined in severance application.
>
> Stage 2. If all the defendants who must be tried together exercise their right to elect trial by judge-alone, the judge's task might be relatively straightforward. However, if only one or two of the group choose 'judge-alone', would it not be absurd for the judge to consent to 'sever' any of them, having just ruled in Stage 1 that it is in the interests of justice that they should all be tried together?

This means that in the absence of some special consideration, such as ill-health, the judge would only be in a position to order trial by judge-alone where every defendant not yet severed has applied for it. A further difficulty will arise in a case where a judge has agreed at Stage 1 to severance and at Stage 2 to different modes of trial. What if findings of fact, right or wrong, necessarily expressed by the judge in the judge-alone trial (for example, whether a crucial prosecution witness is a liar) are sought to be deployed in the jury trial, and might this result in such a conflict that the verdicts cannot sensibly stand together; conversely, if the jury trial came first, where does that leave the judge?

Leveson's idea of a 'much shorter' judge-alone trial

Leveson has sought to persuade the MOJ that judge-alone trials will be 'much shorter'. What the MOJ / Parliament needs to understand is what he means by 'much shorter', and how he claims it can be achieved. I fear that trials by judge-alone, with the judge having the entire responsibility for and power over the verdict, will inevitably develop into a form of 'semi-inquisitorial' system, with the judge constantly intervening as they strive to reach a verdict on their own. In this, I can rely on another law professor, Virginia Hench, in her review of the Jackson – Doran (the 'Diplock' book) says:

> *'As one might expect, Professors Jackson and Doran found that "inquisitorial" questioning (in the form of cross-examination by the judge) occurred almost exclusively in Diplock trials and not in the "ordinary" criminal trials. They also found that Diplock judges were far more likely to question defendants, defence witnesses, and defence experts than were judges in jury trials. Unfortunately, the authors do not consider in any real depth the potential implications of this apparent shift in emphasis. Also unanswered is the question of fairness.'*

As it happens, it appears from Leveson's 2015 Review that this greater, more intrusive judicial participation is exactly what he has in mind. Indeed, he gives this as a reason, if not one of the main reasons, why judge-alone trials might be shorter. Dealing with trials in cases of serious fraud, and taking the experience from civil cases, he says (and see below) *'Trials can be much shorter because the Judge is able to provide feedback to the parties both on the evidence and the arguments that appear persuasive and those that have only marginal, if any, relevance.'*

If these his ideas are put into effect, sooner or later we will move to some form of inquisitorial system – where judges are active in the arena and decide all the facts. The many problems I have described above must somehow be swept aside as no longer being of account. These statements made in his 2015 Review are an indication of the kind of trial he has in mind:

> (1) Para 356: after recommending trial by judge and assessors he concludes with the following: *First, they (Judge and assessors) would understand (or far more readily understand) the financial and commercial context, likely to be entirely foreign to those not involved in the relevant business world. Second, they could pre-read and direct the parties to the central issues thereby avoiding what would otherwise be the necessary deployment of a great body of complex evidence.'*
>
> (2) Para 357: *'I am aware that the Judges at Southwark Crown Court (who try the vast bulk of the most serious fraud) believe that more time and expense is taken up in the interlocutory hearings surrounding these cases rather than the trials. If the parties know that the Judge who is to find the facts is dealing with all aspects of the case, however, it is not implausible to suggest that greater focus on the real issues (rather than satellite concerns) will result. It is worth adding that trials of similar complexity in the Chancery Division and the Commercial Court can be much shorter because the Judge is able to provide feedback to the parties both on the evidence and the arguments that appear persuasive and those that have only of marginal (if any) relevance.'*

This is *crime*, not some niche action in the Chancery or Commercial courts, however important it may be to the parties. It is surprising that anyone with Sir Brian's experience should think that this conduct of a criminal trial would be appropriate. It is well-known that in the course of a criminal trial evidence which appears to have been of only 'marginal relevance' may become crucial. Certainly, this will be so in the eyes of a defendant, in a high state of anxiety, at risk of imprisonment, and sensitive to any indication from the Bench as to which way the wind is blowing. This approach, at the least, undermines the requirements of a

fair trial. ‘Feedback’, interruption and interference of this kind would be inexcusable, and quite likely, appealable. Of course trials will be shorter if a judge behaves like this, particularly if defendants, like their old Diplock counterparts, refuse to participate. The result? Even more and even longer appeals and retrials.

Form of verdict – ‘the reasoned judgment – and confidence in the judiciary

The fashionable argument deployed by those in favour of judge-alone verdicts is that the verdicts will be superior and more soundly based, because they will be explained in a reasoned judgment. In some quarters, this has taken on the mantle of the final, unanswerable reason in support of these trials – a new kind of ‘fairness’ we have never had before. The chief advantage of a reasoned judgment is said to be that the defendant will know what detailed findings of fact are being made against him; as if, under the present system, he does not already know this perfectly well. In the more serious cases juries are routinely given bespoke written directions when they retire to consider their verdict. These are explained by the judge in the summing-up. There is nothing new about them. The written directions set out below have been taken from an old case of indecency:

*

COUNTS 1, 2 AND 3 INDECENT ASSAULT

A person commits the offence of indecent assault if he intentionally touches a child under the age of 16 in an indecent way, intending to a commit an act which would be regarded as right-minded persons as indecent.

* In this connection an indecent touching means a touching accompanied by circumstances of indecency.

* The child's consent is irrelevant; for the law is that a child under the age of 16 cannot consent to indecency against her.

CONSIDERING EACH COUNT SEPARATELY, HAS THE PROSECUTION MADE YOU SURE THAT:

1. Between 13 September 1994 and 12 September 1996, XY was a child under the age of 16 years?

2. In a room in the defendant’s home and when XY was in bed he intentionally touched her breasts (Counts 1 and 2) and/or touched her vagina (Count 3)?

3. This act would in your view be considered by right-minded persons to be indecent?

If the answer to any of these questions is NO the defendant is NOT GUILTY. If the answers to all three questions are YES, the defendant is GUILTY.

*

A finding of guilt in this case provides a defendant and the public with clear answers to all the questions they need to know. What more is necessary?

A reasoned judgment is also said to give a fairer opportunity to appeal. I question this, but if it were so, why then only fraud – this must surely be equally valid and cogent for every criminal case, however long or short it may be. The Review suggests that offences of murder and terrorism must be tried by juries. This would still mean that no reasons would be given in a *Lucy Letby* case.

In the Review (page 250), Leveson tends to make light of the reasoned judgment exercise:

> *'The professional judges sitting in this CCBD (new Crown Court Bench Division) would already have experience in routinely delivering rulings (on admissibility, case to answer and procedural issues) as is presently the case in every trial. I anticipate that these familiar judicial skills will be applied in preparing and delivering a judgment of the court on its verdict. Similarly, the obligation to provide a judgment would not, in my view, be unduly burdensome. Again, as with a jury trial, the judge would always be keeping a running note of the evidence and producing a route to verdict setting out the steps required. With those as a foundation in every case, the production of a reasoned judgment will be far from onerous particularly in the types of less serious offences which will be tried before the CCBD.'*

This is virtually dismissive of the new crucial and additional burden he recommends should be placed on trial judges. One cannot stress too strongly – this is *crime*. The standard of proof is high, the consequences may well be loss of liberty, and fact-finding to the higher standard may be far more difficult than that in civil cases. Indeed, one might foresee that in some demanding cases, judgments will take weeks to write.

I have already referred to the great burden that 'judge-alone' trials will impose upon judges. They will now have to express themselves as being sure of this or that; and the consequences of wrong findings of fact will either be fatal to the verdict or be used to taint the whole trial. For example, in a fraud trial a judge, in good faith, makes 20 important findings of fact, but gets two less important ones demonstrably wrong. How easy it would be to use this as a stick with which to beat the judge, and undermine the verdict if the defendant is found guilty. Equally, there will be a justifiable outcry if judges do not make findings of fact where a defendant has employed the tactic 'attack is the best form of defence'; yet, as the victims of the attack will be unrepresented and without redress, there will be an equally justifiable outcry if they do.

No one could object to reasoned judgments in principle. The difficulty with reasoned judgments in criminal trials is that their content would be bound to spread beyond the answers to a series of simple questions which characterise the questions in written directions currently given to the jury. Judges will be required to review the evidence and express their views not only about the conduct of the defendant, but also, inevitably to make findings and comment on the evidence and conduct of prosecution witnesses, and possibly others

referred to in the case, who are not called as witnesses. They will not be expected to duck this; and they will not be allowed to do so. The result will be that many people – victims of crime, innocent persons on the periphery, and even those not before the court at all, such as the allegedly 'guilty minnows' whom the prosecution have chosen not to prosecute – will all be at risk of adverse, very public judicial pronouncements. The process and result of all this may be profoundly unfair.

Judges must be aware, then, that when they do get things wrong, as surely they will, the victims of their findings and the media will, quite rightly, be relentless in investigating and exposing their errors. The judges concerned will be identified, pilloried, and lose the confidence of the public; doubts will spread as to the safety of their instant, and other judge-alone convictions, with a ripple effect which will eventually undermine the credibility of the criminal justice system.

Judges will be equally at risk whether they find a defendant guilty or not, for their judgments will not only be scrutinised by defendants and their adherents, but by victims and theirs. We can draw this lesson from two cases. In each one, the outcome concerning the trial judge was an excellent one, for in each case the exclusion of evidence avoided an appalling miscarriage of justice. The implications of the concerns I am expressing must be all too clear.

The two trials in question are of (1) George Heron, in 1993, and of (2) Colin Stagg, in 1994. These defendants were each charged with murder. In each case the judge excluded confession evidence, improperly obtained, and they were acquitted – in the first case, following a jury verdict, in the second, when the prosecution was obliged to offer no further evidence.

Following these verdicts, both judges were subject to expressions of outrage from the victim's families (and, unsurprisingly, the police whose evidence had been excluded); but they also sustained very personal vilification in the press. Years later, both Heron and Stagg were proved to be completely innocent, with two other men convicted on the basis of overwhelming evidence – (1) in the Stagg case, Robert Napper, in 2008; (2) in the Heron case, David Boyd, in 2023. In this age of the internet, one dreads to think of the onslaught to which these judges would have been subjected and the impact upon their lives on and off the Bench had they been trying these cases alone.

The wider, practical consequences of all this are that it may be a spur to some defendants to fight a case, in the hope that fear of a 'reasoned judgment' would cause their accusers to turn tail and run, or even 'go down' with them. Even more serious is the risk that they may act as a deterrent to those who might otherwise come forward and assist in the investigation of crime. Who, in the course of their business or career, does not have something they might wish to hide, and which ruthless fraudster would not know this and be prepared to exploit it to their advantage? Corporations are notoriously sensitive to the risks of reputational damage. And what about the acquitted defendant? Will it be fair to be acquitted, and yet face the possibility of pungent criticism reported to the world at large?

Reputation: In an age in which the spotlight can shine very harshly upon public servants, including judges (a trend which is only increasing), one wonders what might be the 'shelf-life' of a judge sitting on these trials. Even on the strength of one or two cases a judge could quickly (and no doubt unfairly) acquire the reputation of being prosecution or defence minded. Consider how great may be the expectations of the trial judge in a judge-alone setting, where liberty is at stake; how intense and personal the scrutiny, and how adverse might be the reaction to their findings. On the other hand, the verdict of a jury, unexplained as it is, and however unexpected or unpopular, never results in the same questioning and attacks upon the system, and upon individuals working within it.

The culture of public 'acceptance' of the findings of 12 'ordinary' men and women may have grown over the years by a combination of chance and good fortune, but it has become a precious asset we can ill-afford to lose. At least a jury could not be accused, as a judge sitting alone will be, of deciding which charges to try, which defendants should face trial (severance), what material should be disclosed, what evidence they should hear, whether a defendant was guilty, and, if so, what sentence they should serve.

Security: This is a sensitive area, for it easy to be accused of scare-mongering. Judges can normally be expected to look after themselves, but it is not quite as simple as that. Fears for the safety of judges of all types have been growing, and judges trying crime alone will not be immune. It is imperative that consideration be given to what may happen if judges do try cases alone -– in particular, high-profile or sensitive crime attracting media attention.

The Lady Chief Justice has already expressed her concern, in another context, about judges becoming targets. In her recent *Times* interview, she is reported as confirming that judges are subject to attacks — online racist and sexist abuse and threats of violence. They have even been door-stepped. *'A weekend does not go by at the moment without my private office forwarding to me a security incident of some sort or another. There will always be a huge gamut of opinion on what is a right or wrong outcome in what are very sensitive, politically charged cases.'*

As to the 'reasoned judgment', On 2 December 2025, in the House of Commons, the Lord Chancellor claimed that he greatly valued juries, but in the same breath he said that a reasoned decision was so valuable that it should be '*hardwired into our justice system*.' Only a moment's thought will tell you that this would mean the end of the jury system.

In a criminal trial the current model is that a jury reaches its decision on the basis of a clear route to verdict explained by the judge, and findings of fact reached by the jury. In my experience of almost 50 years in the criminal courts, simple verdicts of 'Guilty' or 'Not guilty', from an anonymous tribunal of 'ordinary people', are a godsend.

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THE LATEST / CURRENT MINISTRY OF JUSTICE PROPOSALS

We have trial by jury. Leveson has proposed for lesser offences trial by a judge with magistrates, and for more serious offences trial by jury or the right of a defendant to elect trial by judge-alone. In recent days – as Jane Austen might say, 'in the time it takes to stir the fire' – the MOJ has published their own proposals. In the result, if implemented, these would abandon Leveson altogether, replacing his proposals with a scheme of trial by judge-alone (in w/c 24 November, for cases up to a likely maximum penalty of five years, then in w/c 1 December for cases with likely maximum penalty of three years).

No one has the faintest idea what is proposed as regards Leveson, or how long it might take to get any of these proposals through Parliament, let alone organise their implementation. Faced with another long, damaging delay, the only thing we can be certain of is turning the justice system on its head. As to the MOJ branding these new judge-alone courts with the silly, misleading name 'Swift Courts' – (will the judges be called 'Swifties'!) – it betrays all the optimism of Robert Stephenson naming his 1829 steam locomotive 'The Rocket'.

The proposal

The latest proposal appears in the Lord Chancellor's letter to the Chair of the Justice Committee dated 15 December 2025. In summary: all indictable-only offences are to be tried by jury. As to all remaining (either-way) offences, a judge will decide whether they should be tried by judge and jury or judge-alone. The benchmark for this decision will be the likelihood of a sentence of imprisonment in excess of three years. If yes, trial by judge and jury in the Crown Court; if no, trial by judge-alone in a new Crown Court Bench Division (CCBD). However, if the trial is heard by judge-alone, three years will not be the maximum penalty allowed. The judge will be free to impose whatever sentence he or she thinks right.

Mode of trial

As to the decision on mode of trial, involving assessing the likelihood of the sentence, we are told (in the above letter) that the judge will *'consider the facts of the case to make a determination of likely culpability, harm and the impact of any aggravating and mitigating factors. Both the prosecution and the defence will have the opportunity to make representations on likely sentence before a mode of trial decision is reached.'*

1. Offences qualifying for this procedure. A huge number of serious crimes currently attracting substantial sentences will be caught in this net. The scale is enormous. Purely by way of example, they will include offences of arson, burglary, blackmail, fraud, assault occasioning actual bodily harm, unlawful wounding, indecent assault and a whole range of other sexual offences. Take 'dishonesty'. We are led to believe that all offences of dishonesty less serious than robbery are intended for judge-alone trials. Most of these have *statutory* maximum sentences way above 3 years: theft 7 years, fraud and insider dealing 10,

burglary of a dwelling, 14. Is trial by jury in these cases to be decided on the best guess of a judge?

2. Three years: There will be many cases where the likely sentence is fairly obvious, but there will be a great number which will fall within the grey area of being 'likely' to attract a sentence in this region. This is just the area of sentencing – apart from deciding immediate custody or not – which can cause the most difficulty.

3. Judges: Which judges are to make these decisions – the Crown Court judge or a CCBD judge? The logic of the proposal will be that the judge deciding mode of trial will not necessarily be the trial judge. If so, this will cause serious difficulties, because there will be no appeal against the decision and, even within the constraints of the Sentencing Guidelines, judges often have very different ideas of what the likely sentence should be. The Lord Chancellor says: '*We have full confidence in our judiciary to apply these (sentencing) guidelines appropriately when determining mode of trial.'* But judges do not always think alike. This confidence is misplaced. Judges will always do their best to get it right, but very often, there is no 'right', and as judges sitting in the Court of Appeal know only too well, judges will often have different views about a case for different reasons. What will happen when the trial judge in whichever court to which the trial is allocated thinks it has come to the wrong court, and the case should have been allocated to other one?

Parliament is not here drawing the line by re-classifying offences (see under Recommendations, below). Instead, judges will be given the enormous, time-consuming, unacceptable and disproportionate responsibility for deciding whether a defendant should be tried by judge or jury. Any experienced criminal judge will know how foolhardy it can be to assess sentence before the outcome of a trial.

Is the assessment of 'likelihood' to be made on paper alone? The Lord Chancellor has said a judge should take into account aggravating and mitigating factors, and that the parties might make representations, but how can these be assessed without the opportunity of a hearing before the judge? Will the prosecution produce impact statements; will the defence be able to produce personal mitigations such as family commitments, health, employment, even probation reports; and, given that the strongest mitigation is often a plea of guilty, how will all this work? The question whether a defendant is to be tried by a jury or judge-alone can hardly be governed by guesswork.

The Lord Chancellor wishes to save time and expense, but without more carefully expressed detail, these matters are very likely to give rise to a whole pre-trial 'industry' of representations and hearings as to the appropriate mode of trial.

The Lord Chancellor has warned against *'power being concentrated in the hands of one individual',* the judge (see below). What better, or worse, example of excess of power could there be than a judge in a borderline case, of which there will be many, first having the power to decide mode of trial and then act as trial judge?

4. Cases

Just 4 examples of the many problems which will be encountered:

- A black defendant is charged with an offence which may, depending on all the circumstances, attract 2 years or more – a heavy sentence if you have to serve it. As is often the case, the evidence against him is police evidence only. He believes he will get a fairer trial with a jury. Not only is this reasonable, but the Lord Chancellor (no less) has said as much! Should a judge ever be influenced to give a defendant jury trial because he is black? Plainly a consideration of that kind would be out of the question. But this is just the sort of situation that will lead to division and resentment.

- Joint trial of a number of defendants, who must be tried together as being in the interests of justice – cases where there could be no question of severance and separate trials. Some (ringleaders) are likely to face sentences in excess of three years; others (minnows) will be sure to receive far lesser sentences. What then? Presumably the 'default' mode of trial will be jury trial, although this has not been confirmed. Think of the permutations, and requests for severance. There will be many instances where mode of trial decisions will come with deeply unsettling, unwelcome complications.

- Defendant charged with wounding presses for trial by jury. The judge says the case is not serious, and insists upon trial by judge-alone. The judge gets it badly wrong and comes to conclusion that the defendant is a danger, but the defendant has expectation – technically unfounded maybe – of a sentence under three years. What does the judge do?

- Conversely, the defendant is assessed for a jury trial, but the judge gets it badly wrong and realises the correct sentence is about 6 months or a suspended sentence. The jury knows the score and believes that if convicted the defendant will be sentenced *unfairly* to more than 3 years. What does the jury do? (see illustration below).

Unequal justice

It is a central tenet of our criminal justice system that all are equal under the law, and all should be treated equally. Under this scheme, juries and judges sitting alone – both trying indictable crime, possibly the same offences – would be operating side by side. Would these modes of trial be all that different? 'Yes'. Would they provide equal justice? 'No'. Take two cases of arson, or burglary in a dwelling:

Court 1: Trial by jury – (Crown Court) an adversarial system with its obsessive care to ensure that the tribunal of fact, the jury, comes to a conclusion based only upon admissible, relevant evidence. Jurors to not have to wrestle with any problems of admissibility, because these are questions of law for the judge Deciding all the facts is the jury – an anonymous group of 12 people, chosen at random, working together, who then return to everyday life. It

is a system which has the immeasurable benefit of being accepted and having the confidence of the public. However, in this case judges will *now* have to deal with the fact that the jury will know that a judge has assessed the likely sentence as above 3 years – which of itself could lead to pressure and unhealthy speculation.

Court 2: Trial by judge-alone (CCBD) – Now inevitably half-adversarial, half-inquisitorial. The single judge may have to decide which charges to try, whether defendants should be tried together, what material should be disclosed, and what evidence should be admitted. Having achieved the superhuman feat of totally disregarding all the prejudicial material they have seen (which, incidentally, no one will believe is possible) the judge must then decide all the salient facts, and express the verdict in a reasoned judgment; and, if the verdict is guilty, pass sentence.

Anyone familiar with criminal law will appreciate that we are talking about two quite different systems of trial. They cannot provide equal justice. Yet there is *already* a sound system of *equal* justice, respected and accepted by the public at large.

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RECOMMENDATIONS

I have been asked to make recommendations. This is understandable, as I have been so critical of some of the solutions proposed.

(1) Funding: By far the most important and urgent reform is for Parliament to provide the funds which will enable the systems already in place to function efficiently: see (a)–(d) below. In a *Times* article on 20 December the Lady Chief Justice said: *'If you decide to keep justice at the bottom of the financial ladder — and it's not any particular government; it's decades of under-resourcing — then those political decisions have put us where we are.'*

Without adequate funding to achieve the following 'basics', no other reforms, however attractive or 'imaginative', will be of the least value:

(a) The timely and efficient prosecution of offenders (police and CPS);
(b) The provision of adequate court time*;
(c) The provision of adequate court accommodation, court staff and the efficient transport of defendants in custody;
(d) The provision of adequate funding of Legal Aid for the present, and to ensure the future of legal services.

*Very serious thought must be given to sitting days, and the denial of these days to courts which would otherwise sit and get on with their work. In a crisis such as this – and until it is resolved – there should be no quota of days. The listing and conduct of cases should be a judicial function and not limited by any administrative cap.

(2) Mode of trial: The Leveson and MOJ proposals with regard to judge-alone trials should be dropped as quickly as possible. There is no evidence (and never has been) that trial by jury is in any way responsible for the backlog or of the many failings in the justice system.

Judge-alone trials should not be contemplated until the many serious practical problems I have mentioned have been thought through, and solutions found for them. In any event, the burden on judges trying serious cases entirely alone is unsupportable.

Mode of trial should never be allowed to rest on the 'hit and miss' basis of someone, of whatever experience, *estimating* whether a case might attract a particular sentence. It does not make sense, and would be a nightmare to operate. There is much to be said for retaining the present system, which works, when properly funded. If not, what *might* make sense would be to have certain specified offences *re-classified* by statute, and made summary or (possibly) intermediate only. Purely by way of example:

- Summary Offences – attracting a statutory maximum sentence of 12 months.
- Intermediate Offences – attracting a statutory maximum sentence of 2 years*. To be tried by a District judge sitting with two JPs – never just one alone.
- Indictable Offences – attracting a statutory maximum sentence in excess of 2 years or more, to be tried in the Crown Court by judge and jury.

*In my opinion a maximum sentence of three years imprisonment is far too heavy a sentence to justify depriving a defendant of a jury trial.

(3) Individual Offences: Sometimes Parliament / the Executive's first instinct as a result of bad happenings is to introduce 'new' laws to address the special facts of that offending. The MOJ should be aware that in practice the introduction of *new offences* such a racially aggravated offences or assaulting an emergency worker with higher maximum sentences, whilst laudable in their aims and justified in their messaging, send cases up from the magistrates to the Crown Court. But they hardly ever attract a sentence beyond the powers of the magistrates; and of course, in a very serious case the magistrates have the power to refuse jurisdiction and send the case to the Crown Court. Legislative tweaks of this kind cost money and must be properly funded. It might be much better for the Sentencing Guidelines to cater for these cases and leave such aggravating factors for the sentencing judge to take into account. True it wouldn't be marked in a defendant's antecedents as a special category offence, but there are other ways of recording these facts.

(4) Appeals: I believe that the right to appeal from the District Judge and from Magistrates to the Crown Court is essential. First, to act as a check on the performance of District Judges and JPs, who must always be aware (as must Crown Court judges) that their

conduct of a criminal trial is accountable. Second, the number of successful conviction and sentence appeals heard by the Crown Court provides its own justification.

(5) Triaging the backlog of 80,000 cases: A priority must be to make an analysis of the kinds of case which have the greatest impact upon the backlog – for example, shoplifting, burglary, sexual offences etc. No time should be wasted in doing this, and then, with the assistance of this information, devising a system for doing something effective about it. It would be unrealistic to approach this problem without taking into account three fundamental realities:

1. The prison service is also in dire straits, and could not cope with any system which might well produce an increase in the number of custodial sentences.

2. The present backlog is fixed, in the sense that it is there as a fact. It could only be reduced either any Leveson or MOT 'judge-alone' proposals if Parliament enacted retrospective legislation. This would seem to be totally out of the question.

3. Any new system, such as is proposed, retrospective or otherwise, would impose a massive and surreal administrative burden on an already broken system.

In these circumstances there is much to be said for concentrating on those many thousands of cases which might be disposed of with *non-custodial* outcomes. The Leveson recommendations of 'Out of Court Resolutions' (OOCR's) and other 'In-Court' ways to provide these outcomes should be taken very seriously and, subject to careful planning (see below), be introduced as soon as possible. It must be accepted that the state is responsible for the present appalling situation, and the state must move to rectify it owning the consequences of doing so:

- There must be an urgent, serious plan to review and weed out weak cases – by the CPS and / or with the assistance of the judiciary.

- There will be many cases where defendants fearful of imprisonment have either elected trial by jury or pleaded not guilty in order to delay the 'evil day'. Many of them, their families, and /or their alleged victims and families and /or witnesses, who have been crushed by the delays; they have waited so long for trial that they just want to get on with their lives. This wait may well be so long as to mean that the court's approach to sentencing must now be entirely different, leaving scope for rapid resolution.

  For example, a man charged with theft, burglary or a relatively minor assault, might well face a sentence of imprisonment if he is tried and convicted within a reasonable time, but if, awaiting trial, he has stayed out of all trouble for 2-3 years and is in regular employment looking after his family, any court would now be very loath to

impose an immediate custodial sentence. This leaves plenty of scope for a scheme to be introduced very quickly to reduce the backlog.

Therefore, In addition to the steps recommended in (1) above, I recommend the appointment a small committee of very experienced judges (for example, Resident / Senior Crown Court judges) to present a protocol for triaging cases which are weak, or where due to the circumstances of the case or delay the court's sentence might well be a non-custodial one. I believe that in most cases this will be understood by victims, who also wish to put their cases behind them and get on with their lives. There may be many thousands of these cases, and the CPS and the courts should move quickly to take them out of the system. The state must accept that there will be some outcomes that are unpopular or attract criticism. This is the price to be paid, just as in a very different context, the state had to pay a price for quashing many Post Office convictions. This recommendation is the necessary remedy for a scandal that has arisen from years of inexcusable neglect and which the Leveson and /or MOJ proposals will not touch.

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CONCLUSION

In this paper my main concern has been that part of 'Leveson' which amounts to an assault on the jury system – an idea that has been taken up by the MOJ, stamped into a new shape, and is now promoted as a pivotal answer to the crisis. Each and every one of these proposals lacks caution, let alone extreme caution. Each one leaves in its wake a mass of problems for which no sensible, workable solutions are proposed.

Until Tuesday 2 December 2025, when the Lord Chancellor announced his proposals to Parliament, save for one (carefully?) leaked document, we seem to have had a 'perfect storm' of silence – not from the legal profession, but from the three politicians who have the future of the criminal justice system in their hands:

The Prime Minister – A lawyer and former DPP, in 1992: *'The right to trial by jury is an important factor in the delicate balance between the power of the state and the freedom of the individual. The further it is restricted, the greater the imbalance. Despite the inevitable increase in costs, the Haldane Society urges that there be a right of trial by jury in all criminal cases.'*

The Chancellor of the Exchequer – In her budget, the word 'justice' was not mentioned.

The Lord Chancellor – We have seen that his oath of office includes a promise to *'ensure the provision of resources for the efficient and effective support of the courts for which I am responsible.'* We have heard of some increased resources, but what are the chances of the justice system getting anything approaching what is required to turn the crisis around?

As to equal justice, think of the society in which we live. I have already said that in a multi-racial society such as ours, the jury system provides a priceless safety valve; and so, I would be a poor advocate indeed if in conclusion I failed to remind you of words of the Lord Chancellor himself, taken from his own 2017 Independent Review of the Justice System:

* *'Juries are not merely a 'success story'; they are 'the one part of the criminal justice system where minorities were treated without racial bias.'*

* *'The way that juries make decisions is key to this. Juries comprise 12 people, representative of the local population. When a jury retires, its members must consider the evidence, discuss the case and seek to persuade one another if necessary. This debate and deliberation acts as a filter for prejudice – to persuade other jurors, people must justify their position. In the final decision power is never concentrated in the hands of one individual. … The lesson is that juries are representative of local populations - and must deliberate as a group, leaving no hiding place for bias or discrimination.'*

* *'Juries are a fundamental part of our democratic settlement. Criminal trials without juries are a bad idea'.*

One of the persons on the Advisory Panel of this Review was Sir Keir Starmer.

I join with the professions in sincerely hoping that the Prime Minister and Lord Chancellor will have second thoughts about the Government's judge-alone proposals. When it comes to indictable crime, they should not abandon their long and deeply held principles that the right to trial by jury is, and should remain, the cornerstone of our criminal justice system.

The jury system is manifestly the safest and fairest form of adversarial trial we have managed to devise; and above all, in the more serious cases it enjoys the confidence of the public. This is a treasure not to be surrendered lightly. Trial by jury is one of the country's most valuable assets. It may not be the purest gold, but it is the gold standard. We should take heed of Lord Devlin's warning that *'If the jury system is allowed to crumble, it can never be rebuilt'.*

Crime is forever at the forefront of our daily news and in the public consciousness. For society to function, a working, reliable, criminal justice system, with fair trials, civilized punishments and rehabilitation are a national necessity. Along with Defence of the Realm and Public Health, the Administration of Justice is of paramount importance. A healthy justice system would require only a tiny fraction of the resources committed to the other two. What does it say about us that we do not provide it?

January 2026