

## *Introduction:*

### *My Opening Speech*

‘And so that is your defence, is it, Mr Tuttle?’

A pause. His eyes dart to his girlfriend in the public gallery and back to me – a micro-glance, no more – but enough, I’m hopeful, for the jury to have clocked. I turn my head just slightly, crossing gazes with the lady on the front row at the far end. She’s noticed. She’s folded her arms. In fact, several of them have. The elderly chap in the navy blazer and beige slacks nudges the gingham-shirted, fabulously bearded fellow to his left, and they trade conspiratorial grins.

The body language is not good for Mr Tuttle.

He digs his fingers into the sides of the witness box, groping for the right response, oblivious that there isn’t one. As his cheeks flush and he shuffles his feet, he appears to look longingly at the dock at the back of court, stung with regret at his decision to leave the safety of its perspex confines and walk the long fifteen feet to give evidence in his own defence. He had to, of course. It is near-impossible to successfully run self-defence without giving your own account on oath as to why you brought fisty justice to bear upon the man next door. But it is obvious that, if Mr Tuttle could turn back time, he’d give serious consideration to exercising his right to silence.

The double doors to my right groan. The usher slides in cradling his clipboard, pursued by a crash of law students, who are silently urged towards the public gallery. The only

thing a barrister enjoys more than an audience is a bigger, more impressive audience. So I wait for them to squeeze themselves into the narrow oak pews in the back right corner. The lengthy pause, as Mr Tuttle weighs up how to answer my semi-rhetorical question, helps build the suspense. I savour it. I calmly top up my plastic cup from the water jug, and take an insouciant sip of water.

As I do, I notice that all eyes in the courtroom are momentarily trained on a trailing undergrad who, having entered last, has managed to clout Mr Tuttle's partner with his manbag as he climbs over her to the last space on the front row.

She audibly mutters some choice expletives as the student removes himself from her lap. The clerk of the court, hitherto tap-tap-tapping away at her computer, looks up and stares.

'What? He hit me in the face! Could have had my fucking eye out.'

'Shhhh!' the clerk hisses, waving a gowned arm towards the usher, who duly trots to the public gallery to administer a further, entirely superfluous, shhhh.

I look up behind the clerk towards the judge, expecting some sort of judicial admonishment for these noises off, but Her Honour Judge Kerrigan QC is still leaning back in her chair and staring longingly at a fixed point on the ceiling. Now the casual observer may, quite wrongly, think this an indication that Judge Kerrigan is bored by the pedestrian advocacy of a twenty-something upstart apparently channelling an unholy trinity of the Jeremies Paxman, Clarkson and Kyle as they superciliously showboat their intellectual advantage over the bewildered Mr Tuttle. The same observer may, equally mistakenly, bolster this conclusion by reference to the way in which Her Honour appears to have been, at various stages during the twenty-six laboured minutes of questioning leading up to this point, closing her eyes and

dropping her head, before jolting alert again with a quiet snort.

But I know better. The Learned Judge is, quite plainly, bowled over by my oratory skill; no doubt mentally formulating the letter of praise that she will be sending to my Head of Chambers immediately the trial concludes. *Advocacy*, she will surely write, *has a new champion. A golden age of justice is upon us.*

Everyone now seated and hushed, I can resume my sparring. Mr Tuttle again glances for reassurance to his girlfriend.

‘You won’t find the answer in the public gallery, Mr Tuttle.’ I obnoxiously smile at him.

‘It’s a very simple question. What you have said is what you’re honestly asking this jury to believe, yes?’

This is an appallingly phrased, and wholly improper, question. Questions in cross-examination should strictly only be aimed at eliciting facts, not providing an opportunity for the advocate to comment. Closing speeches are where we get to make plain how preposterous we think the other side’s case is. And clearly Mr Tuttle is asking the jury to believe what he said, otherwise he wouldn’t have said it. But I’m feeling good, this is my first jury trial, and no one yet has interrupted to stop me. So I wait for Mr Tuttle’s response.

He delivers another flick of the eyes to the gallery, and back. ‘Yes,’ he nods, any defiance long since melted.

‘How tall are you, Mr Tuttle?’

‘Dunno.’

‘Would you agree that you’re over six foot?’

‘Probably.’

‘And how much do you weigh?’

It doesn’t matter what his answer is. Mr Tuttle is, at a conservative estimate, roughly the size of a supertanker, and, by obligingly wearing a skinny fit, short-sleeved white shirt, is displaying to marvellous effect every square inch of his

tattooed mega-roided biceps. These questions are simply to hammer home the point.

As he mutters estimates, I yank my black gown straight. Posturing with faux furrows, I turn to the jury and look towards crossed-arms woman. I catch her eye. She raises an eyebrow. She knows where we're going.

'And,' I say, looking straight at the jury so as to maximize my apparent disbelief, 'you are telling this jury that the blind man on crutches hit *you* first?'

I swivel to him at those last three words and release them as slowly as melodrama allows. An audible snigger from my left tells me that Mr Tuttle's goose is cooked.

There is nothing he can now say to make his position seem less ridiculous. At this point in a boxing match, he would be hurried out of the ring by minders to avoid him doing himself any more damage. No answer can improve his position. One response, however, could take the goose out of the oven, elegantly carve it and serve it to the grateful cheers of the prosecution. And Mr Tuttle obliges.

'It wasn't how you're making it sound, yeah?'

The joy. I hear a stifled snort from the Crown Prosecution Service paralegal sitting on the row in front of me. My cross-examination, as written out neatly in the standard-issue blue counsel's notebook perched on my lectern, was going to end on that last, over-gestated question. But now, not only is Mr Tuttle giving the jury an implausible story, he's trying to wriggle out of it. The one thing worse than a liar is a liar lying about being a liar. So I treat myself to an encore.

'It wasn't how I made it sound?'

'Nah.'

'Well, we know Mr Martins is blind, yes?'

'Yes.'

'And you agree he was on crutches?'

'Yes.'

‘And you say that he hit you first?’

‘Yeah.’

‘Right. So, let’s try again. You’re saying that the blind man on crutches hit you first, aren’t you?’

‘Umm . . . yeah.’

‘Right.’

As I take a beat to work out how best to gracefully conclude, there’s a frantic scrabbling noise from the end of Counsel’s Row – the long wooden bench at the front of court, facing the judge – as Tuttle’s defence barrister, Mr Rallings, a surly old hack of forty years’ call, furiously scribbles something on a scrap of paper and thrusts it with force along the bench towards me. Up until this point, Rallings has done his best to maintain a rictus poker frown as his client merrily yanks pins out of grenades and stuffs them down his trousers. But now he’s stirring.

I take it. This is unnerving. Why a note, mid-cross-examination? Have I done something wrong? Is he pointing out that I’ve said something that breaches a vital rule of evidence or court etiquette? The blood rushes to my face as the panic takes hold. I have not been doing this long. I don’t know what I’m doing. I’m a Crown Court virgin – no, a baby, a zygote. What fatal sin have I committed? I’ve blown it. I must have. Lord knows how, but the look on Rallings’ wizened face – that cocksure lip-curl-cum-snarl – tells me all I need to know. Carried away with the myth of my own brilliance, I have somehow fluffed it all up. I have flown too close to the sun on wings forged of a misplaced confidence in my plainly meagre ability. I’ve kicked off my Crown Court career by losing the unlosable trial, and this scrumpled grey leaf of A5 bears my epitaph.

I try to feign composure as I unscrunch the note. Whatever it is, I silently counsel, it will be OK. I have my *Archbold* – the criminal lawyer’s bible – to extricate me from any legal problem. I have the warm embrace of a

four-legged friend waiting at home if I'm ultimately disbarred. Things will be OK.

I glance down at what Rallings has to tell me.

On the paper is a really rather good drawing of a stick man in a wig. He's sobbing into his arms. He has a little goatee like Rallings. Below the impression, Rallings has simply written: THIS IS A FUCKING TURKEY SHOOT.

He nods grimly, leans back and looks at the jury. And, then, with an almost imperceptible glint in his eye – a comradely tell of shared ownership of a moment, a sinking defendant setting fire to his own lifeboat, that we'll both remember for years – he turns to me, angling his head out of the line of sight of the jury. And winks.

This, ladies and gentlemen, is the English and Welsh criminal justice system in action. I don't suggest it is the finest example, but it serves as a rough extract of how contested matters of criminal law are settled. And it probably broadly conforms to the picture most of us in the UK immediately summon to mind when we think about justice. Whether learned from first-hand experience or absorbed from pop culture, we all share a conception of criminal justice that we have come to accept as representing the way things are done, and the way things *should* be done. It's culturally embedded, like apologizing when someone else bumps into you, or avoiding eye contact in a lift.

For some of us – if my non-lawyer friends are a reliable barometer – this mental portrait of English criminal justice fuses Judge Judy unholily with *that* scene from *A Few Good Men*. Others fall back on the home-grown motifs of Rumpole, Kavanagh QC or, lord help us, *All Rise for Julian Clary*.<sup>1</sup> But whatever variants we visualize, we probably all agree on the basics: an adversarial battle – *adversarialism* being a loose term for the model pitting the state against the

accused in a lawyer-driven skirmish for victory played out before an impartial body of assessors – comprising a courtroom, judge, jury, accused, lawyers, witnesses, questions and speeches in some sort of configuration. And plenty of wigs.

That, for most people though, is possibly where contemplations on criminal justice end. I imagine few of us devote much, if any, time to thinking critically about our criminal justice system; to considering how and why we have this particular way of doing justice, or reflecting on the impact it has upon the hundreds of thousands of people – defendants, witnesses and victims – who pass through the system every year. Not in the way that most of us form and gladly share opinions on the way we administer or fund healthcare, say, or the merits or demerits of types of schools. And this I find odd; because criminal justice affects us all.

We are yet to find a society that does not have rules surrounding the behaviour of its members and sanctions for their transgression. Agreeing social imperatives and taboos, and enforcing them through shunning, appears to be instinctual behaviour in cooperative primates<sup>2</sup>, and the notion of a codified criminal law can be traced back to Bronze Age Mesopotamia and the Code of Ur-Nammu in 2050 BC. The precise rules have since differed across time and geography, but a mechanism for administering criminal justice always exists. To commit a crime is to break a law that offends not just those directly affected, but strikes at the heart of our communal values so deeply that we agree that organized, coercive action is required to mark the affront. Crimes are marked as the gravest breaches of our social codes which, unlike civil wrongs such as breach of contract, the state cannot leave to individuals to privately arbitrate.

The criminal law establishes the boundaries of our humanity by identifying the no-go zones and endowing the state with unique powers of correction intended to punish, deter, protect and rehabilitate. Crimes are the legal disputes

that evoke primeval, visceral reactions in people with no stake in the fight, intruding through screens and leaping off pages and into our core identity, pinching and testing the standards by which we define ourselves. If crimes are permitted to occur unaddressed, or are attributed to the wrong person, the harm extends beyond those directly involved. It means that our streets are less safe, our values are undermined and our personal liberty is at risk. A fundamental term of our social contract is that the rules are enforced fairly against us all; a breach of this term offends our innate sense of fairness like little else.

And it is not merely theoretical. While we may not wish to think about it, for most of us the impact of criminal justice will someday be immediate and all too tangible. It is certain that at one point in your life, you or someone you love will be in a criminal courtroom; whether it is as a juror, a victim of crime, a witness or locked behind that perspex screen at the back of court, screaming your innocence and flanked by bruising security guards dragging you down to the cells.

I can understand why people might only think of criminal justice in the abstract. Without first-hand experience of the system, it is easy to not give its impenetrable workings much of a second thought. But that first direct contact changes everything. At this point it is brought home, vividly and viscerally, what criminal justice means in practice; not abstract concepts in dusty textbooks, but a suffusion of humanity – tears, blood, anger, loss, redemption and despair. ‘Dispensing criminal justice’ means changing lives forever. The trial process and court’s judgment can tear a life apart. Families can be broken, children separated from their parents and people locked up for decades. A miscarriage of justice can leave the aggrieved confined, metaphorically or literally, in a prison from which there appears to be no escape. While in the UK the state no longer has the power



to kill at the end of a criminal trial, functioning justice can still ultimately be a matter of life and death.

Furthermore, until that first contact, you may take for granted that, much like other inscrutable fundamentals of our society such as intelligence-gathering, refuse collection or library cataloguing, when required the system will broadly, allowing for the margin of error common to all state-delivered services, work as it should, and that the right outcome will be delivered in the end. This entirely understandable complacency is, for many people I meet, what makes that first immersion in the criminal justice system so shocking, as they realize not only how strongly they disagree with the way in which our society prioritizes and dispenses justice, but how, quivering outside the courtroom door, it is now too late to do anything about it.

As someone immersed in the fog of the criminal courts, my fear is that the public's lack of insight into our secretive, opaque system is allowing the consecration of a way of dealing with crime that bears little resemblance to what we understand by criminal justice. That defendants, victims and, ultimately, society are being failed daily by an entrenched disregard for fundamental principles of fairness. That we are moving from a criminal justice system to simply a criminal system.

When you have sat in as many decrepit court cells or tired, coffee-stained witness suites as I have, looking into the eyes of someone whose most basic sense of what is 'fair' and what is 'right' has been entirely crushed by their exposure to the criminal justice system, you can either slink into jaundiced defeatism, or you can sound an alarm.

This is what I want to talk about: to explore why criminal justice matters, and to show how I think we are getting it so wrong.

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But first, a bit about me. I'm a criminal barrister. Not a particularly special one. My cases, by and large, aren't the ones you'll see on the news. I am the kind of jobbing, workaday junior practitioner whom you may find representing you if you suffer the twin misfortunes of being accused of an everyday criminal offence, and of not having available to you someone a little bit better.

I'm a 'junior' barrister in a similar way that the term is applied to junior doctors. It is not a signifier of youth, rather a catch-all for any barrister, from trainee (or 'pupil', in the legalese) up to grizzled old warhorse, who has not been appointed Queen's Counsel (the honour bestowed upon the most impressive in our ranks).

Hopefully, our paths will never cross. But if they do, I can guarantee that, like an undertaker or a clinician at an STD clinic brandishing a cotton bud, it will be at one of the lowest points of your life. Ours is the trade in human misery; the grotty little cousin of the finer, more civilized, more commercial tributaries of the law.

The role of barristers in this misery is, I have learned, not widely understood. Mostly the fault for that lies with us. For professional advocates, we do a strikingly bad job of explaining what we do, or why it matters. In a nutshell, criminal barristers are first and foremost advocates, presenting cases in court, usually the Crown Court, on behalf of either the prosecution or the defence. In practice, the job also requires the skills of a social worker, relationship counsellor, arm-twister, hostage negotiator, named driver, bus fare-provider, accountant, suicide-watchman, coffee supplier, surrogate parent and, on one memorable occasion, whatever the official term is for someone tasked with breaking the news to a prisoner that his girlfriend has been diagnosed with gonorrhoea.

My daily fare is eclectic and erratic. Usually I will be prosecuting or defending in jury trials, but some days are

peppered with other, shorter hearings: opposing a bail application for an alleged arsonist here; advancing mitigation at the sentence hearing of a heroin dealer there. Sometimes I'll be doing my own cases, sometimes covering for colleagues who are stuck elsewhere.

It is unpredictable, irrational, adrenaline-infused mayhem every second of every day, where the only certainty is uncertainty. Hearings and trials overrun, find themselves suddenly adjourned or are listed immediately without warning, making it impossible to say with confidence what you will be doing or where you will be in four hours' time. Your bones ache, your shoe leather disintegrates bi-monthly and your shoulder creaks from dragging your suitcase laden with papers, books, wig and gown between courts and cities. You can become inured to the blood-spattered underbelly of the human condition; unmoved by the mundanity of yet another 'bog standard' stabbing, or desensitized by the unending parade of sexual abuse. You are at best a part-time family member and a fair-weather friend, expected by the courts to abandon holidays, weddings and funerals at a judge's command. An early night sees me home at 8 p.m. A late night is the following morning. Throw in the industry-wide 'perks' of self-employment – the perennial insecurity, the fear of work drying up, the absence of sick pay, holiday pay or pension, the fact that legal aid rates can work out at below minimum wage – and the criminal Bar is in many ways an intolerable existence.

But it is also irresistibly special.

In an age where juries have all but disappeared from civil courtrooms, criminal law is the last vestige of the pure advocacy tradition, where the power of persuasion and force of rational argument, its significance augmented by the historical trappings – the mode of speech, the splendour of the courtroom, the ridiculous Restoration-hangover horsehair wigs – is the tool by which liberty is spared or removed. The

attraction to an egotist with an insatiable desire to hold centre stage – a description applicable to the near-entirety of the Bar – is plain; but for me, and most criminal barristers I know, there is a greater, overarching reason for choosing this path: crime is where the stakes are highest.

The worst that happens if you lose a case in civil or commercial law is that you lose a lot of money, or fail to win money. If you lose a family law case, you might lose your children. In a repossession case, you could lose your home. These are all significant, sometimes life-changing events. But if you lost a criminal case, up until 1965, you could lose your life. And while we have left behind our tradition of sanctioned bodily violations, dismemberment and killing, we have supplanted it with the deprivation of liberty, a punishment capable of encompassing all of the losses above and far more beyond. Loss of the freedom to live with those you love, to work in your job, to provide for your family; the abrogation of the pursuit of happiness, the pausing of your existence, for a period determined by the overbearing power of a state largely uninterested in the consequences for you or your family, is a price whose value only those who have paid it truly know.

And those of us criminal hacks who hawk our wigs and gowns from court to court across the land do so, spending long hours sifting through the very worst of the human condition, because of a fervent, some might say naive, faith in the rule of law and our role in upholding it. If criminals avoid justice, the loss is not only felt by the victim. The danger created by harmful behaviours going uncorrected presents a significant threat to the individual liberty of us all. If there are too many wrongful convictions, or too few criminals getting their just deserts, the delicate social contract bonding us all to each other and to the state can swiftly disintegrate. Simply put, if enough people don't believe the

state to be capable of dispensing justice, they may start to dispense it themselves.

It is for these reasons that it is not hyperbolic, I honestly believe, to suggest that working criminal justice, and our role prosecuting and defending criminal allegations, is essential to peaceable democratic society. It is when people feel that justice is denied that they are at their most indignant and rage-filled; it is in the gaps between justice that anti-democratic, subversive urges can take root.

This is why I consider what I do on a day-to-day basis to be not just a privilege but a civic responsibility. And it is for the same reasons that the current state of our criminal justice system should terrify us.

Because despite the noble principles underpinning the system, despite its international prestige, its intellectual craftsmanship and the very real blood, sweat and tears spilt in its ponderous cultivation, my still-tender years exposed to the grim reality have taught me that the criminal justice system is close to breaking point.

Access to justice, the rule of law, fairness to defendants, justice for victims – these fine emblems which we purport to hold so dear – are each day incarnated in effigy, rolled out in the Crown and magistrates' courts and ritually torched.

Serious criminal cases collapse on a daily basis because of eminently avoidable failings by underfunded and understaffed police and prosecution services. The accused and the alleged victim can wait years for a trial, told their cases are 'adjourned for lack of court time' for a second, third or fourth time, notwithstanding the brand new courtroom, built at significant public expense, sitting empty down the corridor due to slashed court budgets. The wrongly accused wait until the day of trial, or perhaps for eternity, for the state to disclose material that fatally undermines the prosecution case. Defendants can find themselves represented by exhausted lawyers able to devote only a fraction of the

required time to their case, due to the need to stack cheap cases high to absorb government cuts. Some defendants are excluded from publicly funded representation altogether, forced to scrape together savings or loans to meet legal aid ‘contributions’ or private legal fees, failing which they represent themselves in DIY proceedings in which the endgame is a prison sentence. The bottom line is that victims of crime are denied justice, and people who are not guilty find themselves in prison.

And what astounds me is that most people don’t seem to care. Or even know.

On the day after a parliamentary report published in May 2016<sup>3</sup> began with those nine damning words – *the criminal justice system is close to breaking point* – not one single newspaper thought it more newsworthy than repetitive scare stories about migration or, in one case, a confected ‘scandal’ over *Britain’s Got Talent*.

When Karl Turner MP tabled a parliamentary debate over the parlous underfunding of the Crown Prosecution Service (CPS) in January 2017, his litany of sobbing CPS staff and collapsing prosecutions – the things that we in the courts see every day – was attended by a meagre handful of MPs, and met by a virtual media blackout.<sup>4</sup> When the courts upheld government initiatives to deprive the wrongly accused of their legal fees,<sup>5</sup> there was no clamour. Just deafening silence.

If the criminal justice system were the NHS, it would never be off the front pages.

I find it impossible to reconcile this collective indifference, because it is plain that innately we all do care. We know that from the green ink letters to the editor when a paedophile gets a ‘soft sentence’ or ‘early release’ from prison, or the police fail to investigate serious allegations of sexual abuse or, worst of all, when the wrong person is convicted. We know from popular culture – from our *Serials*

and *Making a Murderers* and our Innocence Projects – that the ideal of justice, and in particular criminal justice, can be perhaps our greatest unifier. But something somewhere has clearly gone wrong.

I think it's traceable to the failure of the establishment – and us, the professionals in the system – to properly explain to the wider public how the criminal courts work, why they work the way they do, and why that is a good or bad thing, which has led to a catastrophic dissonance in public understanding. What a jury, or what the public, gets to see is but a pinhole view of the system. There is far more happening behind the scenes, or unreported in magistrates' and Crown courtrooms, closeted in comfortable anonymity and about which the people we serve simply don't know.

This is why I have written this book. I want to shine a light on what really goes on, to take you into the rooms you never get to enter; but more than that I want to explore why we should care, and to illustrate what happens when we don't.

I'm probably not the sort of barrister usually invited to publish a book. I am not reliving a CV bursting with the great and weighty cases of our time. I profess no particular specialism or expertise in my field. I am not an academic. I am not a jurist, a philosopher, an historian or a scholar. I am as much a stranger to the gilded upper echelons of the legal system as they are to me. But I have spent the best part of a decade prosecuting, defending and advising on behalf of my fellow citizens, and I wanted to write this book while I am still a relatively fresh face to this warped game, before the delicate balance between idealism and cynicism tips too far. I write anonymously because it buys the freedom to be candid; to call upon my own personal experiences, and those of others, to illustrate the first-hand tales of justice and injustice that play out every day in courts throughout the land.

This book is loosely structured following the life of a

criminal case, from the first appearance before a magistrates' court, through to trial in the Crown Court, sentence and appeal. And it considers, at each stage, how justice works, and, more importantly, how it often doesn't.

I will also do my best to explore some of the questions raised along the way; in particular common public concerns that we in the system should perhaps be better at answering. Why should the taxpayer fund legal aid for career criminals? How can you defend someone who you believe has raped their own child? Does our system of adversarial justice, pitting the state against the accused in a winner-takes-all war of attrition, do more harm than good? Is the sentencing of criminals just a giant con on the public? And the one overarching question of my own: how, if we truly value criminal justice, have we allowed our system to degrade to its current state?

Certain details of the cases that follow have been changed to preserve the identities of those concerned; however the core of each reconstruction – the incompetence, the error and the malice – is all too true. The examples cited are not special. They are not the stories that make the news. They are not the miscarriages of justice that engender Twitter storms or provoke magazine confessionals or inspire true-life cinema. They are the ordinary tales of injustice that stalk the criminal courts; the fleeting, repetitive diminishment of human dignity that crosses the path of the jobbing criminal hack.

My perspective is necessarily limited, and my role entirely incidental; but I hope it is nevertheless of value.

A working criminal justice system, properly resourced and staffed by dedicated professionals each performing their invaluable civic functions, for the prosecution and the defence, serves to protect the innocent, protect the public and protect the integrity, decency and humanity of our society. This should be a societal baseline. Not a luxury.



Most of you reading this will never expect to be plunged into a criminal courtroom – never expect to hear the constabulary knock on the front door, never expect to be a victim of crime, never expect to be accused of a crime you didn't commit. But the one thing I have learned about criminal justice is that it doesn't discriminate. Anyone can be reeled in. And if you are, whether you're giving evidence against the man who hurt your child, or swearing blind to a jury that that pedestrian stepped out in front of your car without looking, you want the system to work.

When it doesn't, the consequences can be unthinkable.