

## **Criminal Law Reform Now: A new reform network**

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Academics and other legal researchers have always played a valuable role in the reform of criminal law, both through critique of the current law as well as through advocating reform options. There is no doubt that the expertise of legal researchers can contribute to better reforms of the law, and it is a position that carries obvious attractions for the researcher as well. Particularly for those of us who focus our research on identifying unfairness and incoherence within the current system, the opportunity to contribute to the betterment of the law, to use our work to improve that system, may be one of our principal motivations. It is also an activity, increasingly, that is being supported by universities and funding bodies, not least because of the emergence and growth of ‘impact’ requirements within the Research Excellence Framework (REF).<sup>1</sup> Yet the *role* of the lone legal researcher within the dynamics of law reform remains difficult to identify, and even more difficult to realise in practice. It is on this topic that we contribute this short paper to the SLS Special Issue of the *Journal of Criminal Law*, and we also take the opportunity to introduce a new national reform network, the Criminal Law Reform Now Network (CLRNN Network) that we will be launching in 2017.<sup>2</sup>

The creation of the CLRNN Network, we believe, offers great potential for facilitating academics and other legal researchers to have a different kind of impact on legal reform, and we set out our plans for this in the second part of the paper. Before we outline how the CLRNN Network will operate, and how people can get involved, it is important to recognise the challenges for any individual or network when trying to influence and contribute to the reform agenda.

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<sup>1</sup> The REF provides a review of the research output of higher education institutions in the UK. Within the REF assessment, universities and individual researchers have to demonstrate the ‘impact’ of their research outside of the academy. See <http://www.ref.ac.uk/>

<sup>2</sup> [www.CLRNN.co.uk](http://www.CLRNN.co.uk)

## **Part 1. The dynamics of law reform and modern challenges**

There are a number of obstacles facing academics, including the most eminent, when attempting to influence the development of the criminal law, and of the criminal justice system. These obstacles need not induce pessimism, however. Some proposals merit discussion and further educational aims even if they are destined to be unjustly neglected by policy makers. Indeed, it is in areas where there is little political appetite or professional support for reform that it may be all the more important to show that reform would in fact be viable and beneficial.<sup>3</sup> At least four challenges should nonetheless be recognised so that the would-be academic law reformer might maximise what chances there may be of overcoming them.

### *Challenge 1: The political red line*

This is the most obvious obstacle of all, and it is more likely to be encountered in criminal law than in many other areas of law. Crime and the criminal law are a natural topic for the tabloids and this inevitably contributes to the politicisation of the criminal law. We can see this, for example, in the maintenance of the mandatory life sentence for murder. The battle here was perhaps lost back in 1989 when a House of Lords Select Committee, headed by Lord Nathan,<sup>4</sup> put together a compelling report, including evidence from leading academics and judges, which was sadly but predictably ignored. Years later, the Law Commission in 2006 felt compelled to “drive around” the problem when it proposed the restructuring of the offence of murder so that some scope for a mandatory life sentence might still exist.<sup>5</sup> But, even these proposals crossed other red lines. In accordance with most academic opinion, the Commission did not want “first degree” murder to apply to those who might have intended serious bodily harm but had no comprehension that they might kill; but this was thought incompatible with the contemporary problems of knife crime. Or perhaps it was the proposal to extend duress as a full defence to murder which alarmed the government, imagining

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<sup>3</sup> For a discussion of this in the context of the Law Commission, see S. Wilson Stark, ‘Promoting Law Reform: By means of draft Bills or otherwise’ in M. Dyson et al (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing: Oxford, 2016).

<sup>4</sup> Select Committee of the House of Lords, *Murder and Life Imprisonment* (HL Paper 78-1, session 1988–89).

<sup>5</sup> See J. Horder, *Homicide and the Politics of Law Reform* (Oxford University Press: Oxford, 2012).

The final, definitive version of this paper has been published in *The Journal of Criminal Law*, 2017 by SAGE Publications Ltd, All rights reserved. © JJ Child & J Rogers <http://online.sagepub.com> terrorists employing the defence.<sup>6</sup> Had that not been enough, there would doubtless instead have been the age old concerns that the householder (or paratrooper) who kills in excessive self-defence could still be found guilty of murder.<sup>7</sup> At the political level, law reform – or resistance to it - can be driven by individual cases and in some cases by a misunderstanding of them.

Moreover, since red lines are driven by politics rather than logic, there is no telling how far they will be drawn. One of the co-authors had his own experience of this when he proposed that the Law Commission should look at a potential partial defence to murder of (consensual) mercy killing for family members of the deceased.<sup>8</sup> The point was precisely that, whether or not mercy killing could be defined satisfactorily, a partial defence could at least be considered independently from the wider debate on the legalisation of euthanasia, which successive governments have avoided. The issues raised (mainly the relevance of compassion, besides ones of definition and scope) are distinct from those which restrain debates about doctor-initiated euthanasia, but the Law Commission refused to even consider the topic.<sup>9</sup> Evidently this was anticipated as merely an extension of the red line in the eyes of policy makers. More recently, one notes that the Law Commission declined to consider any reform to the offence of procuring a miscarriage when undertaking reform of the Offences against the Person Act 1861, but the liability of women who procure their own miscarriages at an early stage excites a good deal of critical commentary even from those who would support the continued use of the criminal law against some others who procure abortions<sup>10</sup>.

One can find examples of red lines in criminal procedure too, for example in the adherence to trial by jury: no government seems willing to express doubts in lay fact

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<sup>6</sup> As Ashworth diplomatically put it 'In relation to duress, as we have seen, the pragmatic avoidance of controversy did not hold sway' ('Principles, Pragmatism, and the Law Commission's Recommendations on Homicide Law Reform' [2007] *Crim LR* 333 at 343).

<sup>7</sup> Readers will be aware of the controversies surrounding the conviction of Private Lee Clegg, whose conviction for murder was originally upheld because the House of Lords held that there was no possibility of creating a partial defence to murder at common law, largely on account of the political dimension surrounding the mandatory life sentence: *R v Clegg* [1995] 1 All ER 334. The case of Tony Martin, who was released when the Court of Appeal substituted a conviction of manslaughter on the basis of diminished responsibility: *R v Martin* [2001] EWCA Crim 2245, has also continued to exercise politicians (see n15).

<sup>8</sup> J. Rogers, 'The Law Commission's Proposed Restructuring of Homicide' (2006) 70(3) *J Crim L* 223.

<sup>9</sup> J. Rogers, 'The New Homicide Ladder' (2007) 157 *N.L.J* 48.

<sup>10</sup> See the letter signed by over one hundred academics and barristers at <https://www.theguardian.com/world/2017/mar/10/a-key-proposal-for-abortion-law-reform>

The final, definitive version of this paper has been published in *The Journal of Criminal Law*, 2017 by SAGE Publications Ltd, All rights reserved. © JJ Child & J Rogers <http://online.sagepub.com> finders.<sup>11</sup> Similarly, the political antipathy to anything markedly “European” will doubtless rule out any proposals for judicial oversight of police investigations, no matter how problematic our law on disclosure of unused evidence to defendants appears to be<sup>12</sup>; and it also inhibits, one imagines, radical reform to the law on expert evidence, no matter how well argued it might be.<sup>13</sup>

### *Challenge 2: the political preference for simple headlines*

This is another obstacle which arises within criminal law reform in particular. Academics look at criminal law through principles of criminalisation, they are generally suspicious of a notion that criminals adjust their behaviour in response to criminal law reform,<sup>14</sup> and they tend not to think of the criminal law as having a role in simply propagating moral messages. By contrast it is perhaps in the nature of legislators to overestimate the likelihood of legal change influencing all types of behaviour and attitudes and also to think in terms of propagating simple moral messages which may attract headlines or party support. This seems to explain householder provisions in the law on self-defence, which governments of both colours have enacted,<sup>15</sup> which appear to be solely motivated by the desire to show that they are “taking the side of the householder rather than the burglar”. The notion of “taking sides” is also never far from the surface when maximum sentences for offences are raised. Sometimes, a “message” is inserted into what is otherwise quite coherent legislation and threatens to distort it. One recalls here the enactment of loss of control as a new partial defence to murder, replacing the partial defence of provocation. Responding to perceptions that provocation succeeded too frequently when pleaded by men who “lost self-control” on account of their partner’s infidelities, it was enacted that “the fact that a thing said or done

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<sup>11</sup> Those who talk about a ‘British’ bill of rights, including the present Lord Chancellor, typically refer to trial by jury as being something that might be on offer which would not be found in ‘European’ human rights law. See <https://www.theguardian.com/law/2016/aug/22/uk-bill-of-rights-will-not-be-scraped-says-liz-truss>

<sup>12</sup> For an extreme example of the dangers of expecting the police to alert prosecutors to all disclosable evidence, see the facts of *R v Maxwell* [2010] UKSC 48

<sup>13</sup> J. Spencer, ‘Court Experts and Expert Witnesses: Have we a Lesson to Learn from the French?’ (1992) 45(2) CLP 213. There would, admittedly, be likely opposition from the profession to court appointed experts: see challenge 4 below.

<sup>14</sup> There may be exceptions, eg in the instance of certain possession offences.

<sup>15</sup> Labour first presumptively barred burglars from suing the householder, by virtue of Criminal Justice Act 2003, s. 329, though the provision received a restricted reading in *Adorian v Commissioner of Police* [2009] 1 WLR 1864. The criminal law concerning defence within the home was amended by the coalition government by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s. 148 and the Crime and Courts Act 2013, s. 43.

The final, definitive version of this paper has been published in *The Journal of Criminal Law*, 2017 by SAGE Publications Ltd, All rights reserved. © JJ Child & J Rogers <http://online.sagepub.com> constituted sexual infidelity is to be disregarded” as a qualifying trigger in the new partial defence.<sup>16</sup> This led to resistance among academics and judges who understood that possessiveness may indeed be behind a lot of domestic violence, but who realised that the message will not guide behaviour, and would be unlikely to lead to more convictions of murder (on account of the problems in defining “sexual infidelity”<sup>17</sup> and because, unless D offered a remarkably damaging interview, there would likely be plausible evidence of other triggers of loss of control<sup>18</sup>). It is no coincidence that this troublesome clause was inserted when the Law Commission’s earlier work came to be overtly revised by the Ministry of Justice before it became law.

Indeed, “taking sides” on issues that exist more in the minds of politicians than in the language of lawyers is a recurrent theme. To similar effect, we see talk of rebalancing the criminal justice system in favour of complainants (increasingly called victims) and against defendants (almost presumptively guilty) as though their interests were necessarily polarised and a choice had to be made between the two.<sup>19</sup> Perhaps the best illustration of this was the decision simultaneously to widen the admissibility of propensity evidence against defendants whilst restricting the deployment of bad character evidence of others (normally, complainants).<sup>20</sup> The “simple” message, that the innocent will have nothing to lose by explaining themselves to the police while the guilty will want to hold their silence in the hope of ambushing the prosecution, underpinned the reforms to the right to silence in 1994, in the teeth of all expert opinion including the (then) very recent Runciman Commission.<sup>21</sup> Another recurrent misconception in the eyes of some politicians is that criminal justice should be about nothing other than convicting the factually guilty. Thus it took serious

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<sup>16</sup> Coroners and Justice Act 2009, s. 55(6).

<sup>17</sup> See eg A. Reed and N. Wake, ‘Sexual Infidelity Killings’ in A. Reed & M. Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: Surrey, 2011) 117.

<sup>18</sup> This concern led, properly or not, to the watering down of s. 55(6) in *R v Clinton* [2012] EWCA Crim 2.

<sup>19</sup> See Home Office, *Rebalancing the Criminal Justice System in Favour of the Law Abiding Majority* (2006) <http://webarchive.nationalarchives.gov.uk/20060904182404/http://homeoffice.gov.uk/documents/CJS-review.pdf/CJS-review-english.pdf?view=Binary>

<sup>20</sup> Arguably these reforms have worked well but there is no underestimating their political context. The relevant provisions of the Criminal Justice Act 2003 had been due to come into force in April 2005, at the same time as the other evidential provisions in the Act; but with no explanation, the government fast-tracked the bad character provisions so that they came into force in December 2004, before trial judges could receive any training. The suspicion at the time was that the Labour government wanted to be able to claim that the job was already done, and hopefully that the conviction rates had increased, in the run up to the anticipated General Election in 2005.

<sup>21</sup> For contemporary criticism, see I. Dennis ‘The Criminal Justice and Public Order Act 1994: the Evidence Provisions’ [1995] Crim LR 4; and more recently, H Quirk *The Right to Silence: Principle, Pragmatism, and Policy Making* (Routledge, 2016) Ch 2.

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rearguard action from the legal community to prevent the Labour government in 2006 from changing the rules of criminal appeals, such that it would be impossible to quash a conviction if the courts concluded that the defendant did in fact commit the offence as charged, no matter what sort of error took place in the court below or what sort of police malpractice may have emerged since the trial.<sup>22</sup>

This is not meant to read as a list of complaints about reforms which successive governments have attempted at their own initiative. The purpose is rather to show that, unsurprisingly, the political mindset often radically differs from the legal and academic concerns. Reforms that carry simple headlines are much more viable, even if their benefits are slender or even non-existent, than those whose benefits might be substantial but only likely to be appreciated by the legal community. With limited time to push legislation through Parliament, the political preference for simple headlines matters. This no doubt goes a long way to explaining the lack of interest in many of the various codification projects of the Law Commission, and the Commission's more recent preferences to ascertain the level of political interest in any project before starting to work on it.<sup>23</sup>

### *Challenge 3: The political indifference to principles of criminalisation*

Modern academic writers think deeply about criminalisation. Whether criminal conduct should be harmful (whatever that means), and perhaps wrongful as well, or whether it suffices that it be offensive or immoral – such debates are familiar to us all. Where the avoidance of harm is the reason for criminalisation, we expect there to be some evidence that the activity sought to be proscribed does have a tendency to cause harm. We are also familiar with the idea that finding a reason to criminalise behaviour is only the first question:

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<sup>22</sup> See J. Spencer, 'Quashing Convictions, and Squashing the Court of Appeal' (2006) 170 JPN 790 and 'Quashing Convictions for Procedural Irregularities' [2007] Crim LR 835. The latter article begins in true Spencerian style:

In September 2006 the Government announced its intention to change the law so that in future the Court of Appeal would no longer be able to quash convictions on "purely procedural grounds" if it was sure that the defendant was factually guilty. The announcement was made in what was called a "consultation paper"; but with arrogance as startling as its frankness, the Government said it did not wish to hear from anyone who disagreed.

<sup>23</sup> See generally, M. Dyson et al (eds), above n. 3.

The final, definitive version of this paper has been published in *The Journal of Criminal Law*, 2017 by SAGE Publications Ltd, All rights reserved. © JJ Child & J Rogers <http://online.sagepub.com> there may be still stronger reasons not to criminalise, to do with problems in enforcement, or prosecutorial discretion, and so on.<sup>24</sup>

To those who find some of this literature rather abstract, it might be a welcome thought that politicians, inevitably, treat decisions to criminalise and/or to extend the criminal law rather more simply. Empirical evidence may be desirable but it is certainly not always necessary to persuade politicians to enact new offences to prevent harm. The recent offences of possession of non-photographic pornographic images of children<sup>25</sup> and possession of extreme pornography might serve as good examples.<sup>26</sup> Here, the more likely reasoning was that “it might have a real harmful tendency and even if not, it seems immoral and there is no good reason to need to do it”.<sup>27</sup> Similarly, the offence of causing death by driving whilst uninsured did not include much thought to the connection between being uninsured and having an accident.<sup>28</sup> It is true that the coalition government in 2011 introduced a “gateway mechanism” designed to reduce the proliferation of new (unnecessary) criminal offences, which on paper seems admirable,<sup>29</sup> but its operation in practice appears to be somewhat underwhelming.<sup>30</sup>

One recurrent issue in criminalisation decisions is whether a broad offence should be preferred, with much room for prosecutorial discretion in cases where there seems little harm was caused or truly risked, or whether an offence should be more narrowly defined such that it only applies in more serious cases. Scholars may have their own preferences as matters of principle; or they might at least have their own checklist of factors which ought to influence the approach to take with regard to any particular activity. Again it may be a mistake to expect such thinking from politicians. Consider the divergent approaches in the

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<sup>24</sup> At the risk of choosing just one citation in this crowded area, see D. Husak, *Overcriminalization: the Limits of the Criminal Law* (Oxford University Press: Oxford, 2008).

<sup>25</sup> See ss. 62-68 Coroners and Justice Act 2009, and commentary by S. Ost ‘Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?’ (2010) 30(2) *Legal Studies* 230.

<sup>26</sup> Criminal Justice and Immigration Act 2008, s. 63. See further C. McGlynn and E. Rackley ‘Criminalising Extreme Pornography: A Lost Opportunity’ [2009] *Crim LR* 245.

<sup>27</sup> Or, as it is put by McGlynn and Rackley, *ibid.* at 257:

Three different, and somewhat contradictory, arguments were offered by the Government during the legislative process: the cultural context of sexual violence, arguments of direct harm, and those grounded in disgust. We suggest that as the Government came under pressure, it lost sight of the nature of the harm it was seeking to legislate against and reverted to the weakest possible justification for action, disgust.

<sup>28</sup> See C. Clarkson ‘Aggravated Endangerment Offences’ (2014) 60(1) *CLP* 278.

<sup>29</sup> See now <http://www.justice.gov.uk/downloads/legislation/criminal-offences-gateway-guidance.pdf/>

<sup>30</sup> J. Chalmers “‘Frenzied Law-Making’: Overcriminalization by Numbers’ (2014) 67(1) *CLP* 483.

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Sexual Offences Act 2003 and the Children Act 2004. The former addressed, inter alia, the liability of children who have consensual sexual activity with each other,<sup>31</sup> and the latter addressed, inter alia, the scope of the defence of parental chastisement to any criminal charges, including common assault.<sup>32</sup> There is a certain similarity between the activities; in respect of both, the possibility of criminal liability should be there for the protection of children from potentially abusive conduct, but the possibility of over-zealous prosecutions might be a real concern. But the models of criminalisation preferred in each case were quite different. On the one hand, the government seemed reluctant to countenance any decriminalisation of mutually underage sexual activity, and preferred to leave untroublesome cases to prosecutorial discretion.<sup>33</sup> On the other hand, the parental chastisement defence was retained, on the basis that effectively restricting its scope to charges of assault and battery would, as a matter of law, eliminate the more serious cases.

Doubtless this inconsistency can be explained. The retention of some defence of chastisement was another political “red line”: the Labour government of the day wished to avoid accusations of wishing for a “nanny state” where parents were told how to raise their children.<sup>34</sup> By contrast, tabloid headlines would not have been sympathetic to any possible message of tolerance towards underage sexual activity. Or, one might explain that parents are thought to be more concerned about their children experimenting with sex than they are about the criminalisation of their own disciplinary methods, and that ultimately parents, but not children, have votes. Whatever the reasons for the contrasting approaches, they were somewhere in the political realm and largely outside that of academic thinking about the link between over-criminalisation and prosecutorial discretion.

#### *Challenge 4: The division between academics and practitioners*

The obstacles above naturally prompt the thought that law reform might, as a rule, be best pursued within the legal community itself. One could encourage counsel to make certain new arguments, and/or press their merits upon the judiciary. One might also seek to

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<sup>31</sup> Sexual Offences Act 2003, ss. 9 and 13.

<sup>32</sup> Children Act 2004, s. 58.

<sup>33</sup> For critical commentary on the decision, see J. Spencer ‘Sexual Offences Act 2003: Child and Family Offences’ [2004] Crim LR 347. For doubts about the operation of prosecutorial discretion in trivial cases, see A Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing: Oxford, 2016) 496-498.

<sup>34</sup> See <http://www.telegraph.co.uk/news/uknews/1466296/Parents-can-smack-but-not-too-hard.html> and [http://news.bbc.co.uk/1/hi/uk\\_politics/3868561.stm](http://news.bbc.co.uk/1/hi/uk_politics/3868561.stm)

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influence policy makers who influence the operation of the law; for example, the Crown Prosecution Service, who often consult on their various policies.

But, the division between academia and the legal profession in seeking law reform is wider than might be expected, because it goes beyond the relative absence of networking (as we understand it to be, at least outside Oxbridge and London) and the fact that most practitioners have even less time to read academic literature than do the academics themselves<sup>35</sup>. Again, there is typically a difference in mindset, albeit perhaps less pronounced than between would-be law reformers and the political community. Academics like to think as deeply as they can, and these “deep” thoughts often prompt them to suggest subtle distinctions. These might be very beneficial if everyone understood them, but they are not so beneficial when one considers: that verdicts in serious criminal trials are delivered by juries, who cannot be expected to think in very abstract terms; that predictability of outcomes is especially important in a system which operates a large discount for a guilty plea; and that no one has any proper interest in a series of appeals based on alleged misdirections in explaining a difficult area of law to a jury. Such thoughts naturally weigh more heavily on the minds of practitioners and judges. Thus, the House of Lords in *G and R*<sup>36</sup> considered the possibility of saving the problematic and heavily criticised test of *Caldwell* recklessness, whilst making only an adjustment for those unable to foresee an obvious risk, but rejected it in these terms:

A further refinement, advanced by Professor Glanville Williams in his article "Recklessness Redefined" (1981) 40 CLJ 252, 270-271 ... is that a defendant should only be regarded as having acted recklessly by virtue of his failure to give any thought to an obvious risk that property would be destroyed or damaged, where such risk would have been obvious to him if he had given any thought to the matter. This refinement also has attractions, although it does not meet the objection of principle and does not represent a correct interpretation of the section. It is, in my opinion, open to the further objection of over-complicating the task of the jury (or bench of justices). It is one thing to decide whether a defendant can be believed when he says that the thought of a given risk never crossed his mind. It is another, and much more speculative, task to decide whether the risk would have been obvious to him if the thought had crossed his mind. The simpler the jury's task, the more likely is its verdict to be reliable<sup>37</sup>

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<sup>35</sup> Further, for some practitioners, the literature may not be freely available online, or they may be put off much academic literature by the theoretical nature of many contributions.

<sup>36</sup> *R v G and another* [2004] 1 AC 1034; [2003] UKHL 50.

<sup>37</sup> See the opinion of Lord Bingham at [38].

We regard Glanville Williams' article on recklessness to be a leading work even today, and Lord Bingham paid his respects to him earlier in his opinion but still their Lordships chose to abolish altogether a troubled strand of the criminal law, on the basis that it had originally been developed in error, in favour of nuancing it.

Even in areas of procedure, where one typically finds less academic literature of the theoretical variety, there may be different perspectives. Practitioners are likely to be more resistant to changes to their own familiar working patterns. Many in practice (unsuccessfully) opposed the reform to allow for appeals against unduly lenient sentences imposed in the Crown Court,<sup>38</sup> and (not dissimilarly) to retrials of some acquitted defendants when compelling new evidence is discovered.<sup>39</sup> Many also resisted the changes to the admission of bad character evidence.<sup>40</sup> Practitioners have so far (successfully) resisted proposals to restrict the right to elect trial by jury.<sup>41</sup> Some still oppose the spirit of the Criminal Procedure Rules which require defence practitioners to co-operate to some extent with trial preparation.<sup>42</sup> Naturally one must beware of generalisations here, as not all practitioners are so conservative and conversely not all in academia have welcomed these reforms either. It should be uncontroversial, however, to say that those who practice within the system are more likely to oppose seemingly radical reform to it.<sup>43</sup>

As we said at the outset of this section, elucidating these challenges is not a matter of pessimism; it is a matter of getting a better idea of what needs to be done in the cause of law reform. It is evident that much more than writing standard academic papers is required. At the minimum, would-be reformers must try to imagine political objections, which may

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<sup>38</sup> See J. Spencer 'Do we need a prosecution appeal against sentence?' [1987] *Crim LR* 724.

<sup>39</sup> The Bar Council and Criminal Bar Association jointly criticised the proposals: see S. Broadbridge, *Double Jeopardy SN/HA/1083*, available at:

<http://researchbriefings.files.parliament.uk/documents/SN01082/SN01082.pdf>. Academics at least gave a mixed reception at the time: cp. P. Roberts 'Justice for All? Two Bad Arguments (and Several Good Suggestions) for Resisting Double Jeopardy Reform' (2002) 6 *E & P* 197 and I. Dennis 'Prosecution Appeals and Retrial for Serious Offences' [2004] *Crim LR* 619.

<sup>40</sup> See J. Spencer in the Preface to his first edition of *Evidence of Bad Character* (Hart Publishing: Oxford, 2006).

<sup>41</sup> This is apparently a never ending saga. Much as governments have shown themselves wary about restricting trial by jury, resistance has been loudest from the profession itself. See M. Zander 'The Right to Reform Trial by Jury' (2012) 176 *JPN* 69.

<sup>42</sup> See eg A. Hall 'Where do the Advocates Stand when the Goalposts are Moved?' (2010) 14 *E & P* 107; J. Richardson 'A "Just" Outcome: Losing sight of the Purpose of Criminal Procedure' (2011) 1 *JCCL* 105.

<sup>43</sup> This is discussed by Ian Dennis in the context of the 'failed' codification projects of the 1980's in I. Dennis, 'The Law Commission and the Criminal Law: Reflections on the Codification Project' in M. Dyson et al (eds), above n.3.

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be of a relatively simple variety which would not naturally occur to them. Some judgement may be called for when deciding when political preconceptions about criminal justice may be indulged and when they need to be challenged. Reformers must consider how their reforms could be packaged and sold to a wider public. They should be aware that politicians do not think in terms of criminalisation theory; they might ask why conduct should be legal rather than why it should be criminal, and consistency with other criminal law decisions is not likely to be a priority. Reformers should beware the dangers of radicalism if they are to engage with the professions; at the very least, if a radical goal is desired, it may be best approached step by step by a series of relatively simple and modest reforms. Most of all, close consultation with politicians, policymakers or practitioners (or whomever might be expected to deliver reform) is needed throughout the writing process and not just at the end of it.

## **Part 2. The Criminal Law Reform Now Network**

One of the principal routes through which academics and legal researchers can contribute to reform is through the Law Commission.<sup>44</sup> Indeed, the importance of academic contributions at various stages of the Commission's consultation processes was the overriding theme of David Ormerod's presentation to the 2016 SLS Conference.<sup>45</sup> As well as asking for feedback on specific reform projects, the Commission periodically consults on what areas of the criminal law they should focus their future work (ie, on each new Programme of Law Reform). Coinciding with the Commission's consultation on its 13<sup>th</sup> Programme in 2016, a conference hosted by the University of Sussex Law School brought together a group of academics and legal professionals to debate a number of law reform proposals (proposals that were subsequently submitted to the Commission as consultation responses, and will be published later this year as a collection).<sup>46</sup>

That conference, themed 'Criminal Law Reform Now', achieved its principal aims of identifying and critiquing law reform proposals for the Commission, as well as acting as

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<sup>44</sup> <http://www.lawcom.gov.uk/>.

<sup>45</sup> Professor David Ormerod QC is the Criminal Law Commissioner for England and Wales. His presentation is available at <https://www.youtube.com/watch?v=gqndBJDWT7Q>.

<sup>46</sup> For information on the conference, co-hosted with Professor Antony Duff, see <http://www.sussex.ac.uk/crime/newsandevents/clrn>. An edited collection coming from the conference, 'Criminal Law Reform Now' will be published at the end of the calendar year with Hart Publishing.

The final, definitive version of this paper has been published in *The Journal of Criminal Law*, 2017 by SAGE Publications Ltd, All rights reserved. © JJ Child & J Rogers <http://online.sagepub.com> a launch event for the new Crime Research Centre at the University of Sussex.<sup>47</sup> Here, the idea for a separate CLRN Network was born from the desire of delegates to contribute to the reform agenda in different ways, in addition to collaboration with the Law Commission in its various projects. It was envisaged that one of the present co-authors, John Child, would direct it, and since then John asked the other co-author, Jonathan Rogers, to co-direct it. We have established a small committee,<sup>48</sup> which we are ready to expand in the early years, with free membership spreading as widely as possible across all sections of the legal community.<sup>49</sup>

The creation of the CLRN Network, we believe, holds great potential for facilitating academics and other legal researchers to have a different kind of impact on legal reform. The CLRN Network begins work in 2017, with the broad aim of facilitating collaboration between academics and other legal experts to gather and disseminate comprehensible proposals for criminal law reform to the wider community; in principle including affected members of the public and mainstream media as well as legal professionals, police, policymakers and politicians.

At its simplest, through a mailing list and website, the CLRN Network will provide a forum for researchers interested in criminal law reform to share ideas and advertise events. The Network will also, in combination with the SLS, provide a resource for law reform institutions and individuals to reach out to for potential ad hoc collaboration.

The core of our work will be the creation of our own reform proposals, through CLRN Network Projects. Whilst continuing to support the work of other established networks and institutions such as the Law Commission, the CLRN Network aims to provide a new pathway for researchers interested in law reform, one that offers opportunities to liaise with others, including those outside legal academia, who have interests and contributions to make concerning the project. The hope is that using such a network will help both individuals and teams to produce proposals that are all the more persuasive, and are made with full acknowledgement of some of the obstacles to reform as outlined in Part 1. In order

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<sup>47</sup> For information about the Sussex Crime Research Centre, see <http://www.sussex.ac.uk/crime> and follow us @SussexCRC. Email [j.j.child@sussex.ac.uk](mailto:j.j.child@sussex.ac.uk) to be added to the Centre's events mailing list.

<sup>48</sup> Current members include Professor Liz Campbell (University of Durham), and Simon McKay (Barrister).

<sup>49</sup> For information about the CLRN Network, to become a member, and for updates, see our website [www.CLRNN.co.uk](http://www.CLRNN.co.uk); follow us @CLRNSussex.

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to appreciate the potential role and processes within the CLRN Network, we set out the basic stages of how we intend to deliver our projects below.

### *Stage 1: Identifying the area of law*

The first task for each new project will be to select a suitable area of law for review. This will be done at a CLRN Network meeting, with members of the network encouraged to attend and/or to provide written recommendations. The first of these will be hosted at UCL on 13 June 2017 (details can be found on our website [www.CLRNN.co.uk](http://www.CLRNN.co.uk)).

There are very few restrictions on the kinds of project the CLRN Network can take on. We will restrict ourselves to comprehensible ideas for specified reforms, thus excluding those which would only be expected to receive academic support or understanding. We will also need to target areas where there is sufficient expertise to form a useful project team. However, we would be open to exploring ideas which are comprehensible even though they might be thought likely to encounter political resistance, and in that we distinguish ourselves from the Law Commission. Nor need we restrict ourselves to reforms which would require legislation. Reforms which public bodies such as the Home Office, police or CPS could bring about by internal policies may interest us, and also the work of judiciary, bearing in mind the proper constraints on judicial law making. We would be happy to consider projects across the criminal law piste: including procedural, evidential, sentencing and substantive issues, as well as topics that combine these. We provide some examples of potential projects on our website, but we are very much open to new ideas.

### *Stage 2: Identifying the issues, and forming the team*

Having identified the area of law, the next stage will be to reach out to members of the CLRN Network and beyond (eg members of the SLS, and Halsburys Law Exchange<sup>50</sup>) to find relevant experts working and/or researching in the field. These individuals will be brought together for a full day conference exploring various aspects of the legal topic, and identifying issues that require further review within the project. Within the final session of

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<sup>50</sup> Halsbury's Law Exchange is a legal think tank, hosted by LexisNexis. It aims to communicate ideas on reform or legal direction to decision makers and the legal sector and promote debate through papers, reports, events and media pieces. <http://www.halsburyslawexchange.co.uk/>.

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the conference, we will form a core project team of 3-5 members representing the experts in that area. Anyone who delivers a paper at this Conference would be entitled to have it attached as an Appendix to the later Report, or may seek to adapt it for publication elsewhere.

### *Stage 3: Writing the Report, and flexible consultation*

The project team will be responsible for drafting the CLRN Network Report, exploring the relevant area of law and setting out recommendations for reform. Project teams, with support from the CLRN Network Directors and Committee, may also conduct consultation exercises and/or empirical investigations as appropriate to the project. Reports will typically be less than 100 pages in length (sometimes much shorter<sup>51</sup>) and written in an accessible style, taking into account likely objections, and alternative perspectives on legal problems, from outside the academic community. Lastly, the CLRN Network Directors and Committee will review the Report and offer comments before it is finalised.

CLRN Network Reports will be published under the auspices of the Network, with the names of all contributors listed within. Project team members may adapt or republish their own material elsewhere under their own name, provided that they acknowledge that the work originated as part of the Network and provide a link to the relevant Report. We do not anticipate any project lasting longer than one year.

### *Stage 4: Dissemination and impact*

CLRN Network Reports are intended to have maximum impact on their chosen target for legal reform. With this in mind, reports will be made immediately available for free on our CLRN Network webpage, Halsburys Law Exchange, as well as through the SLS. Print copies will be sent to relevant people within the targeted reform institution or body. A range of publicity will also be considered at this stage, including interviews with print media, launch symposium, public meetings etc. The CLRN Network Committee and Project Team will continue to work with the target reform institution or body to take the proposals forward.

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<sup>51</sup> Depending upon the primary target audience.

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### **Concluding observations**

Within academia and legal research, it is always easier to remain within one's comfort zone: to publish quality research and to hope that it makes a positive contribution to the world. As the volume of research increases, and perhaps disconnect between researchers and the political community also increases, so the hope for impact can become more forlorn. The CLRN Network does not require researchers to abandon their familiar domain, but rather provides an opportunity for them to come together within multi-skilled teams to transform their work into a format that is most likely to prompt change for the better, and to persuade practitioners and policy makers whose perspective might be surprisingly different. It may open up different sources of funding, afford opportunities for networking, offer previews of planned changes and inspire different ways of thinking. The CLRN Network will not succeed in bringing about such changes with every Report; but it will try to do so. We look forward to trying something new together, and we would like you to join us.