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Re-evaluating post-conviction disclosure: a case for ‘better late than never’

Holly Greenwood¹ and Dennis Eady²

Abstract

The recent instances of fundamental failings in pre-trial disclosure should also place systemic procedures for post-conviction disclosure firmly in the spotlight. Drawing on the authors’ experience of working on university miscarriage of justice projects, this paper will argue that the UK Supreme Court decision in *R v Nunn* must be revisited to strengthen the duty of disclosure of material post-trial, and to provide sanctions for authorities that fail to comply. In the current climate of austerity, there is increasing reliance on student projects and other similar organisations to assist appellants post-conviction; it is necessary to determine what their role should be and what rights they might have to access material on behalf of defendants. The article concludes by suggesting that fairness demands for consideration to be given to proposals in the “Open Justice Charter,” which is a document drafted by several academics and practitioners in the field of criminal appeals.

Keywords: Criminal disclosure; post-conviction disclosure; miscarriages of justice; innocence projects.

Introduction

The system of pre-trial disclosure in England and Wales has recently come under scrutiny after the exposure of fundamental disclosure failings by the prosecution has reportedly led to the collapse of “hundreds” of cases.³ The current ‘flagship’ case responsible for bringing problems with disclosure to the forefront is that of Liam Allan. Allan was accused of raping his ex-girlfriend. Two days into the trial, Julia Smart (Allan’s defence counsel), successfully fought to obtain telephone records held, but not disclosed, by the prosecution. Smart then spent the night trawling through tens of thousands of messages (something that defence lawyers would

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³ The BBC reported on the 24th January 2018 that a freedom of information request revealed 916 people had their cases dropped due to non-disclosure in 2017. <https://www.bbc.co.uk/news/uk-42795058> (accessed 29/01/19)

ordinarily not be paid to do)⁴ and identified messages from the complainant that exculpated Allan; this caused the trial to collapse. Of concern is how the exculpatory messages nearly remained undiscovered. Despite repeated requests from Allan’s legal team for disclosure of any downloads from the complainant’s telephone, the prosecution assured them that none existed. It was only after the prosecution sought to adduce a text message conversation at trial that Allan’s defence team became aware that such phone records existed. Even then, the prosecution initially resisted disclosure, claiming the messages were just “girly chat”, only agreeing to disclosure following a battle from Allan’s defence counsel.⁵ Had the exculpatory messages not been discovered, Liam Allan would very possibly have been convicted of rape, depending purely on who the jury found more believable. Therefore, sadly, Allan might be viewed as one of the more “fortunate” ones. Nevertheless, no one who has been subjected to a two-year police investigation for false allegations should ever be called “fortunate.”

Allan’s case has been considered a “near-miss” (Smith 2018b) and sparked widespread concern. The CPS and Metropolitan Police conducted an urgent review concluding that “disclosure problems” in Allan’s case “were caused by a combination of error, lack of challenge, and lack of knowledge” (House of Commons Justice Committee, *Disclosure of evidence in criminal cases*, Eleventh Report of Session 2017-2019, para.7). Further responses included the commencement of an Attorney General’s review (Attorney General’s Office 2018); the production of a National Disclosure Improvement Plan by the CPS, National Police Chiefs’ Council (NPCC) and College of Policing in January 2018 (Crown Prosecution Service and NPCC 2018); and a Justice Select Committee inquiry launched in January 2018 (House of Commons Justice Committee 2018).

This national scandal has inevitably brought into question the adequacy of the disclosure provisions under Section 3 of the Criminal Procedure Investigations Act (CPIA) 1996.

Section 3(1) Criminal Procedure Investigations Act 1996 states:

- (1) The prosecutor must—
 - (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or
 - (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

Therefore, the current regime entrusts the prosecution to disclose evidence to the defence that might help their case. As Allan’s case illustrates, there is a risk that the defence might miss

⁴ Under current legal aid arrangements, defence lawyers are not paid to read ‘unused evidence,’ which further discourages the discovery of potentially helpful evidence to the defence (something that has currently been considered by the Justice Committee. See Criminal Legal Aid, Justice Committee, House of Commons <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/1069/106903.htm>)

⁵ This information on Liam Allan’s case is drawn from a talk given by Julia Smart at the Manchester Miscarriage of Justice Conference in February 2018.

fundamental evidence because, in Smart’s words, “we don’t know what we don’t know.”⁶ Clearly, the fallout from recent high-profile cases⁷ raises inevitable questions over the sensibility of such a structure and this has generated considerable academic discussion (see for example, Quirk 2006, Redmayne 2004). However, whilst we will touch on this to a certain extent, the central focus of this article will be the argument that the current national disclosure scandal ought to re-focus attention on our current provisions for *post-conviction* disclosure. In a broken system, we find it is necessary to argue that disclosure post-trial is “better late than never.”

The article will proceed as follows. First, we will highlight the difficulties of operating in a criminal appeal system that requires a defendant to demonstrate *fresh* evidence affecting upon the safety of their conviction, whilst simultaneously constructing insurmountable barriers to post-conviction investigation. This section will examine the legal position on post-conviction disclosure as outlined by the Supreme Court in *Nunn v Chief Constable of Suffolk Police* ([2015] A.C. 225). We will first explain the scope of post-conviction disclosure duties since *Nunn*, before deconstructing the fallacious assumptions upon which this judgment relies. Next, the article will put the current issues surrounding disclosure in the context of a collapsing criminal justice system in England and Wales. We will explain how austerity is leading to an ever-increasing reliance on student-based projects to assist in post-conviction appeals and suggest that certain reforms are required to enable this. Finally, we will argue that the recent report by the Justice Select Committee on disclosure perhaps does not go far enough in its recommendations. We will direct consideration towards the “Open Justice Charter” and argue that the only way forward is to work towards a more transparent approach to criminal justice.

1. Criminal appeals and post-conviction disclosure

Currently, whilst an appeal against conviction from the Magistrates’ Court entitles the defendant to a full re-hearing of the case, an appeal from Crown Court requires a defendant to meet very specific grounds. Section 2 (1) (a) of the Criminal Appeal Act 1995 (CAA 1995) stipulates that the Court of Appeal (Criminal Division) (hereafter CACD) shall allow an appeal against conviction where they think the conviction is “unsafe.” Section 23 of the Criminal Appeal Act 1968 states that the court can receive evidence “in the interests of justice,” provided that it was *not adduced in the proceedings from which the appeal lies*. Thus, the CACD generally does not hear evidence that was available at trial (even if not used) unless there is a reasonable explanation for not adducing it (S.23 (2) (d) Criminal Appeal Act 1968). Therefore, a prospective appellant must identify an error in either law or procedure affecting the conviction’s safety; or must find some compelling fresh evidence that casts doubt on the original conviction. This leaves convicted defendants in an almost impossible position. In the absence of a legal or procedural error, they are tasked with trying to obtain some fresh evidence that could help their case; yet the entire criminal appeal process is stacked against any form of post-conviction investigation. This is most notable with the rules on post-conviction disclosure;

⁶ Julia Smart, Manchester Miscarriage of Justice Conference (February 2018).

⁷ For example, Liam Allan, Isaac Itiary (see below), Samuel Armstrong (see below)

the Supreme Court determined the current legal position on this in *Nunn v. Chief Constable of Suffolk Police* ([2015] A.C. 225).

1.1 Nunn v. Chief Constable of Suffolk Police [2015] A.C. 225⁸

The case of *Nunn* went to the Supreme Court in 2014. *Nunn*, the appellant, had been embroiled in a disclosure dispute with Suffolk Constabulary after being refused disclosure of certain documents and items that he requested from the police. The material *Nunn* requested was not withheld and had been properly disclosed at trial; but his legal team wanted to examine the items to determine whether there might be grounds for appeal (para 15, p.240). The Supreme Court was called upon to determine the extent of disclosure duties owed to a defendant by the prosecution post-conviction. The question of public importance certified was, “Whether the disclosure obligations of the Crown following conviction extend beyond a duty to disclose something which materially may cast doubt upon the safety of a conviction, so that the [Chief Constable] was obliged to disclose material sought by the claimant in these proceedings?” (p.229).

The Supreme Court concluded there was no broad-brush duty upon the prosecution to disclose material requested by the defendant post-trial. It identified the applicable test as located within paragraph 72 of the Attorney General’s guidelines, which specifies, “Where, after the conclusion of proceedings, material comes to light, that might cast doubt on the safety of the conviction, the prosecutor must consider disclosure of such material” (para 30, p.245). The court held that disclosure of such material “should be made unless there is good reason why not” (para 30, p.245). This might include “a new (and credible) confession by someone else” or “the discovery, incidentally to a different investigation, of a pattern, or of evidence, which throws doubt on the original conviction” (Para 35, p.246). Therefore, if the police or prosecution come into possession of evidence which is “new” and “which might afford arguable grounds for contending that the conviction was unsafe, it is their duty to disclose it to the convicted defendant” (Para 35, p.246). The protection of this duty is extremely important, but likely has little practical relevance for the majority of individuals seeking to challenge their conviction.

The key issue for those involved in post-conviction investigation is when the police or prosecution should comply with a defendant’s request to supply material that he/she might want to examine in preparation for an appeal. The Supreme Court extended the duty in paragraph 72 to include that, where “there exists a real prospect that further inquiry may reveal something affecting the safety of the conviction that inquiry ought to be made” (Para 42, p.249). However, *Nunn*’s counsel had sought to argue that when the CPIA 1996 is no longer applicable post-trial, a pre-existing common law duty⁹ should apply, which would have a much wider scope. The court summarised this submission as contending that the police (as “custodians” of the exhibits/other products of the investigation) “must afford the claimant such access as he

⁸ All references in this section refer to this reported judgment.

⁹ Prior to the CPIA 1996 coming into force, a common law duty had been established in the case of *Ward* [1993] 96 Cr.App.R. This test required the prosecution to disclose all the evidence and witness statements that were to be adduced by the prosecution, but also any ‘unused material’ in the prosecutor’s possession that might have possibly assisted the defence.

seeks so that he can, if material emerges which supports him, challenge his conviction” (Para 21, p.242). The Supreme Court rejected this argument: it would require the prosecution to continuously “give active consideration” to the evidence and to “respond from time to time to any requests for information, or for access to material, which the convicted defendant makes” (Para 30, p.245). They described this as a fallacious assumption that the common law duty was identical before and after conviction (Para 31, p.245). Conversely, they said the common law duty “was designed to avoid trials creating miscarriages of justice, not as a means of investigating alleged miscarriages after a proper trial process has been completed” (Para 31, p.245). Thus, it was not devised to equip convicted persons with a continuing right to indefinite re-investigation of their cases (Para 31, p.245). The court emphasised that “what fairness requires varies according to the stage of the proceedings,” and the position of a defendant post-conviction is entirely different to one pre-conviction; whilst the latter is presumed innocent until proven guilty, the former has been proven so (Para 32, p.246). The court commented, “The defendant on trial must have the right to defend himself in any proper way he wishes, and to make full answer to the charge. The convicted defendant has had this opportunity.” Furthermore, whilst post-conviction there is a public interest in “exposing any flaw in the conviction which renders it unsafe,” this must be counterbalanced against a “powerful public interest in finality of proceedings” (Para 32, p.246).

In reaching this decision, the Supreme Court was justifiably influenced by resources. It said a major investigation produces “voluminous” material, and the investigating officer might have moved on and no longer have access to material (Para 33, p.246). It emphasised “a clear public interest that in the contest for the finite resources of the police current investigations should be prioritised over the re-investigation of concluded cases, unless such good reason is established” (Para 33, p.246). The court acknowledged that important miscarriages of justice had been exposed due to the re-examination of key material, but held it did not follow that the law should impose a “general duty on police forces holding archived investigation material to respond to every request for further inquiry which may be made of them on behalf of those who dispute the correctness of their convictions” (Para 38, p.247). It expressed the view that if such a duty were accepted, “the potential for disruption and for waste of limited public resources would be enormous” (Para 38, p.247).

Finally, the Supreme Court emphasised that the CCRC was an important “safety net” for disputed disclosure requests (Para 39, p.248). The Commission has the statutory power to compel disclosure of materials from public bodies in s.17 of the Criminal Appeal Act 1995 and, as of more recently, the power to compel material from private bodies under s.18A. Nunn’s counsel submitted that relying on the CCRC was difficult as there is no obligation for the Commission to request or examine materials; it was merely a discretion that was “difficult to challenge” (p.232). The court summarised his contention as suggesting that, before applying to the CCRC, an applicant must firstly re-investigate several matters to try to convince them to review the case (paragraph 21, p.241). However, the Supreme Court disagreed, stating that the CCRC “does not, and should not” only make inquiries when a “reasonable prospect of a conviction being quashed is already demonstrated,” but it “can and does...make inquiry to see whether such prospect can be shown” when appropriate (Para 39, p.248).

Therefore, the Nunn judgment was clear: when post-conviction disclosure is sought to assist in appeal preparation, the defendant must demonstrate that disclosing the materials would have a “real prospect” of revealing information that might affect the safety of the conviction. A defendant is not entitled to disclosure of materials more generally to assist him/her in investigating their case post-conviction. Where a request is disputed, the defendant can apply to the CCRC to ask it to exercise its powers to compel disclosure of the materials under s.17 (and now also s.18A).

1.2 Evaluating the scope of the Nunn duty

First, the fact that the police/prosecution must consider disclosure to the defendant if they come into possession of information that actively undermines the safety of the conviction seems only right. But how often does this realistically happen? The examples provided (such as a new and compelling confession) are no doubt extreme rarities in occurrence, and such evidence is very unlikely to materialise for most wrongly convicted defendants. Furthermore, given that the police are charged with deciding how “compelling” the new evidential material is, this might offer little comfort to those familiar with miscarriages of justice. There is a fundamental conflict of interest in expecting the police to willingly disclose information suggesting they might have been party to a wrongful conviction.

Second, the Supreme Court’s extension of the duty in paragraph 72 is a positive step in urging the police or prosecution to disclose materials that might have a “real prospect” of revealing information affecting the safety of the conviction. However, its effectiveness will depend on how broadly the police and prosecution are willing to interpret this test. Given the recent exposure of fundamental disclosure failings pre-trial, there should be clear concerns about entrusting the police to decide whether to disclose material post-conviction; police can readily dispute disclosure requests on assertions that the material has no “real prospect” of affecting the conviction’s safety. Furthermore, there are currently no sanctions for police forces that “lose” or “destroy” relevant material; a number of disclosure requests made by the Cardiff Law School IP (CLSIP) have received the response that items required have been lost or destroyed. Not only does the loss or destruction of material deny the defendant the opportunity to access material that could potentially have a “real prospect” of revealing important information, this also provides an unassailable excuse to dispel disclosure requests. Another problem is that the scope of the current post-conviction disclosure duty leaves little room for an appellant to discover incidents of non-disclosure, which the CCRC has recently described as the “biggest single cause of miscarriages of justice” (CCRC 2017). The current test requires the defendant to show *why* access to certain materials might affect the safety of the conviction, which presumes a defendant’s awareness of what they might contain. In February 2018, at the National Training Conference on Investigating Miscarriages of Justice held at Manchester University, Julia Smart emphasised that the problem with disclosure failings is that “we don’t know what we don’t know.” It is much less likely that evidence will emerge post-trial that can point to non-disclosure. Therefore, save for applying to the CCRC, which is fraught with its own difficulties (as will be discussed below), the post-trial disclosure system leaves a convicted defendant with little recourse when disclosure requests are disputed.

2. The Nunn fallacy

The decision of the Supreme Court in Nunn is based on several dubious assumptions about the current system. Arguably, the judgment can only be justified if the following points are accepted.

First, that there is an effective system of pre-trial disclosure.

Second, that there is an effective pre-trial defence investigation.

Third, that the CCRC is an effective safety net for disputed disclosure requests.

Each of these assumptions can be challenged. For this reason, we argue that the Nunn decision can no longer be justified on these grounds.

2.1. There is an effective system of pre-trial disclosure

Despite the problem of prosecution disclosure only recently re-surfacing as a national scandal, this has long been a source of concern for those familiar with the topic. Dennis notes, this subject has “generated more official reviews than any other topic in the law of criminal process”¹⁰ (Dennis 2018, p.829). Examples of fundamental disclosure failings long pre-date our current disclosure regime in the CPIA 1996.¹¹ Redmayne is clear to highlight that there were “no halcyon pre-CPIA days” and that “disclosure has always been a problem and very probably always will be” (Redmayne 2004, p.461-462). Nevertheless, the CPIA itself generated significant controversy; Quirk discusses how its provisions for disclosure “generated immediate concern among practitioners, policymakers and academics” for its potential to “cause miscarriages of justice” but also to create “a means by which such mistakes will less likely be discovered” (Quirk 2006, p.43). Post-CPIA reviews have supported concerns by identifying that “poor practice in relation to disclosure is widespread” (Plotnikoff & Woolfson 2001, p.131) and that “improvement is required on part of all concerned with the disclosure process” (Gross LJ 2011, p.93). The more recent 2017 review by the HM Crown Prosecution Service Inspectorate again found there was “significant failure” in the disclosure process (HM Crown Prosecution Inspectorate 2017, para. 1.4), whilst highlighting that “non-compliance

¹⁰ Dennis lists the following: Report of the Royal Commission on Criminal Justice (Cm 2263, 1993) Ch.6; Crown Prosecution Service Inspectorate, *The Inspectorate’s Report on the Thematic Review of the Disclosure of Unused Material* (CPSI, London, 2000); Lord Justice Auld, *Review of the Criminal Courts of England And Wales* (TSO, 2001) (the Auld Review) pp.444–476; J. Plotnikoff and R. Woolfson, “A Fair Balance?” *Evaluation of the Operation of Disclosure Law*, RDS Occasional Paper No.76 (Home Office, London, 2001); *Review of Criminal Investigations and Prosecutions* Conducted by HM Customs and Excise by the Hon. Mr Justice Butterfield (2003). Ch.12; Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (2011); Lord Justice Gross and Lord Justice Treacy, *Further Review of Disclosure in Criminal Proceedings: Sanctions for Disclosure Failure* (2012); HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary, *Making It Fair, A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (2017).

¹¹ Significant prosecution disclosure failings were apparent in a number of high-profile wrongful convictions pre-dating the Royal Commission on Criminal Justice in 1993 (e.g. Ward [1993] 96 Cr. App. R and Maguire [1992] 94 Cr. App. R. 133).

with the disclosure process is not new and has been common knowledge amongst those engaged within the criminal justice system for many years” (para. 11.4). Therefore, for many, the recent disclosure scandal in the wake of the Allan case would not have come as a surprise.

The scale of the problem has continued to become more apparent with several other cases ‘post-Allan’ further showing serious disclosure failings. Dennis cites the cases of Isaac Itiary¹², Samuel Armstrong¹³, Oliver Mears¹⁴, Connor Fitzgerald¹⁵, Petruta-Cristina Bosoanca¹⁶ as some key examples (Dennis 2018, p.836). Thus, whilst recent case law clearly demonstrates that the pre-trial disclosure process is broken, the Nunn case is based on trust in its effectiveness. Limited access to disclosure at appellate stage is justified by the rationale that the defendant should have sought it at trial and that the police and/or prosecution would have necessarily disclosed it. However, the decision to vest power in the prosecution to determine disclosure duties in section 3(1) CPIA 1996 has attracted scepticism, particularly in the context of an adversarial system. Dennis identifies a clear and potential conflict with asking the police to disclose material that could help the defence case; this requires the police to act in a way that is inconsistent with their “occupational interest in building a case against the accused” (Dennis 2013, p.354). He points to research that suggests police will marginalise or repress information that does not fit the police case (McConville, Sanders and Leng 1991). Smith argues that problems with disclosure are deep-rooted within the adversarial criminal procedural structure, stating, “At the bedrock is the fundamental fact that the police are an adversarial institution, deeply committed to the apprehension and prosecution of offenders. This adversarialism inevitably influences the police approach to investigating evidence and sharing it with the defence -- their opposition” (Smith 2018a, p.156). Discussing the cases of Allan and Itiary (see above), Smith highlights that both defendants had pointed the police to exculpatory evidence; thus, he claims, it is “more likely that the problem was belief in the suspects' guilt rather than a lack of resources to investigate” (Smith 2018a, p.156). He concludes, “Giving the police sole responsibility for conducting an impartial assessment of whether evidence is exculpatory is a design flaw. Without addressing this, it is hard to envisage real change following” (Smith 2018a, p.156). These criticisms of the premise of the CPIA 1996 in England and Wales should

¹² Isaac Itiary, 25, spent four months in jail awaiting charge for sexual offences against a child. Itiary claimed he thought the girl was 19. The charges were dropped after the police revealed text messages from the girl showing she routinely posed as a 19-year old. The defence had originally asked for disclosure of the text messages approximately three months prior. (*The Times*, 20th December, 2017).

¹³ Samuel Armstrong, 24, was found not guilty of raping a woman after a year’s wait when the prosecution disclosed medical and phone records from the complainant (*The Times*, 22nd December 2017).

¹⁴ Oliver Mears, 19, was cleared of rape after spending two years on bail when the CPS and Surrey Police handed over relevant evidence just days before the trial was due (*The Times*, 20th January 2018).

¹⁵ Connor Fitzgerald, 19, lost his job as a BT engineer and spent three months in jail after the police failed to disclose messages from the complainant “in which she bragged about “ruining” his life.” (*The Times*, 1st February 2018).

¹⁶ Petruta-Cristina Bosoanca, 25, was accused of trafficking a Romanian prostitute to Britain. The alleged victim told police that she was brought to Britain to work as a prostitute and became pregnant after being subjected to repeated rapes. However, several days after the trial started the prosecution revealed there was a medical record proving the woman was already pregnant when she arrived in the UK. There were also over 65,000 WhatsApp and Facebook messages undermining the account that the police had had in their possession since the prior February. The deputy chief crown prosecutor for London South, Malcolm McHaffie, reportedly apologised and provided a letter to the judge acknowledging "It is clear that the disclosure handling has fallen below the standard we expect." (*The Times*, 1st February 2018).

not be controversial; the rules of contest sports are not usually determined and applied by one side, but by an independent referee. Thus, it is questionable whether the current pre-trial disclosure framework will ever operate as a fair and open process.

This should turn our attention back to thinking about options for post-trial disclosure. What might have happened to Liam Allan if the exculpatory messages were not discovered and he was convicted? What chances would he have had of uncovering the messages post-conviction? First, any person conducting a post-conviction review would need to spot the existence of the messages in the first place and appreciate their importance. Smart explained that she was not aware that a download of messages had been taken from the complainant's telephone until the prosecution sought to adduce a string of messages between the complainant and a friend. Therefore, if this was not discovered during trial, it seems unlikely that an appeal lawyer would have easily spotted that the messages existed. Even if this were found, Allan would then have to request disclosure from the Metropolitan Police. Given the battle that Smart faced at trial to obtain the message downloads, it seems highly unlikely that the police would be prepared to hand them over post-conviction. The Supreme Court in *Nunn* was clear that the defendant has to demonstrate that the enquiry might reveal something material to the safety of the conviction. Clearly, given the assurances by the police that the messages contained nothing of relevance, this would be difficult to argue in a system that entrusts the disclosure duties to the prosecution. Therefore, the mostly likely route to challenging the conviction would require proof that the messages contained information that meant they *should* have been disclosed at trial. In many cases, it would be impossible to make this argument without obtaining the record of messages in the first place. This is the very real "catch-22" situation that appellants can find themselves in (McCartney and Speechless (sic), 2015, p.125). Thus, we are currently working within a system where, not only is it very easy to get it wrong the first time, it is extremely difficult to correct it afterwards. Therefore, the current position from *Nunn* ought to be reconsidered; if we cannot be sure that the pre-trial disclosure process has worked effectively, a defendant ought to be armed with a broader right to post-conviction disclosure to catch anything missed.

2.2 There is an effective pre-trial defence investigation

The Supreme Court in *Nunn* concluded that a defendant should not be entitled to the same level of disclosure pre and post-trial, because post-trial s/he has had the opportunity to "defend himself in any proper way he wishes." The implication is that a defendant should make his/her disclosure requests pre-trial and should not subsequently be entitled to re-investigate because they were convicted. This feeds into the systemic aim of ensuring "finality" of convictions. However, the notion of an effective pre-trial defence investigation is a myth. Brants and Field criticise the view that credible defence narratives should be presented at first instance as based upon a "culturally informed but false institutional assumptions about the way the investigative process works: that advance prosecution disclosure, supported by independent active investigation by the defence, routinely provides the basis for strong defence narrative building and thus something like equality of arms" (Brants and Field 2016, p.276). The rationale behind the adversarial contest model in England and Wales is that two competing parties present the best aspects of their case before a neutral factfinder who decides which party has presented the most convincing case. However, it works very differently in practice; the police do the

investigation, the prosecution decide whether to charge, and the defence do very little of their own investigation. Rather, the defence rely on the prosecution to disclose information from the police investigation so they can utilise this to identify holes or weaknesses within the prosecution case to exploit. As Redmayne notes, “the defence's role is essentially reactive: to respond to the case made by the prosecution” (Redmayne 2003, p.442). There is no scope within the current system to allow for an active defence investigation. First, there is a dearth of resources, as defence practitioners are not paid to examine unused material; and second, much case preparation is completed last minute, which is symptomatic of an increasingly chaotic and underfunded system (see for example The Secret Barrister 2018, Boycott 2017, and Gibb 2017). Thus, there is little time allowance or financial incentive for the defence to do anything other than respond to the prosecution case.

Placing the burden of a high standard of proof upon the prosecution along with the presumption of innocence for the defence is intended to counterbalance this obvious inequality of arms. However, there is an argument that this works against the defence both at trial and in pre-trial investigation (Naughton 2011). First, to what extent might this inequality of arms permeate the root of the investigation? Before asking whether the police disclose helpful information to the defence, we must address the more complex problem of whether the police *will identify the information that might help the defence in the first place*. Paragraph 3.5 of the Code of Practice on Disclosure states that an “investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.” However, there have been some examples of shocking failings within the police to identify readily accessible evidence that could have exonerated the accused. The case of Hallam¹⁷ is particularly memorable in this regard, and Dennis (2018) points to a more recent case of Kay.¹⁸ Brants and Field (2016, p.247) have questioned the adequacy of this in ensuring impartial police investigations. They point to empirical research by Brookman and Innes who concluded that the adversarial tradition “permeates and foreshadows all aspects of detective decision-making in murder cases” and at the forefront of police strategy is “‘shutting down’ avenues of defence attack” and “pre-empting and negating possible defences” (Brookman and Innes 2013, p.297). Additionally, resource limitations inevitably restrict the scope of police investigations. Dennis comments that “it may not be unduly cynical” to question whether much energy or resource will be put into pursuing potential defence points when the police think they have a strong prima facie case (Dennis 2018, p.839). Once the police have reasonable grounds to suspect certain individuals then costly scientific testing might concentrate only on eliminating or implicating these suspects.¹⁹ This might seem a pragmatic approach, especially where the defendant has no explanation for how they might be forensically implicated (i.e. why their DNA might be present or a fingerprint), but that is not always the case. Sometimes the defendant can explain why they

¹⁷ Hallam [2012] EWCA Crim 1158. Hallam was convicted of the murder of a youth in October 2005. He was acquitted in 2012 after a picture was found on his mobile telephone that proved he was elsewhere at the material time of the offence.

¹⁸ Kay [2017] EWCA Crim 2214. Kay was convicted of rape against one complainant in September 2013. However, his conviction was quashed on appeal in December 2017 after records were found on his computer that undermined the complainant’s account and supported his account of consensual sex. In this instance, the prosecution had not followed up on Kay’s requests for his computer to be examined.

¹⁹ This is something that has been experienced in criminal appeal casework.

might be forensically linked to certain items/places; arguably, limiting testing in this instance could be potentially dangerous in failing to identify other possible lines of enquiry. Furthermore, as Nunn currently stands, a defendant will likely struggle post-conviction to obtain disclosure of trial exhibits to conduct further testing unless they can clearly show how that might impact upon the safety of their conviction. However, the chance of identifying forensic links to other individuals is unlikely to satisfy the Nunn test, unless this could simultaneously cast significant doubt on the defendant's involvement. Thus, although there is no satisfactory substitute for an effective investigation in the first place, a broader approach to post-conviction disclosure would ensure a defendant could properly investigate potentially missed lines of enquiry.

Additionally, the defence culture of concentrating primarily on undermining the prosecution narrative means that, inevitably, the case presented for the defence can be comparatively thin to that presented by the prosecution. Naughton criticised the defence strategy of "attempting to counter prosecution evidence at trial with little more than unsupported counter arguments that the evidence presented is not beyond a reasonable doubt" as leaving the innocent vulnerable to wrongful conviction (Naughton 2011, p.47). Furthermore, in order to prevent any possible prejudice to the defendant, defence counsel might tactically avoid certain lines of enquiry or avoid calling defence witnesses.²⁰ These kinds of problems have been long documented (see for example McBarnet 1981, Heaton-Armstrong et al 1999, Stone 1988, Sanders and Young 2007). One must question whether legal warnings about the standard and burden of proof are enough to prevent the jury from being won over by a more substantial prosecution case. This culture is also frustrating for defendants who see the trial as their chance to put forward their case; it can be difficult for them to understand why they cannot use this evidence post-conviction, even though it was not adduced at trial.²¹ Thus, the Supreme Court's conclusion that a defendant has had the chance to investigate and present a full case at trial ignores the practical working realities of the criminal justice system; and the Nunn decision prevents a defendant from exploring those potentially relevant lines of enquiry post-conviction.

If we cannot be sure that the prosecution has disclosed all relevant material, and we cannot be sure that the defence has properly identified and investigated all potentially relevant material, then the justification for the Nunn decision is substantially weakened. Brants and Field conclude that if, in practice, the defence "lack the capacity or will either to conduct active independent pre-trial investigations or to make sense of the 'unused materials' disclosed by the prosecution," then the "cultural assumptions of the system become points of weakness" (2016, p.276). Thus, following Mr Southey's submission on behalf of Nunn, as it cannot be assumed the defence team at trial have conducted a full investigation, "*there is a need to permit further investigations after conviction*" (emphasis added) (Nunn v Chief Constable of Suffolk [2015] A.C. 225 p.230). This calls for a reconsideration of the Nunn decision to permit a more flexible disclosure process post-conviction. Clearly, adjusting the post-trial system to compensate for

²⁰ In some case examples on the CLSIP, defence witnesses are not called despite the fact a number of witnesses are prepared to give evidence on behalf of the defendant. Although there are clearly important tactical decisions at stake here, it is debatable whether not calling witnesses at all might be more damaging to the defence in cases based on bad character evidence or in cases involving uncorroborated allegations of sexual offences.

²¹ This view is regularly represented to the CLSIP in casework.

flaws in the pre-trial system is unsatisfactory. Ideally, we would try to ensure that everything was done correctly the first time; but until this is possible, there is a clear argument that effective post-conviction disclosure is “better late than never.”

2.3 The CCRC is an effective safety net for disputed disclosure requests

The first point for discussion is the Supreme Court’s conclusion that the CCRC acts as an ‘effective safety-net’ for disputed disclosure requests. This relates to cases where the applicant or the applicant’s representatives have been refused disclosure of requested items of evidence from the relevant police force. The Supreme Court suggest that, in such instances, the appellant can apply to the CCRC and request them to exercise s.17 to compel the evidence in question. However, the CCRC have an extremely high caseload²² and are generally considered as overburdened.²³ Thus, not only will the applicant face a potentially long wait; if they are to stand any chance of success, they must first construct a convincing case that the use of s.17 is warranted. In response to the Nunn judgment, McCartney and Speechless (sic) expressed their concerns that the CCRC has “demonstrated a clear reluctance to seek further testing of materials (to save time and money and prevent ‘fishing expeditions’) and will ordinarily only seek disclosure of unused material when it may serve to demonstrate an applicant’s innocence” (2015, p.125). Consequently, the authors suggested that appellants could be left in a “catch-22” situation, whereby in order to make a convincing case to the CCRC that testing will support their claim of innocence, they essentially need access to the materials in the first place (McCartney and Speechless (sic) 2015, p.125). Therefore, the Supreme Court decision somewhat overlooks the difficulties faced by applicants in presenting a meritorious case to the CCRC.

Furthermore, there is a further ‘catch-22’ here because an appellant can only apply to the CCRC once they have exhausted their appeal options (unless they have exceptional circumstances).²⁴ In order to apply for leave to appeal in the first place a convicted defendant needs a willing legal representative and appropriate grounds.²⁵ Unless there is a legal or procedural error, this will require finding fresh evidence, which in turn might often require disclosure. Therefore, once a defendant is advised post-trial that there are no grounds of appeal, they risk becoming relegated to a post-conviction limbo; there is no access to post-conviction disclosure, therefore no fresh evidence to launch a first appeal, which means no access to the CCRC (unless they can persuade them of exceptional circumstances).²⁶ It must be said that the CCRC will

²² The number of applications per year to the CCRC has been consistently high over the last few years (1439 applications in 2017-2018; 1,397 applications in 2016-2017; 1480 applications in 2015-2016).

²³ The Justice Select Committee Report 2015 recorded on p.17 that “Most written evidence submitted to us supported the notion that the CCRC is an under-funded and under-resourced organisation, facing a sharp increase in its workload.” <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/850.pdf>

²⁴ See the CCRC’s ‘Casework Policy’ on Exceptional Circumstances <https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1/uploads/2018/11/EXCEPTIONAL-CIRCUMSTANCES-1.pdf> (accessed 30/01/19)

²⁵ Although this might be resolved by putting in an application for appeal in on weak grounds – this still depends on an applicant having a willing legal representative. The applicant is unlikely to get legal assistance to lodge this appeal, and where an application is deemed weak, it might result in an increase in sentence.

²⁶ The need to obtain disclosure of materials is something that the CCRC will consider as having potential relevance to an exceptional circumstances application, but it is by no means enough. They are clear that this will

sometimes accept ‘no-appeal’ cases where there is a need for disclosure.²⁷ However, the CCRC specify that it will be “relatively unusual” for them to review or to refer any “no appeal” case; and “the fact that the use of the CCRC’s powers under section 17 or 18A has produced (or might produce) fresh evidence amounting to a real possibility is not necessarily an exceptional circumstance. Context will be an important consideration.”²⁸ Therefore, an applicant seeking to apply to the CCRC under the exceptional circumstances policy will need to make an even more convincing case than a regular applicant does if they are to succeed in persuading the commission to use s.17. Thus, wrongly convicted individuals that are relying on the disclosure of materials to explore potential fresh evidence can become trapped in a perpetuating cycle. This also potentially raises the question whether we can really justify the current limited access to post-conviction disclosure on a resource basis, or if it really just transfers the problem to the already over-stretched CCRC.

As a final point, it is worth noting that even if the CCRC might provide some form of ‘safety net’ for disputed disclosure requests, there is no guarantee that the commission will help identify instances of *non-disclosure* of evidence. There has been much criticism levelled at the CCRC for operating simply as a ‘review-body,’ rather than as an active, investigatory body (see for example Naughton and Tan 2010, Naughton 2010). Written evidence to the Justice Select Committee suggested a perception that the CCRC was “failing to carry out investigations properly and proactively, and that as a result of these weaknesses some miscarriages of justice were going uncorrected,” (House of Commons Justice Committee (2015) *Criminal Cases Review Commission*, Twelfth Report of Session, 2014 – 2015, p.6) although others disputed this (Justice Committee 2015, p.23). Nevertheless, there is a justifiable concern that the CCRC are potentially unlikely to identify instances of non-disclosure unless there is some clear evidence to suggest it. Elks (2008), writing as an ex-CCRC commissioner, expressed concern that the CPIA 1996 made it difficult for defence practitioners to determine when material has been withheld and therefore they can often only speculate on this point (p.307). He expressed concern that this makes difficult for appellants to draft a convincing CCRC application because an applicant cannot make non-disclosure a principal ground “*where he or she has no evidence of it*” (Elks 2008, p.307). Without any evidence of non-disclosure to point to for the CCRC, they are potentially unlikely to discover it. Elks stressed back in 2008 that the CCRC cannot “routinely comb” through the unused material to check for breaches of disclosure obligations because, if the commission were to review prosecution material in every case, “its output would grind to a virtual halt” (Elks 2008, p.307). Clearly, it is reasonable to assume that this would be even more unworkable now in 2018 (than when Elks was writing in 2008) because the

be context and fact specific (see paragraph 12, <https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1/uploads/2017/07/FM-Exceptional-Circumstances.pdf>).

²⁷ The annual report of 2016-2017 suggests the CCRC reviewed 99 ‘no appeal’ cases under potential exceptional circumstances (they received 536 ‘no appeal’ case applications and 1,397 applications in total); in 2017-2018 they reviewed 82 cases (they received 532 ‘no appeal’ case applications and 1439 applications in total). However, there is no indication in the annual reports if these ‘no-appeal’ cases were accepted because of issues surrounding disclosure, or whether the commission used their s.17 powers in any of the cases.

²⁸ The CCRC’s ‘Casework Policy’ on Exceptional Circumstances <https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1/uploads/2018/11/EXCEPTIONAL-CIRCUMSTANCES-1.pdf>

CCRC now receives substantially more applications.²⁹ Thus, it is doubtful that the CCRC should be seen to provide an effective safety net for individuals wrongly convicted based on *non-disclosure*.

Therefore, this section has sought to argue that there are flaws in the Supreme Court's reasoning that the CCRC is an effective safety net for post-conviction disclosure. The points raised here are not necessarily put forward as criticisms of the CCRC itself, but instead aim to illustrate the practical limitations of treating the CCRC as a 'disclosure safeguard'. Many of these points were raised in similar terms in submissions made by JUSTICE, Innocence Network UK (INUK) and the Criminal Appeal Lawyers Association (CALA) as an 'Intervener's Case' at the Supreme Court hearing of Nunn.³⁰ Thus, we echo the concerns raised in this submission and suggest they were wrongly disregarded.

3. Criminal justice in crisis: the need for university criminal appeal projects

The above section argued that the Supreme Court judgment in Nunn ought to be reconsidered to grant a broader right to post-conviction disclosure. This section will demonstrate the importance of this in the context of a wider crisis in criminal justice. Mark George (2018) suggests the current climate creates a 'perfect storm' for miscarriages of justice. The prolonged erosion of due process protections coupled with a political climate focused on austerity means that, not only are wrongful convictions likely increasing, but also available legal assistance for criminal appeals is decreasing. Convicted defendants seeking to appeal are increasingly left to rely on help from non-profit organisations, such as student-based, university projects that work on criminal appeals. This section will discuss the problematic position of such projects and outline the changes required if university initiatives (and other similar organisations) are to be of assistance to the unrepresented in challenging their conviction.

3.1 The Perfect Storm: diminishing due process protections and the austerity factor

The developing crisis of justice in England and Wales has been escalating over the last quarter of a century. A full discussion of this is beyond the scope of this article; but this context is important to justifying our case for more transparency and accountability in the criminal justice system. The erosion of due process safeguards in England and Wales began with The Criminal Justice and Public Order Act 1994, which effectively abolished a defendant's right to silence (inferences could now be drawn about the failure to answer questions or give verbal evidence in court). Section 32 also abolished the need for corroboration warnings in cases of sexual

²⁹ In 2008/2009 the commission received 918 applications, whereas in 2017/2018 it received 1439 (see the Criminal Cases Review Commission Annual Reports of 2008/2009 accessed here https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/248166/0857.pdf and 2017/2018 accessed here <https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1/uploads/2018/07/CCRC-Annual-Report-2017-18-Web-Accessible.pdf>).

³⁰ Nunn v The Chief Constable of Suffolk Constabulary, Interveners' Case (JUSTICE, Criminal Appeal Lawyers Association & INUK) <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2014/12/Interveners-case-in-Nunn.pdf> (accessed 30/01/19).

accusations, beginning a trend that has left many defendants unable to mount any defence in the face of complainants' accusations that require no other evidence. In 1996, the CPIA placed the responsibility for disclosure decisions firmly in the hands of the police and prosecution and, for the first time in English and Welsh legal history, obliged the defence to disclose its case to the prosecution in a defence statement. In 1999, The Youth Justice and Criminal Evidence Act greatly limited a defendant's right to challenge the credibility of the accuser, whilst also enacting increasingly protective measures for alleged victims. However, The Criminal Justice Act 2003 represented the most profound erosion of defendant safeguards, promoting a one-dimensional victimology epitomised by the Labour Government's notion of "re-balancing the criminal justice system in favour of the victim" (Home Office 2006). The 2003 Act introduced greater use of hearsay evidence, previous "bad character" and yet more defence disclosure in order to achieve convictions more easily. In addition, the long-standing double jeopardy safeguard was abolished and new draconian sentencing provisions introduced. This process has continued with further legislation on terrorism and sexual offences establishing more overtly "crime control" measures at the expense of due process. Burnett claims that sexual offence convictions are proliferating in the current febrile atmosphere with many convictions resting purely on uncorroborated accusations in the context of a stated police philosophy of "believing the victim" (Burnett 2016, Ch1). Furthermore, in line with the "crime control" rhetoric, often fuelled by the media and government policy the always-conservative Court of Appeal (CACD) has become increasingly resistant to allowing appeals (Roberts 2017). This has also resulted in a similar approach from the CCRC, whose referral rate reached an all-time low of 0.77% of applications in 2016-17 being referred to appeal (this amounted to 12 cases out of around 1500).

In recent years, the decline in due process has been accompanied by the perceived economic requirement for austerity; this has led to widespread reductions in many public services, including the criminal justice system. Reductions to legal aid and changes to arrangements for case funding have greatly reduced the number of law firms undertaking criminal defence work (Boycott 2018).³¹ There have been further restrictions to the time and resources available for case preparation; this makes it difficult for the defence to fully examine the unused schedule, which can contain important information not automatically disclosed in the prosecution review. Additionally, case management in both trial and appeal courts encourages increased throughput (to match increased demand) and puts pressure on lawyers to streamline cases, sometimes at the expense of detailed and thorough scrutiny (documented in 'The Secret Barrister' 2018).

A consequence of the declining number of law firms undertaking criminal defence work is that there are fewer lawyers able and willing to pursue the long-established tradition of pro bono work on miscarriage of justice cases in the UK. It is very difficult for a convicted defendant to obtain professional legal help unless there are very clear grounds of appeal (however weak or unfounded the prosecution case may be). The reduction in due process combined with the

³¹ Since 2007 a series of Criminal Defence Service Funding Orders (amendments made under The Access to Justice Act 1999) have impacted on the Litigators Graduated Fee Scheme (LGFS) resulting in lower rates of legal aid. Furthermore the Legal Aid, Sentencing and Punishment of Offender's Act 2012 introduced means testing for eligibility for funding in criminal cases.

impact of austerity inevitably increases the likelihood of miscarriages of justice, whilst reducing the potential to address these failings. Therefore, in recent years, the need for assistance at the post-conviction stage from university clinics or other similar organisations has only increased. The next section will discuss the role of university, student clinics in assisting individuals with their appeals against conviction. We will argue that such projects have an important role to play in challenging potential wrongful convictions, but their effectiveness needs to be enhanced by a clarification and recognition of their status.

3.2 The Problematic and Ambiguous Status of Student-based Projects in the UK

University involvement in miscarriage of justice work originated in the United States³² in the form of innocence projects (IPs).³³ Michael Naughton established the first UK IP at the University of Bristol in 2004,³⁴ where he also established the Innocence Network UK (INUK) in 2004.³⁵ INUK was intended to act as an umbrella membership organisation for IPs at universities across the UK. Between 2004 and 2014, it facilitated in the establishment of 36 IPs.³⁶ However, the movement was plagued by several problems and INUK folded in 2014, which led to the closure of several projects. For those that decided to continue, the majority changed their name from ‘innocence project’ to variations of ‘miscarriage of justice project’ or ‘criminal appeal project’ (Greenwood 2017). Therefore, this article will refer to such initiatives more generally as student-based, criminal appeal projects.

Victims of miscarriages of justice in England and Wales have long relied on campaigning and aligning their efforts with the media and charitable organisations. Prior to the Royal Commission on Criminal Justice and the establishment of the CCRC, television programmes such as ‘Rough Justice’ and ‘Trial and Error’ were responsible for overturning several high-profile miscarriages of justice; and charitable organisations such as Liberty and JUSTICE were at the forefront of campaigning on behalf of the wrongly convicted. However, there was a widespread closure of such organisations following the establishment of the CCRC due to a belief that this would be the solution to the problem (Naughton 2006, p.7). Naughton was concerned that the withdrawal of such efforts was “at the very least, premature” (2006, p.7).

³² The Innocence Project New York was the first to be established in 1992 by Barry Scheck and Peter Neufield (<https://www.innocenceproject.org/>) but the movement has spread across the United States (for information, see The Innocence Network <http://innocencenetwork.org/>).

³³ For more information about the role of innocence projects in the US see for example, J Stiglitz, J Brooks and T Shulman, ‘The Hurricane Meets the Paper Chase: Innocence Projects new emerging role in clinical legal education.’ (2001-2002) 38 California Western Law Review 413; K Findley, ‘The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education.’ (2006) 13 Clinical Law Review 231. D Medwed, ‘Actual Innocents: Considerations in Selecting Cases for a New Innocence Project.’ (2002-2003) 81 Nebraska Law Review 1097; S Krieger, ‘Why Our Justice System Convicts Innocent People and the Challenges Faced By Innocence Projects Trying to Exonerate Them.’ (2011) 14(3) New Criminal Law Review 333

³⁴ Michael Naughton is an academic at the University of Bristol.

³⁵ Prior to this there was some university involvement in criminal appeal work on small scale – notably Northumbria University ran a student advice clinic and helped to quash the conviction of Alex Allan in 2001.

³⁶ <http://www.innocencenetwork.org.uk/history> (accessed 22/05/16). For more information about the role of innocence projects in the UK see, S Roberts and L Weathered, ‘Assisting the factually innocent: the contradictions and compatibility of innocence projects and the Criminal Cases Review Commission.’ (2009) 29(1) Oxford Journal of Legal Studies 43; J Price and D Eady, ‘Innocence projects, the CCRC and the Court of Appeal: breaching the barriers?’ (2010) 9 Archbold Review 6

He saw IPs as necessary to revive assistance to individuals claiming to be wrongly convicted but who had thus far been let down by the legal process. Therefore, in recent years, student-based projects have provided an avenue where unsupported cases can receive attention. In the context of “legal aid austerity,” there are increasing numbers of convicted people claiming innocence and seeking help.³⁷ Many convicted defendants write directly to student projects but, in the experience of the CLSIP, law firms are increasingly seeing student-based projects as an option. This is either (in a few cases) to obtain additional help from students under their guidance, or more often, as a referral option for individuals they cannot help. Thus, whilst traditionally the CLSIP has been predominantly involved in cases at the CCRC stage, increasingly the project is receiving cases from individuals that have not attempted their first appeal because their lawyer has advised them there is no grounds.

The latest estimate of student-project numbers is around 22,³⁸ although some of these are small-scale and others are thought to be virtually inactive. Despite continuing reduction in numbers, the demand for such clinics to fill gaps in provision is only increasing. The diminishing number of student projects is unsurprising given the insurmountable hurdles that such projects face. Beyond the obvious limitations of funding restrictions, student inexperience and the blurring of educational, academic and quasi-practitioner roles, student projects also face structural barriers, which (in part) explain their lack of impact. For example, the CPS website states that case-related requests must be made through a law firm; the CCRC will sometimes require (in the case of repeated applications) for further communications or applications to be made through legal representatives; and some prisons will only grant legal visits to practising lawyers.³⁹ In this situation, both the client and the project are unclear about their rights and status. There is an argument that students (and other voluntary organisations) should not be involved in post-conviction appellate work because such bodies are essentially “unregulated,” which would not be countenanced in most professional spheres of work. However, given that the paucity in post-conviction assistance looks set to continue, the position and status of student-based projects needs urgent clarification; there needs to be an enhancement to their powers and mode of operation to facilitate their role in challenging wrongful convictions.

Disclosure is central to the problem that student-projects face. The Nunn judgment’s maintenance of “Catch 22” logic makes post-trial disclosure problematic for lawyers, but it leaves student-projects (and other ‘DIY’ organisations) virtually helpless when trying to identify fresh evidence for an appeal. Barriers to post-conviction disclosure were identified as one of the most significant challenges that university-based, student-projects face in conducting their investigations (Greenwood 2015). One of the most positive aspects of university-based projects is their potential to engage experts across numerous fields to assist with re-examining evidence on a free-of-charge basis. However, in the experience of CLSIP, such input from experts invariably depends upon access to documents or exhibits, which have either been lost,

³⁷ The CCRC currently receives around 1500 applications a years compared to around 900 in the early years of operation.

³⁸ A research report was recently circulated amongst the Clinical Legal Education Organisation by an intern at the University of Greenwich Innocence Project (Calum McCrae, February 2018).

³⁹ However, this (as with most aspects of UK prisons) is inconsistent between various institutions and at various times.

never disclosed, or never requested by the defence at the time of trial. This causes the exercise to stall (usually permanently) as requests for disclosure are met with procrastination, blank refusal or, more commonly with the CPS than the police, no response at all. This response may be due to an obstructive, bureaucratic, institutional mentality; a wish to avoid the extra work involved in making disclosure; or a desire to prevent the truth being exposed by disclosing material that might undermine the prosecution case. Several requests from the CLSIP have been met with the response that an item has been either lost or destroyed. Examples include: the Senior Investigating Officer's Policy file, guns and knives seized in investigations and even the trial Judge's Summing Up of the case.

More often than not, CLSIP's disclosure requests concern case papers that have been lost or never obtained. This is especially true when clients use numerous solicitors over the years and paperwork seems to get mislaid and unaccounted for. Whatever the post-trial disclosure request, the CPS and police can comfortably invoke the Nunn judgment. However, the CLSIP has been confronted with more innovative and ironic responses, such as those invoking the Human Rights Act, the Data Protection Act and the Freedom of Information Act. In the latter case, disclosure requests are treated as though made under the Freedom of Information Act 2000 (FOIA), even though they were not made in that context; the FOIA exemptions are then applied to deny the freedom of information. The argument is that if documents or exhibits were disclosed to the requesting party then (under the terms of the Act) these items would have to be made available to anyone requesting them; this presents several problems, including the potential to cause distress to the original victims of the crime. However, the flaw in this argument is the unilateral decision of authorities to treat disclosure requests as pertaining to "freedom of information": case documents are the right of the accused person to access, so that they can know the case against them and be able to mount a fair and justified defence. The inappropriate application of the FOIA 2000 creates a Kafkaesque situation where rights-based legislation is manipulated to deny fairness and ultimately freedom itself.

Whilst barriers to disclosure also affect law firms, university projects (and similar organisations) are more vulnerable to "closed justice" and less able to challenge it. This article makes the case for a move towards a more "open" system of justice in England and Wales. Not only would this combat several of the problems associated with the unusual and ill-defined position of student projects, greater transparency and disclosure obligations would be of broader benefit to legal practitioners, student projects, voluntary organisations and individuals. Furthermore, a more transparent justice system would better safeguard against malpractice, better protect the citizen from unaccountable institutional power, and would ensure that errors can be corrected more easily.

4. A move towards "open justice"?

Since 2017, the results of two major disclosure inquiries have been reported. First, the HMCPSI disclosure report was published in July 2017 (prior to the Allan case), which concluded that for any improvements to occur, "the whole concept of disclosure must be demystified" ((HMCPSI, 'Making it fair: a joint inspection of the disclosure of unused material in volume Crown Court cases', July 2017). Furthermore, that effort was required to ensure "improved training and

supervision” to emphasise the “crucial importance” of disclosure to the case management process (HMCPSI 2017, p.33). The Justice Select Committee inquiry set up in response to Allan reported in July 2018 (House of Commons Justice Committee 2018). Despite the view expressed by several stakeholders that “there is an irreconcilable conflict at the heart of CPIA 1996 disclosure procedures” (Attorney General’s Office 2018, p.10), the committee recommended no legislative changes and said the prosecution should retain the power to decide matters of disclosure. The committee’s recommendations emphasised the need for a “shift in culture” to ensure “all police officers recognise both that they are searching for the truth; and that they have core disclosure duties which are central to the criminal justice process and are not merely an administrative add-on” (Justice Select Committee Report 2018, para. 106). They commented that there was “more work to do to ensure that this mind-set is embedded across all police forces” and welcomed efforts of education and training (Justice Select Committee Report 2018, para.106). Therefore, there is no current plan for amendment to the current CPIA 1996 disclosure regime with the primary focus being on implementing better training.

Back in 2004, Redmayne concluded that the problems afflicting prosecution disclosure were “too deep-rooted to be cured by legislative tweaking,” noting, “they stem from the fact that the police are naturally reluctant to reveal information which may damage the prosecution case” and that “they know that undisclosed material will often not be discovered (Redmayne 2004, p.445). Similarly, Quirk concludes in 2006 that the disclosure process “cannot be made to work satisfactorily merely by legislative amendment” (Quirk 2006, p.57) and urges policymakers to recognise the “occupational cultures and practices of criminal justice practitioners” (p.59). Therefore, both agree that the problem runs deeper than the legislation and that there needs to be more emphasis on understanding the culture in criminal practice. Dennis has reflected on the recent recommended changes and notes the “striking” similarities in recommendations made by various post-CPIA disclosure reviews (2018, p.840). He questions “why these recommendations are still having to be made more than 20 years after the CPIA regime came into force” (Dennis 2018, p.840). Similarly to Quirk, Dennis argues that there has been a consistent “failure to probe the adversarial cultures of these organisations” (2018, p.840). Although some might argue that education and training is a step towards tackling this, Dennis argues that “the accumulated experience of two decades suggests that it is not enough simply to call for police and prosecutors to do their existing jobs better without addressing these broader and deeper issues” (2018, p.840). Therefore, concluding, we should “examine other more radical possibilities” (2018, p.840). He calls for “more far-reaching thought” about both the arrangements for dealing with prosecution disclosure and the institutional arrangements for investigation and prosecution (Dennis 2018, p.840). Smith has also argued that if we accept that the adversarial role of the police will inevitably continue to undermine a workable police-managed disclosure scheme then any training efforts will simply be “a plaster on a leaking dam” (Smith 2018a, p.157) and thus also calls for more “radical reform” (Smith 2018b, p.729).

Effective disclosure is essential to facilitating the central aims of the criminal process. This includes ensuring a fair trial, protection of a defendant’s rights and the promotion of truth finding and accuracy of outcomes. Alongside this, disclosure also ensures transparency and legitimacy in the investigation process. Therefore, any decision to withhold information has the potential to undermine each of these important objectives and should be subjected to

rigorous scrutiny. Furthermore, any proposed reforms to the current disclosure regime must go towards promoting better protection of these systemic values. On this basis, we suggest that consideration is given to the Open Justice Charter (Justice Gap 2017, p.68-71) which outlines the key areas where our system could *and should* be more open to ensure justice and fairness. This has been developed by the Centre for Criminal Appeals (CCA)⁴⁰ in consultation with CLSIP and other interested parties. A number of those working with the CCA have experience of post-conviction work in the US and, whilst acknowledging the very serious flaws in the US system, they still find the disclosure rules and lack of transparency in England and Wales seriously inadequate in comparison to the provisions in the US.

In brief, the Open Justice Charter makes the following proposals:

Access to recordings of trial proceedings: When a defendant is convicted in the USA, a full transcript of their trial is made available, which has been the case for the last 30-40 years. Many appeal lawyers in the USA find the concept of undertaking an appeal without access to the full trial transcript “absurd” (Walker 2017, p.57-58). In England and Wales, not only are trial transcripts expensive (a full trial transcript can cost thousands of pounds), but their destruction after either 5 or 7 years has become the normal practice⁴¹. CLSIP has come across many cases where, without legal aid, clients cannot afford to obtain even the Judge’s Summing Up.⁴² In the digital age, creating a similar right to trial transcripts in England and Wales should not be problematic or an unreasonable expense. The Open Justice Charter asserts that defendants should be entitled to court transcripts free of charge and that premature destruction should cease.

Access to Police Documentation: The charter proposes that, both pre and post-trial, the defence should have access to an electronic copy of the HOLMES computer record (this is used in major crimes to record all the materials associated with the investigation). Currently this information is not routinely disclosed and may be resisted on the grounds that much of the material pertains to the investigation rather than the evidence. While there may need to be safeguards (so as not to reveal police methods or to protect certain individuals) much of the investigation is crucial to forming an understanding of how evidence came about, its validity and any alternative avenues of investigation that may otherwise be obscured to the defence. Furthermore, with the full HOLMES disc available to the defence there should (and could in the digital age) be full disclosure without the current conflict of interest requiring the prosecution to disclose material that undermines its own case. This proposal could be criticised on the same grounds as the “keys to the warehouse” approach for simply transferring the problem to the underfunded defence (Gross LJ, *Review of Disclosure in Criminal Proceedings*, September 2011, p.73). However, providing such access does not necessarily equate to the conclusion that the defence should be solely responsible for identifying the material, it just enables them to explore it; we will suggest below that this move ought to be accompanied by

⁴⁰ The Centre Criminal Appeals (CCA) is a law firm with charitable status. The organisation engages with some university projects to assist the review of cases taken on by the CCA. The CCA is also active in addressing the need for change in the criminal justice system in England and Wales.

⁴¹ Under HMCTS’s current Crown Court ‘Record Retention and Disposition schedule’, digital audio recordings of Crown Court trials are deleted after just 7 years and audio tape recordings after just 5 years.

⁴² In one case worked on by CLSIP, the Judge’s Summing Up had been destroyed, leaving no record of the trial.

the establishment of an independent disclosure agency. The Charter also asserts that the loss or destruction of documents or exhibits that might affect the safety of the conviction should be grounds for appeal in itself; this is in contrast to the current system where such claims simply nullify the line of enquiry without any accountability or consequence.

Access to Physical Evidence for Scientific Testing: The Charter supports the controlled access to exhibits pre- and post-trial by scientists who maintain direct custody of the exhibits. Importantly, and presumably in response to the Nunn restrictions, the Charter states:

“The individual seeking to examine the evidence is not obliged to predict what the examination will show to gain access to the evidence.”

Access to Journalists for Prisoners: The legal right of prisoners to have access to journalists when claiming wrongful conviction has been established in common law since 1999 (O’Brien and Simms [1999] 3 All ER 100 HL). However, the current regulation (Ministry of Justice PSI 37/2010 (Section 1.2)) requires Governor’s approval for telephone contact with journalists in liaison with the Press Officer; and in the case of visits from journalists, the view of the Governor has to be approved centrally on behalf of the Secretary of State and the Press Officer, who will consult Ministers if that is considered necessary. This is a far cry from the freedom implied in the O’Brien and Simms judgment and leaves access to journalist subject to decisions of individual Governors, civil servants and ultimately Ministers. The Charter proposes free access for journalists provided they have the consent of the prisoner or his/her representatives, a two-month time limit from the initial request to the visit taking place and independent arbitration if visits are denied for security reasons.

Improve Access to Materials Obtained or Produced by the CCRC: Currently Section 23 of the Criminal Appeal Act 1995 prohibits any disclosure by the CCRC. Although there are some exemptions to this in Section 24, the Disclosure by the CCRC Casework Policy (para 14) states that “The intention behind Section 24 (1) (a) is that the disclosure is authorised for the purposes of existing criminal, disciplinary, or civil proceeding and not for the purpose of bringing such proceedings into existence”⁴³ (Emphasis in the original). The Open Justice Charter would require a review of Section 23 and 24 of the Act to enable those seeking to establish grounds of appeal to have greater access to potentially important materials.

All of these measures would make significant improvements to facilitating a more transparent system of justice in England and Wales and would help address the disclosure problems both pre- and post-trial. Furthermore, because most of the rights proposed would be granted to the individual convicted person, they could then voluntarily pass this on to any agency assisting them, which would increase the effectiveness of student-based projects and help to clarify their status (as with other similarly ill-defined groups or organisations). Most of the measures proposed in the Charter, while not cost-free, could be a cost-effective approach to disclosure, especially if they could speed up the process of review, increase efficiency and most importantly correct the wasteful and unjust continuation of wrongful conviction. While electronic copies may be less so, scientific testing can be very expensive, but giving access to

⁴³ <https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1l/uploads/2019/01/FM-DISCLOSURE-BY-THE-COMMISSION.pdf>

exhibits at least enables defendants or their supporting organisations to seek pro bono help from experts, or to raise funds for testing. None of this is possible without access to exhibits.

The CCA and associates suggested the establishment of an independent disclosure agency in their submission to Justice Select Committee's review of disclosure in 2018. Removing disclosure from the police and prosecution would not only free up a great deal of their time but would provide a significant safeguard against malpractice, error and misinterpretation. There would no longer be a fundamental conflict of interest where the prosecution is theoretically obliged to undermine its own case or resist attempts to correct wrongful convictions. The suggestions for cultural change made by the Justice Select Committee are unlikely to have significant long-term effect as long as this conflict of interests is maintained. Implementation of the Open Justice Charter could be the starting point for an independent disclosure agency, which would take on responsibility for pre-trial (perhaps limited to an inspection and arbitration role) and fully in relation to post-trial disclosure. Most importantly, the Agency would be charged with ensuring the principle of transparent justice.⁴⁴ However, herein lies a problem; there seems to be an inevitable process by which new agencies become drawn back to traditional and ineffective approaches that do not reflect the original good intentions (the CCRC's conservative approach to its remit and low referral rate for example reflect this tendency) (see for example Naughton 2009). Therefore, whilst there will be complexities surrounding how the disclosure agency should work in practice, the most significant consideration will be how to embed the fundamental principles of openness without these being compromised by bureaucratic tendencies and scarce resources. Such an agency, we suggest, should be founded on a clear and binding protocol based on human rights and open justice.

The Charter was established as a campaigning tool aimed at identifying the need for an overhaul of the criminal justice system to create transparency. The newly formed All Party Parliamentary Group has indicated that there are twenty-plus MPs already recognising the need for change in this and other aspects of the criminal justice system. Legislation would be required and the perhaps the principles of open justice as expressed through the Charter might be the first foundation on which to build a fairer more transparent system. The costs and complexities would be counterbalanced by the empowerment of wrongly convicted individuals and the agencies that work for them (be that professional law firms or student based/DIY projects); this would ensure a greater chance of preventing and correcting miscarriages of justice. Establishing these principles and accordant practice would move the criminal justice system from a broken, closed and outmoded model, to one based on openness, human rights and the prevention of wrongful conviction.

Conclusion

This article has sought to re-focus the current spotlight on flaws within the pre-trial disclosure process to urge a re-examination of the systemic position on post-conviction disclosure. We

⁴⁴ For detail on how these proposals might work in practice see [Centre for Criminal Appeals and Cardiff Law School Innocence Project - written evidence to Justice Select Committee](https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2017/disclosure-criminal-cases-17-19/publications/) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2017/disclosure-criminal-cases-17-19/publications/>

have argued that in our broken criminal justice system, which increasingly stacks the odds against the accused, there is an argument for “better late than never” when it comes to facilitating post-trial investigations through more flexible post-conviction disclosure rules. In support of this point, we have argued for the Supreme Court decision in *Nunn v Suffolk Constabulary* to be revisited on the grounds of its fallacious reasoning, which perpetuates the illusion that our pre-trial criminal justice process is based on equality of arms between the prosecution and defence; this position cannot be sustained. Consequently, this article has sought to make a case for a more transparent and open approach to criminal justice in England and Wales at both pre-conviction and post-conviction stage. A more ‘open’ justice process could be important for sustaining the operation of student-based, university criminal appeal projects; rightly or wrongly, such projects are becoming increasingly relied upon for post-conviction help in our resource-starved system, yet continue to face countless barriers in carrying out post-conviction investigations. Therefore, we have sought to direct attention to the Open Justice Charter and other proposals around post-conviction disclosure. We would argue that, aside from better protecting those individuals who might be wrongly convicted, a more transparent approach to criminal justice would help to facilitate fairness, truth-finding, and would promote public confidence in the system by ensuring the legitimacy of the process.

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