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THIRD TIME'S THE CHARM: THIRD PARTIES'S POTENTIAL ROLES IN CRIMINAL PROCEDURE

SUMMARY: 1. Introduction – 2. *Hollington v Hewthorn* – 3. What is a party? – 4. What comparative lessons might there be? – 5. Conclusion.

1. *Introduction*

This article sketches uses for "third party" terminology and function within the criminal justice system, drawing particularly on common law examples. It briefly considers what the term means, as a first step to considering what criminal procedural gaps third parties might be perceived to be filling, and how. It begins by considering just one example of what being a "third party" might mean, drawn from an English case on whether a conviction can be admissible in later civil proceedings, to prove the facts upon which the conviction must have been founded. It turns then to consider what a party is, and why we might use the concept of "party". It then draws out a few comparative lessons, and concludes. The paper is written from the perspective of a substantive criminal and civil lawyer, rather than a specialist in criminal procedure.

2. *An example of what a "third" is in the common law: Hollington v Hewthorn*

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What does it mean to be a "third" party? One example from English legal history might show how complex this issue can be, and what it might reveal about legal reasoning.

Hollington v. *Hewthorn* was a civil action for negligent driving against X and X's employer, Hewthorn brought by Hewthorn, from the 1940s[1]. X had allegedly hit the car driven by Hollington Jr and caused damage. By the time a civil action was brought, Hollington Jr had died for unrelated reasons so his father brought the action as executor and in his own right. There were only three pieces of evidence in Hollington's favour: the position of the cars on the road after the incident; the statement Hollington Jr made to the police after being told his words might affect a prosecution; and the conviction of Poll in the magistrates' court for careless driving, a conduct offence, in relation to his driving at the time of the accident[2]. Hilbery J found the second and third to be inadmissible, but that the position of the cars was sufficient evidence of negligence so he found Hewthorn liable and awarded damages[3]. Hewthorn appealed to the Court of Appeal.

In the Court of Appeal, counsels' argument is revealing. Of course, one argument was whether there was sufficient evidence of negligence from the position of the cars, but clearly, admitting the conviction as evidence would have helped. Counsel for Hollington argued that from the eighteenth century, a conviction was admissible so long as it was not founded on the evidence of an interested party[4]; and from the twentieth century there was generally admissibility. In reply, counsel for Hewthorn argued that the first instance decision's reasoning was correct and Hollington's argument was a "revolutionary" approach, and that it did not acknowledge that criminal liability differed from civil liability. Finally, Hewthorn's counsel argued that in any case the magistrate's conviction would be hearsay, a form of evidence restricted in English courts, where a person essentially claims to repeats what another person said out of court[5].

Goddard LJ, giving the judgment of the Court,[6] allowed the appeal. First, he stressed the modern focus on "relevant" evidence, but did not say why a conviction was not "relevant". Second, the

[1] For more detail, see M. DYSON, *Explaining Tort and Crime* (*CUP)*, Cambridge, 2022, p. 299 ss.
[2] Road Traffic Act 1930, section 12.
[3] *Hollington* v. *F Hewthorn & Co* [1943] KB 27, though the report is quite sparse.
[4] See C. A. WRIGHT, *Evidence - Admissibility of Criminal Convictions in Civil Actions – Hearsay*, 1943, 21 Canadian Bar Review 643, 655.
[5] *Hollington* v. *Hewthorn* [1943] 1 KB 587, 588–92.
[6] See the reports, [1943] 2 All ER 35, 112 LJKB 463, 87 Sol Jo 247, 169 LT 21, 59 TLR 321 listing the other two members of the court as Lord Greene MR, and du Parcq LJJ.

conviction would only be the opinion of the court on facts, not evidence of those facts themselves.[7] He argued that to link up the civil case with the conviction the civil court would effectively have to start from scratch anyway. This idea was the newest[8] and least supported: much "opinion" was already admitted as evidence, from orders in lunacy[9] to official reports,[10] as was well known. It also ignored the duties on the court to consider the evidence, the burden of proof on the prosecution and the procedural advantages of the defence[11]. Above all, this is also hard to square with how *res judicata* in civil cases would work, which it clearly did in its common law forms[12]. Third, Goddard LJ seemed to accept the description of the conviction by Hilbery J as *res inter alios acta*, that is, a legal thing that was done between other parties than the ones in the present action, and therefore not admissible. Goddard LJ added only that "it is difficult for a layman to understand why" this was the case[13]. Fourth, he reasoned that since the prior conviction cannot be conclusive, it could also not be evidence because it would be impossible to know how much weight to put on it[14]. He did not mention that it is inherent in the job of juries and judges to weigh evidence. He even suggested that if a conviction is admissible, so too should an acquittal be admitted, a very novel claim[15]. Acquittals have only ever been admissible in actions of malicious prosecution,[16] and,

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[7] *Hollington* v. *Hewthorn* [1943] 1 KB 587, 594-6.

[8] Z. COWEN-P.B. CARTER, *Some Observations on the Opinion Rule'* in idem, *Essays on the Law of Evidence*, 1956, p. 169: «revolutionary extension». Cf. the rare mention of the idea in *Fontaine Moreau* (1848) 11 QB 1028, 1035.

[9] E.g. *Faulder* v. *Silk* [1811] 3 Camp 126; 170 ER 1328, 1328. See also *Harvey* v. *Regem* [1901] AC 601, 611 (Lord Lindley) whose reasoning could equally well apply to prior convictions.

[10] See e.g. J.P. TAYLOR, *A Treatise on the Law of Evidence,* vol. 2, London, 1848, p. 1270.

[11] M. DEAN, *Law Reform Committee: Fifteenth Report on the Rule in* Hollington v. Hewthorn, 1968, 31 Modern Law Law review (MLR) 58, 59f. See also Lord Pearson, *Law Reform Committee Fifteenth Report: The Rule in Hollington* v. *Hewthorn* London, 1967), [4] and G. PALMER, *The Admissibility of Judgments in Subsequent Proceedings* (1968) 3 NZULR 142, 154f.

[12] Anon, 'Evidence: Judgments and Pleas in Prior Criminal Prosecutions as Evidence in Civil Actions' (1962) Duke Law Journal 97, 99. Cf *Hui Chi-Ming* v. *The Queen* [1992] 1 AC 34, 492f.

[13] *Hollington* v. *Hewthorn* [1943] 1 KB 587, 596. Described as a «masterpiece of under-statement», in *Wright, 'Admissibility of Criminal Convictions*, 660.

[14] *Hollington* v. *Hewthorn* [1943] 1 KB 587, 596.

[15] *Hollington* v. *Hewthorn* [1943] 1 KB 587, 601; for novelty, see e.g. F. BULLER, *Introduction to the Law of Trials at* Nisi Prius, London:, 1767, p. 245; Starkie, *Law of Evidence,* vol. 1, p. 221; Coutts, 'Criminal Judgment', p. 240 and Johnson (1965) 18 CLP 81, 89f.

[16] R. Cross, *Evidence* (London: Butterworth, 1958), p. 346; Pearson, *Hollington* v. *Hewthorn,* [15] cf [30]. There may also be some possibility to prove underlying facts despite the acquittal, see *R* v. *Z* [2000] 2 AC 483, 487, 488, 504f, 508, 510.

as later pointed out, an acquittal has, «as everyone realises, no probative value at all since it is perfectly consistent with the criminal court's having been of the opinion that the accused was probably guilty»[17]. Finally, Goddard LJ rejected the use of *omnia praesumuntur rite esse acta* for not being certain when it would apply and it could not always apply[18]. The presumption would normally apply to set the stage for any litigation by assuming that the correct process was followed to come to a formal conclusion. Finally, Goddard LJ went on to hold that there was no exception for the admissibility of Hollington Jr's statement to the police[19]. As a consequence, no new evidence was admissible before the Court of Appeal and it held that the position of the cars after the accident was insufficient evidence of negligence[20].

The case is probably interesting to non-common lawyers for a number of reasons. The result at common law is obviously surprising to modern audiences generally, at the very least, it seems quite inefficient. The civil claim would have to be proven from scratch even though the defendant was already convicted. There's one clue there already, in that the civil claim was not for exactly the same things as the criminal conviction. The conviction could not prove the substantive parts of a civil negligence claim, which it could in some other legal systems, particularly civilian ones such as Germany (under section 823(2) of the BGB).

But the method of argumentation is also interesting, which is why it is set out above in a little detail (but far less detail than in the cases and academic discussion which followed!). It will be noticed at once that the arguments of counsel seem to be directly linked to the outcome.[21] The argument against

In substance, the criminal conviction was treated as an act between third paries, the Crown (as prosecutor) and the defendant, not between the claimant and the same defendant. As an action that the claimant had not formally been involved in, neither risking nor benefitting, he was not to benefit from it. The principle of a *res inter alios acta* was applied. This is a paradigmatic concept of "third" party, predicated on a formal distinction of "party". For criminal law

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On this see C. Tapper (ed), *Evidence*, 11th edn Oxford University Press, 2007, p. 113-7.

[17] Lord Gardiner LC, House of Lords debates (HL Deb)/8 February 1968/vol. 288/col. 1347.

[18] *Hollington* v. *Hewthorn* [1943] 1 KB 587, 602, citing the note (1926) 42 LQR 144. The fuller form is sometimes given as *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium.*

[19] *Ibid*., 603.

[20] Another possible reason, surprisingly not mentioned here, was the idea that the evidence must have been cross-examined by counsel to be admissible: Wright, *Evidece - Admissibility of Criminal Convictions* cit., p. 644 esp note 5.

[21] Note, the law report only contains the outline of counsels' argument.

purposes the victim or his father were not parties to the criminal procedure, and would have been parties to the civil one. Instead, the criminal prosecution was an action by the Crown against at least one other, and therefore the parties were different. For the civil claim, the civil characteristics of the trial were paramount, such that the civil rules on why the parties needed to be the same, took precedence. It ties into the absence of civil law decision-making inside the criminal courts, and vice versa. Unlike most civilian legal systems, there is no "joined-in" action, a civil claim being handled inside the criminal courts. Most common law jurisdictions instead use an autonomous criminal order, which compensates in broadly parallel ways, but which can depart from civil law. It can even be awarded where there would be no civil liability, and for different amounts than civil law would award. Typically those sums would be lower, as where the criminal court is compensating, it takes into account the means of the defendant, so as not too easily to use the punitive force of the state for compensation. The civil party can then go to a civil court to seek the amount between the lower compensation order and the full loss, though of course unless something has changed, the defendant still will not have the means to pay.

The alternative to *res inter alios acta*, looking at the conviction as some kind of finding of fact, or requiring some integrity of the civil and criminal parts of the legal system, was not seriously considered. The closest to that was almost an administrative argument, about presuming acts of judges, amongst others, to be done properly unless there is evidence to the contrary. But this argument failed.

Given the flaws in the decision, both practical, and as a matter of argumentation, it is remarkable that later courts continued to follow *Hollington v. Hewthorn*. The case was at least arguably against the prevalent trend of increasing use of prior criminal findings in later civil cases. me commentators quested for a way to avoid reference to the case within the law as it stood[22] while others sought out evidence of the courts avoiding it.[23] Both were elusive. In Palmer's words: "The judgment… stands as a bastion by the judiciary against reform, at least in the important category of criminal judgments in subsequent civil cases."[24] Pressure against the decision did not lead to it being changed quickly. To do so in the courts, cases were needed with parties willing to try, and perhaps they were

[22] A. L. Goodhart (1967) 83 Law Quarterly Review (LQR) 167, p. 167 where Goodhart argued that the Court of Appeal should take up the new power of the House of Lords to depart from its own decisions and depart from *Hollington* v. *Hewthorn*. See also Cowen, 'The Admissibility of Criminal Convictions', cit., p. 191.
[23] Coutts, 'Criminal Judgment', 243 citing Lord Goddard CJ in *Carnill* v. *Rowlands* [1953] 1 All ER 486, 488.
[24] Palmer, 'Subsequent Proceedings', cit., p. 151, and on later cases see p. 159–64.

simply not being brought, or not being brought at a high enough level to challenge the rule, because it was prohibitively expensive to do so. A more general willingness to consider reform existed at the time of the great reforms of the 1960s, during which many aspects of civil and criminal law were amended by legislation.

Ultimately, change did come, but it was only 25 years later, when the interests of the criminal law appeared to be threatened that the legislator intervened. By this point, common law courts might have been less willing to intervene in an otherwise established rule. It was only a decision of the Court of Appeal, but no appeal had gone to the House of Lords.[25]

In the 1960s libel cases began to arise where a convicted criminal brought an action in defamation «against anyone rash enough to assert his guilt of the crime for which he had been convicted, [and] put his opponent to the proof of his guilt de novo»[26]. It seems to have taken a little while for the «different and perhaps alarming significance»[27] of *Hollington* v. *Hewthorn* to come out in cases[28]. Perhaps the most significant was *Goody* v. *Odhams Press*[29] in 1967. It showed that even one of the "Great Train Robbery" participants could use the libel implications of *Hollington* v. *Hewthorn* to throw doubt on his conviction in the public mind. In doing so, he This robbery, in 1963, was one of the most famous robberies in English criminal history, and one of the largest. Used bank notes were being taken by train in mailbags to Scotland to be decommissioned and destroyed was stolen by a gang, and a guard was seriously injured. The sum stolen was £2.5 million, which is equivalent to £46 million in 2025. Goody, one of those convicted of the theft brought a libel action against Odhams Press for its story alleging his criminality. The story was that he had seduced a local woman while planning the robbery; the defamatory imputation, at the least, being that he had indeed committee the robbery, not just that he had been convicted of doing so. This Odhams could not prove the facts from scratch so sought to amend its defence to plead the partial justification and mitigation. That is, they wished to prove only part of the defamatory imputation. Then, they also wished to argue that the defendant's reputation, though harmed, was already worth

[25] Technically the Court of Appeal could not overrule itself, though it could and did distinguish its earlier decicisions. Indeed, it was not until 1966 that the House of Lords (and since 2009, in the form of the Supreme Court) could overrule itself ([1966] 3 All ER 77), giving some sense of the formal restrictions on courts, let alone their non-formal ones.
[26] J. Campbell, 'The Civil Evidence Act 1969' [1969] Cambridge Law Journal (CLJ) 35, p.37.
[27] Andrews [1967] Criminal Law Review (Crim LR) 441, 442; the article is a good introduction to the post-*Hollington* v. *Hewthorn* cases.
[28] The first was probably *Hinds* v. *Sparks* [1964] Crim LR 717.
[29] [1967] 1 QB 333.

very little because everyone knew had been convicted for committing the crime, so any compensation should be minor. Ultimately, Goody won his claim, but he received only 40 shillings in damages, something like £40 in 2025 paying significantly more in costs[30].

The case shows that even a wealthy newspaper did not wish to try to prove Goody's role in the robbery from scratch despite it being in the same year as he had been convicted[31].

Such cases generated a great deal of public interest. Newspapers played a leading role in this[32], but the nature of a libel action was also key. It generated a particular kind of publicity. As noted, the onus was on the defendant to justify his statement, or perhaps seek to mitigate it, as in Goody. More than this, the forum was a jury trial, outwardly similar to that of the criminal trial where the plaintiff had been convicted. This would play more to public sentiment than a later proceeding without a jury[33].

Ironically, libel had not always been seen as an illegitimate way to challenge a prior criminal conviction. Indeed, before the creation of the Court of Criminal Appeal in 1907, this was the only way to clear a convict's name,[34] other than perhaps through the prerogative of mercy[35]. While it is hard to explain why there had been little effort to remove the rule in *Hollington* v. *Hewthorn* prior to the mid-1960s, it is clear that the libel cases catalysed reform[36]. Even the case itself had not originally forced change. Indeed, The Times only reported on it in the context of the libel cases twenty years later.[37] Nonetheless, a range of sources, from the minister in charge through to the relevant committee, and Parliamentarians, acknowledged that the libel cases had been the trigger for reform[38].

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[30] The Times, 22 June 1967. Interestingly, the most senior judge in the Court of Appeal was Lord Denning, who, as junior counsel, had argued for Hollington in *Hollington v Hewthorn* and lost.

[31] See R. N. Gooderson [1967] CLJ 36, esp. p. 38. There were some other similar cases, e.g., *Barclays Bank* v. *Cole* [1966] 3 All ER 948.

[32] E.g. in generating Parliamentary questions: The Times, 27 July 1967.

[33] There were other issues, e.g. cost, but there was a focus on the rehearing before peers: HL Deb/8 February 1968/vol. 288/col. 1356 (Lord Denning).

[34] K. R. Handley (ed.), *Spencer Bower, Turner and Handley's Doctrine of Res Judicata*, 3rd edn, London, 1996) [264]. It might also have been possible for the defendant to prosecute an accuser or witness for perjury, e.g. the infamous case of the Reverend Henry Hatch: The Times, 18 May 1860.

[35] See also the roots in *Helsham* v. *Blackwood* (1851) 20 LJ (CP) 187; 11 CB 111; 138 ER 412; *Leyman* v. *Latimer* (1877–78) 3 Law Reports, ExD 352; 47 LJQB 470.

[36] Other legal systems had no trouble in dealing with *Hollington* v. *Hewthorn* immediately, e.g. the South Australian Evidence Amendment Act 1945. On which see e.g. Z. Cowen (1953) 69 LQR 180, 180f.

[37] The first being: *The Times*, 21 June 1966.

[38] See, e.g., HL Deb/8 February 1968/vol. 288/col. 1346f, esp. 1347; HC Deb/24 April 1968/vol. 763/col. 444; Pearson, *Hollington* v. *Hewthorn,* cit. [1], [26], [27].

The result of the concern about convictions not being admissible was legislative action, in the Civil Evidence Act 1968. Part II of the Act admits convictions as evidence of the facts on which they must have been founded, for the purposes of later civil litigation (section 11)[39], and makes them binding for the purposes of defamation claims (s. 13). In fact, the Act goes even further for non-defamation actions, and makes convictions not just admissible, but proof of the offence unless the contrary is proved[40]. Picking up the reasoning above, the report which preceded the 1968 Act, written by a law reform committee, argued that convictions were more likely right than wrong and so they should be admitted as evidence[41]. The CEA has not led to many appeals, albeit after an initial period of uncertainty.

This example highlights not just how a legal system can use particular definitions of "third" party with quite significant effects, but also about how those definitions might change over time. As a matter of legal theory, the common law remains that prior convictions are not admissible in a later civil court, because the change to admit them was made by statute, depowering the common law, making it inapplicable while the statute exists. It seems likely that if the Civil Evidence Act 1968 was repealed, it would be replaced with another statute doing the same work. If not, I suspect judges would though it would take the Supreme Court to do it. Of course, it is easy to look back and queston the reasoning and values that led to *Hollington v Hewthorn*, and so assume it would not survive modern reasoning and values. For present purposes, it should be noted that the qualification of "party" did not change under the new 1968 Act. On the same fact pattern, the claimant in the negligence action would still be a third party to the criminal prosecution of the tort defendant. But what the legislation did was to make a legally recognised object from that prosecution, the conviction, admissible and presumptively correct. It reduced the significance of the third party characterisation. It did not do so by making the conviction a res judicata and in English law, could not have done so easily. The substantive issues are different in the civil and criminal claim, and the medium of evidence gave a ready currency that could cross over from one area to another.

Having considered one example, we might not turn to more general questions about third parties. The first of which is focuses on defining a "party".

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[39] "(1) …for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings;

[40] Section 11(2)(a), the convicted person "shall be taken to have committed that offence unless the contrary is proved".

[41] Pearson, *Hollington* v. *Hewthorn,* cit., [3].

3. *What is a party?*

One of the issues must be why we want to distinguish between parties, and one way to start that discussion might be with the definition of a party. There are numerous ways, and I will canvass just some here. They focus on different qualities of the relevant discussion, and so are non-exclusive: they can overlap.

First, we might do so rhetorically, that is, by reference to a a linguistic quality. The most obvious of these would seem to be its "charge", which could be positive or negative. In effect, the nature of the definition describes what the object is, or says what what it is not. A negative definition is how "third" is often used, disussing a person from being covered by what might be thought of as the full criminal law personal units. Those established personal units might be a number of things within a trial, such as "parties", "participants",[42] the judicial panel, the lawyers engaged by the parties or participants, witnesses and experts, and of course, the victims or other civil party in those systems where that is permitted. It is not always specified with precision what the relevant units are in any particular instance.

Outside of a trial there are other uses, perhaps most famously in contracts, such as in insurance: the first party takes out a policy of insurance with the second party, and anyone outside of that is a third party. The idea of "thirdness" in colloquial English can also tie into a premise that two is enough, and any more is inappropriate, unhelpful and undesirable. The "third wheel" did not realise the two others present were meeting romantically, for instance.

Second, we might discuss what a third party is from some kind of general theoretical perspective. Examples might be normative, or non-normative. A normative example might be to play out a particular claim to what should make a party. This could include the roles to be plaued in the criminal case: prosecution, being at risk of facing sanction, and of course, judicial (and perhaps, lay-person, such as lay factfinders). There might be other forms of normative claim, such as those around what makes a criminal procedure legitimate. Non-normative claims might simply be about the grammar and taxonomy of the criminal law as a technical or

[42] In England it is possible to be a party without being a participant in a particular process, e.g., an *ex parte* application, where the other party is not present, such as an application for some kind of urgent injunction.

descriptive matter. An example might be the work of Hohfeld, in teasing out who has "rights" and what "rights" actually means[43].

Third, we might use the language of parties purposively, that is, rather than representing some specific fact or facts, it is used to further a particular desired outcome. There might be many such purposes, but in practice, the most obvious and immediate purpose is to grant or deny the benefits of a status to a particular individual or group. Typically this will be seen as a zero sum game, that granting protection to some will by an equal measure reduce it for others, or at least that engagement with a third party might use up resources that might otherwise be available for others. There might be ulterior purposes behind the most immediate purpose, of course. The integration of third parties might pursue a purpose of making the criminal justice system more legitimate, fairer, more effective, or make the wider legal system more efficient in some way.

Fourth, parties might have specific roles, and these could be described sectorally. This breaks up what a party might be into different elements relevant to the criminal process and considers how a party fulfils them and, especially, to what extent rather than considering it merely binary as in or out. It has two particularly significant consequences. A party might have multiple roles, while there might also be more parties than roles. And, to the extent that this dimension is useful, it highlights that the language of "party" might be overly rigid to the extent that it suggests any : certain qualities in, others out, and the language of "party" is too binary?

Examples of the kinds of roles relevant include passive and active roles. A passive role might be to receive information, including notice of milestones or events in the prosecution. An active role is normally more onerous, extending to participation in some form, and is typically an additional step after passive involvement. It could include rights to give evidence, request or contest court decisions or require investigations, the right to appeal a prosecutor or court decision, or the right to receive compensation (whether in civil law, or an autonomous criminal law order as in the common law tradition).

The roles so far described are procedural, as the language of parties often focuses there. It might be possible to have substantive rights holders in some sense. This is one of the places that the Human Rights dimension comes in most strongly. The right to bodily integrity, autonomy, peaceful enjoyment of property, however the legal system chooses to construct substantive rights. And a party to the proceedings would be promoting those rights, or protecting

[43] W. HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *Yale Law Journal*, 1913, p. 16ff; W. HOHFELD, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 1917, p. 710ff.

them, through the means of the procedural rights granted to that party. Of course Human Rights might provide procedural protection, but they can also provide substantive protection, and might be regarded by some as a useful way to re-orientate criminal law[44], potentially around rights[45].

Finally, a party might be described qualitatively on the object of the case: that is, whether the individual is a party to the facts of the case, or to the matter of law in the case, to the extent that can be distinguished. A third party might simply be a witness or expert providing evidence, and they are involved in the proceedings for their connection to factual questions around the events at issue in the trial. By contrast, *amicus curiae* and interveners are third parties in a sense, but are typically more concerned about the legal rules generally, though they might also have an interest in the specific defendant. They seek to mark or reinforce a particular position on the law. As a result, the relevance of such *legal* third parties is likely to depend on the court's role in interpreting, or changing, those legal rules. They are more likely to appear the higher up the court structure, on the assumption that legal systems give greater law making powers, in law, or in fact, to courts at or towards the apex. Of course this is an overt position within the common law tradition, but there are certainly apex courts in civil law jurisdictions which appear to be changing the law significantly, and deliberately, by their decisions.

What is clear is that the word "party" describes a range of different and overlapping roles. But we might ask what it fulfils for the legal system.

4. *Why "parties"?*

Given what we have just discussed, one might wonder what parties does to our understanding of criminal law, and what talking of "third parties" then adds. Each of the definition strands above speaks to a value for what work "party" should be doing. In part, it is meant to bring clarity to the actors within the system, and to ensure checks and balances for them. It constrains prosecutors, and protects defendants, while also of course empowering prosecutors and constraining defendants; the point is to ensure the primary importance of the trial's pursuit of justice.

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[44] See, e.g., M.A. SUMMERS-M. DELMAS-MARTY, *The Criminal Process and Human Rights*, Dordrecht, 1994.
[45] See, e.g., P.A. HIRSCH-ELIAS MOSER, *Rights in Criminal Law: Studies on a New Paradigm in Criminal Law and Procedure*, London, 2025.

In this discussion, we might wonder about the number of parties or persons involved. The premise is normally that there are two, accuser and accused, plus the independent judge. Thus "third" means anyone else. Binary status, both of party or non-party, but also historically linked in some areas of law to why the parties were not themselves independent. Parties were *interested* in the outcome, in English law. It was why it was not until 1898 that the defendant could give evidence in all criminal proceedings. Here, the English language at least, shows some potentially misleading flexibility in language, as in the modern sense, a person has many interests, but they rarely disqualify her from anything. Relatedly, one might be *partial* to a cold ginger beer on a hot day, but lacking impartiality would make one unsuited to drink that beer during a recess from a court hearing[46]. The result, clearly, was speaking of *parties* was necessarily to exclude the judge. But the premise for that seems to be that each side has a person, and a cause, and personal connection to either makes one inappropriate to judge it. The full picture might be a little more complex, as the rest of this special edition amply show. On a minor level, obviously, there might be multiple defendants, so multiple "parties" with that title. It also traditionally excluded the party harmed from that status. That said, they have been re-integrated in a number of ways[47]. In many civilian systems, using what I call a joined-in action, a civil claim inside the criminal prosecution, a party harmed by a crime will also have a civil claim. So I speak substantively first: in many, that is essentially automatic, through a unity of liability terms (e.g., German in §823(2) BGB and the Netherlands' construction of an unlawful act) or a part (e.g., the French historic unity of civil and criminal fault[48]). Clearly in one tradition, ever since the French *ancien regime*, that a person who suffers harm from a crime can be a *partie civile*. This conveys not just the right to receive compensation if appropriate, but also procedural rights. But in the common law tradition, there are few substantively aligned component parts of civil and criminal actions, so the evidence used in one is the best medium for affecting the other.

As this volume shows, there is significant doubt that having only two parties enables criminal procedure to efficiently and fairly do the work needed of it. Debating that point is not the purpose of

[46] Or, more academically, Hobbes wrote: «For without that [the Equity], the Controversies of men cannot be determined but by Warre. He therefore that is partiall in judgment, doth what in him lies, to deterre men from the use of Judges, and Arbitrators; and consequently, (against the fundamentall Lawe of Nature) is the cause of Warre». T. HOBBES, 1651, I, XV.
[47] See, e.g., M. DYSON, *Explaining Tort and Crime*, cit, p. 299ff.
[48] On which see *Ibid*, p. 220ff.

this contribution, but it does want to assess what a legal system might do if it accepts that argument.

One area that is alluring, at least to some, is to consider "third parties" as forms of hybrids. Hybridity is used in some parts of the law to select characteristics from at least two fields, and combine them in one object. They can be used in efforts to avoid restrictions, such as restrictions of criminal procedure, but labelling something as not-criminal, but a hybrid civil and criminal object, for example[49]. But more interestingly as a matter of conceptual analysis, they are paradoxical. They acknowledge the existence of the structure of two parties, but in the same breath accept, in at least this case, something else, a third party. They reinforce the existing conceptual structure, acknowledging the primacy of the sources, but then make an exception for this particular hybrid. It is a little like the English expression "the exception that proves the rule": there cannot be an exception without a rule, so by referring to an exception, you both confirm the rule and provide at least once place where it does not apply. However, difficulty with hybridity matches its allure. There are no well-theorised limits to how a hybrid is made, and which constraints from the source material it should contain, along with its other parts. Without that work, its paradoxical nature is interesting, but ultimately a cautionary tale.

Perhaps most usefully, the idea of a third party could be seen as empowering, or excluding, on its own. In other words, "third" in "third party" might not be significant for what excludes, but for the nature of the word it conditions, "party". Instead of considering whether a given individual meets the conditions for being a party of some kind or not, we could consider whether "party" is doing the work we need it to. The use of "party" as a hook on which to hang much of the procedural mechanisms and identification could be changed, rather than accepting it as a necessary and unchaging underlying structure. The different qualities of party discussed above might be refined and parts chosen. Just as an example, a person might be a third party *to the investigation*; a third party *to a criminal charge*; a third party *to something else* in the criminal procedure.

5. *What comparative lessons might there be?*

We have already seens some examples of the comparative significance of this issue. The language of "party" is common,

[49] See, e.g., M. DYSON, *Overlap, Separation and Hybridity Across Crime and Tort* and F. MEYER, Propria *and Boundaries of Crime and Tort*, in M. DYSON-B. VOGEL (eds.), *The Limits of Criminal Law*, Cambridge, 2018, p. 79-148.

perhaps pervasive. It crosses civil and common law traditions. It spans inquisitorial and adversarial modes within the criminal law. Yet the mode of employ can vary significantly, and the weight on principle, or practice, can vary too. Part of the work involves selecting the right points of comparison, and then delving into why they legal system's structure and culture position that system's answer as it does. It is a difficult but rewarding endeavour.

To take just one example, one of the persons most obviously characterised as a third party in some legal systems is the victim (or "complainant" for some crimes and in some systems). One place the victim overlaps with the prosecution party is in a power to bring a prosecution. This unlocks a series of further questions about the nature of the criminal prosecution. In some legal systems, this is a right. In Spain, the accion popular is protected by the constitution[50], that citizens may engage in the "*acción popular*"; though of course there is an extensive system of public prosecution that would do the work for them, along with investigating judges who have the power to begin prosecutions, and a background of cultural norms of relying on the state for many common functions. In English law, private prosections are permitted and have grown in some areas (particularly fraud), subject to the power of the state to take them over and continue or discontinue them. By contrast, in France, in some contexts at least, a victim of a crime can force the state to bring a prosection, in effect by saying that the victim's right to compensation, able to be carried out through the criminal process, means the prosecution must happen. Instead of a separate track for prosecution, the French system "keeps the state on its toes" or "honest" in the colloquial English, by having victims promote their own interests. There are then checks and balances on constituting oneself as a *partie civile* in this way, so that the power is not abused, including a security deposit and the risk of prosecution oneself. Just this one example shows how rich the material is for comparative understanding, as well as how the classification of "party" or "non-party" is somewhat artificial, as what a party does in one system, such as Spain, a non-party does in France but forces the party, the prosecutor, to do.

The comparative dimenstion will continue to be of value for the new and changing challenges of the future. Significant conflict between law enforcement and technology companies about unlocking codes for mobile phones takes on a new dimension when the technology now simply scans a face, with the police able to just hold the phone up to the defendant to have access to its contents.

[50] Article 125: «Los ciudadanos podrán ejercer la acción popular y participar en la Administración de Justicia mediante la institución del Jurado, en la forma y con respecto a aquellos procesos penales que la ley determine, así como en los Tribunales consuetudinarios y tradicionales».

Since the Covid pandemic in 2020-2022, telepresence is far more established and accepted, and will likely continue to be so for legal systems which might otherwise need oral evidence. Artificial intelligence might offer everything from legal advice, assessment of evidence, probability of success, through to draft judgments. All of this will be comparative testbeds of the most potent kind.

6. *Conclusion*

The example of *Hollington v Hewthorn* highlighted how complex the issue of a party might be, and why the concept of party could be given different meanings within the legal system. It also highlighted how different conceptions of the roles of different persons might lead to quite surprising results if those different conceptions are not understood. Indeed, questions about the role of different parties tied into questions of evidence and from there into appeals processes. In the background for the common law, but perhaps more prominent in some other legal systems, are questions of how integrated and unified the legal system is. English law looked at an individual instance of a problem, a particular seam in its fabric, and set an answer, but tastes and persuasiveness changed over time and the result was a legislative reset. A similar approach is to ask what qualities of "party" are important to the legal system, and what they might show us about what the criminal law is missing by only thinking in terms of two parties. This article has sketched that analysis, as part of the wider special volume's examination of multiple facets of the issue.