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The Crisis in the Courts: Before and Beyond Covid

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One year after the first COVID lockdown the backlog at the Magistrates' and Crown Courts together totalled approximately half a million cases. This article reports on the impact of court delays on domestic abuse victims using data from the ESRC-funded 'Shadow Pandemic' project. Using this data as illustrative, the paper goes on to discuss the causes of delays in all criminal cases, challenging the assertion that COVID caused the backlog. Instead, the paper contends that austerity measures have been the underlying cause with COVID merely extending the scale of the crisis. The paper then questions whether post-COVID recovery plans are realistic, particularly in relation to any increase in remote hearings and out of court disposals. It concludes that a more fundamental shift needs to take place in dealing with criminal cases to enable speedier and more effective access to justice for victims of all crimes including domestic abuse.

Key Words: Magistrates Courts, Crown Courts, COVID, domestic abuse, backlog, jury trial

INTRODUCTION

At the one-year anniversary of the first COVID lockdown, the backlog in the Magistrates' Courts stood at 476,932 together with a further 56,875 outstanding cases waiting to be dealt with in the Crown Courts (HMCTS 2021a). Our ESRC-funded project 'The Shadow Pandemic', partly focused on the delays to court proceedings brought about by the public health emergency during 2020–21, and their impact on domestic abuse victims. This paper uses data from that project to illustrate the impact of the backlog on victims and the processes designed to bring their abusers to justice. Since domestic abuse cases were prioritised during and after the COVID emergency, victims of many different types of crime may have had cases delayed. This backlog is likely to have an enduring impact for many years to come. This paper examines the causes for the delays, the realistic prospects for recovery, and concludes by suggesting that a more fundamental shift needs to take place in dealing with criminal cases, which both reduces the number of cases going to court, and deals more effectively with those that do.

The 'Shadow Pandemic' project: methods

This project 'Responding to Domestic Abuse: the Shadow Pandemic' (ES/V00476X/1, Ethics approval 7858/9) was funded in June 2020 under ESRC COVID rapid response funding, to

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investigate how the police responded to the anticipated rise in domestic abuse during the lockdown period, and how the courts would deliver justice to victims once they reopened. We sent questionnaires to all 43 police forces in England and Wales (25 returned) and conducted interviews with senior police officers (Detective Sergeants to Chief Constables) from 20 geographically dispersed forces of different sizes. We interviewed representatives of the Bar Council and the Magistrates Association, Shadow/Ministers with relevant portfolios, and policy officers for the Office of Commissioner of Domestic Abuse about the difficulties of policing and securing speedy justice for victims of domestic abuse. We also carried out a statistical analysis of receipts (cases sent to the courts), hearings, and disposals in court cases between October 2019 to May 2021 using reports from the Crown Prosecution Service (CPS), Her Majesty's Courts and Tribunal Service (HMCTS), Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI), Ministry of Justice (MoJ) and reports from NGOs. Finally, we carried out a documentary analysis of updates and communications from government and other agencies between March 2020 and August 2021 specifically regarding the court backlog and projected recovery plans. Research findings on policing responses have been published (Richardson et al. 2021, Walklate et al. 2021a, Walklate et al. 2021b). This article reports on the impact of court delays on victims of domestic abuse and other crimes.

The courts: crisis management?

During the initial 'lockdown' period in March 2020 reports of crimes fell, particularly public order offences, burglaries, and robberies (ONS 2021). Some minor additional caseload for the courts was caused by police chasing up historic cases (since they had personnel available as they were not deploying at the same rate as before the lockdown period) but a main concern that soon arose in March 2020 was the delays to existing cases going through the courts. Lord Chief Justice, Lord Burnett, reassured the public that 'Our immediate aim is to … ensure as many hearings in all jurisdictions can proceed and continue to deal with all urgent matters'. (HMCTS 2020a: 3). Robert Buckland, Secretary of State for Justice and the Lord Chancellor, echoed this ambition, stating, 'Despite an unprecedented public health emergency, the Prime Minister and I are clear that our courts across England and Wales have a critical role to play and should go on sitting' (HMCTS 2020a:3). Nevertheless, on 23rd March 2020, all jury trials were suspended, and Buckland admitted that coronavirus was a crisis of a very 'different order of magnitude' (Dearden 2020a). Weekly HMCTS briefings were held with partner organisations, and immediate plans were made to mitigate the impact of the lockdown on courts (HMCPSI 2020:46). At the end of March 2020, 157 priority court and tribunal buildings were selected to be kept open for urgent and essential face-to-face hearings, and a further 124 were closed to the public but open to staff. Closed courts were then either used to support remote video or telephone hearings (permitted by the Coronavirus Act, 25 March 2020: HMCTS 2020a:3) or were temporarily designated as 'suspended courts'.

There was a determination by HMCTS to ensure that the situation did not escape them. However, after just the first week of the lockdown, newspapers reported that the justice system was in 'meltdown' as the criminal court case backlog passed 37,000 (Dearden 2020a, Syal 2020) The backlog in the magistrates' courts had already increased by 32%, from 12,100 to 16,000 and in the Crown Courts it had increased by over 40% from 17,400 to 24,900 (HMCPSI 2020: 43). Jury trials were re-initiated in some courts in May 2020 in an attempt to address the backlog. By June 2020 remote hearings were dealing with all urgent applications including those for bail or to extend custody time limits, and also for Domestic Violence Protection Orders (HMCTS 2020c). Other work, including motoring offences, was diverted to the Single Justice Procedure to be dealt with by single magistrates sitting at home, connected to the legal advisors by phone or video camera (HMCTS 2020c). The Jury Trials Working Group recommended that the Central

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Criminal Court (Old Bailey) recommence trials on 11 May 2020, with new trials starting in Bristol, Cardiff, and Manchester Crown Courts on 18th of May. By June there were six crown courts running trials, twenty-two by July, fifty-four by August, sixty-six by September, seventy-nine by October, and by end of December 2020, there were eighty-four courts in operation (HMCTS 2020c).

Cases were divided into three priorities: Priority 1 involved all custody cases, sentencing cases, applications to extend custody time limits, in and out of hours terrorism applications, civil applications under the Coronavirus Act 2020, warrants of further detention, Domestic Violence Protection Orders, and urgent search warrants/rights of entry. Priority 2 cases involved any public health or coronavirus related prosecutions (including breaches of restrictions or requirements imposed to protect public health, and other criminal activity designed to exploit the situation); sensitive/high profile cases and cases involving children and vulnerable witnesses/victims; any serious and time-sensitive Youth Cases (e.g. where delay might mean a relevant age-threshold was crossed); and any custody trials. All other cases became Priority 3 (HMCTS 2020c).

Some police forces across the country set up working groups to establish local and regional mechanisms for the prioritisation of cases (including domestic abuse) with both CPS and the police reporting that there had been far more collaborative working between the two parts of the system in an attempt to mitigate the crisis (HMCTS 2020b:52).

> 'We set up a weekly meeting between [various parts of the prosecution and court criminal justice system] to discuss demand, risks, and escalate critical [domestic abuse] cases. Brought together operational leads from both agencies' (DCI, Southern Force 1)
>
> 'So they [domestic abuse cases] took priority and what we did is we introduced a case progression meeting with the courts and CPS which allowed us to go over every trial that was happening in the two weeks coming up so that we knew that those trial slots were being filled with effective trials. If there were issues, we would raise them in that meeting and say, "This person is not going, this person's suffering from Covid etc. They can't come to court". And then the courts would sit there and go, "Okay, we'll re fix it for this day or CPS will apply to vacate". So we had a really good line of communication with the two partner agencies - being CPS and the courts to enable that, the trials that we're putting in are going to be effective trials' (Witness Care service, Southern Force 2)
>
> 'We've agreed [with CPS and HMCTS] and it's worked already - where we've got high risk cases we get them bumped up the queue. We've used that that two or three times and that's worked, we've got the highest rate of domestic abuse convictions in England and Wales, 91%.' (DCI, Northern Force 2)
>
> 'Weekly Skype meetings chaired by a Chief Officer to bring all Community Safety Partnerships, commissioned support services, HMCTS, CPS, National Probation Service, Community Rehabilitation Companies and police departments together to address, at an early stage, recovery after lockdown and what plans all agencies had in place to deal with the anticipated demand … Fortnightly Tactical Domestic Abuse Multi Agency meeting chaired by a DCI … the CPS have always attended all our strategic domestic violence meetings' (DCI, Northern Force 3)

Despite these activities, by June 2020 the media was reporting that there were thousands of outstanding cases (Dearden 2020b). Almost 483,700 cases were waiting to be dealt with by mid-May, up from 395,600 in March when the UK's lockdown came into force. At the end of June the magistrates and crown courts combined had 524,000 outstanding cases waiting to be heard. Claire Waxman, London's Victims Commissioner, described the backlog as a 'ticking timebomb [which had the potential to become] worse and worse' (Dearden 2020b).

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At the end of June 2020 (following the first lockdown), the government and HMCTS initiated steps to curb the backlog, and to increase the number of jury trials. On 30 June 2020, a £142 million capital investment was announced, with an additional £80 million to help courts process cases (IFG 2020: 64). On 19th July, a new initiative was announced as a response to COVID. Ten Nightingale Crown courts were opened in court buildings, some of which had been recently closed due to austerity measures, and some of which were repurposed rooms in theatres, town halls, and so on. A total of 300 courts were now in operation and some courts had extended their hours of operation (HMCTS 2020c). Eight more Nightingale Courts were announced in September (IFG 2020:70). Twelve-thousand Crown Court hearings, and more than 20,000 overnight remand cases had been heard by magistrates by September (HMCTS 2020d). Despite the imposition of new restrictions on movement in September, HMCTS were confident enough in the recovery of case-progression and the throughput of cases that they announced that 'courts and tribunals will continue to function in these regions as normal. As an essential public service, work continues as before and there are currently no plans to change scheduled hearings' (HMCTS 2020c). Recovery plans were announced (HMCTS 2020c). Three-quarters of Crown Courts resumed trial work, and cases involving high-risk defendants or vulnerable witnesses and victims were added to the Priority 2 category in July (HMCTS 2020c).

HMCTS (2020d: 4) announced four pillars that underpinned the recovery effort:

- Maximising the use of HMCTS' existing estate (introducing physical screens to ensure safe use of the courts)
- Providing additional capacity through Nightingale Courts
- Using technology (remote or video hearings)
- Considering adopting different operating hours (opening the courts on evenings/weekends)

The initial system-wide recovery phase was overseen by the Criminal Justice System Strategic Command (CJSSC). A number of cross-CJS silver working groups representing various parts of the criminal justice system were tasked to address the backlog. As CJSSC admitted, 'without some innovative thinking and solutions, the challenge of addressing the backlog is likely to be much more complex than dealing with the immediate crisis' (HMCPSI 2020: 43). Indeed, this proved to be the case as the backlog of cases in the Crown Court continued to grow. The CPS were experiencing significant problems upstream from the courts, with the post-charge caseload being 67% higher than the pre-COVID baseline (which equated to 67,679 extra cases). The magistrates' court live caseload was 83% higher (with 19,500 outstanding trials), and the Crown Court live caseload was 44% higher (with approximately 28,000 trials outstanding) (HMCPSI 2021). The *Law Gazette* remarked that it was becoming usual for trials to be listed into 2022 (Hyde 2020).

Statistics released in December 2020 suggested that the magistrates' courts had begun to reduce the backlog (see Figure 1). However, the Crown Courts, where the backlog had reached over 53,000 cases, seemed to have made little progress in slowing the rise (Figure 2).

The criminal courts were beginning to catch up with themselves in terms of receipts (cases entering courts). The numbers of cases disposed of were approximately the same as the number of receipts. However, they were not making a dent in the backlog. As they entered 2021, the courts were running to stand still. The Ministry of Justice remained, however, very optimistic. The Criminal Courts Recovery Plan contained a range of measures designed to help the courts return to normal operation, and to minimise delays in delivering justice. They were opening more courts, with another thirty Nightingale courtrooms in use, the employment of 1,600 court

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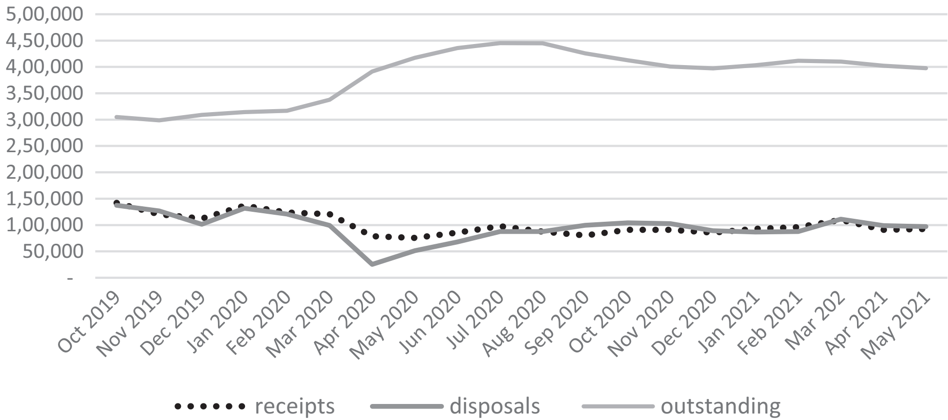

Fig. 1 Receipts, disposals, and outstanding cases, Magistrates' Courts, October 2019 to May 2021.

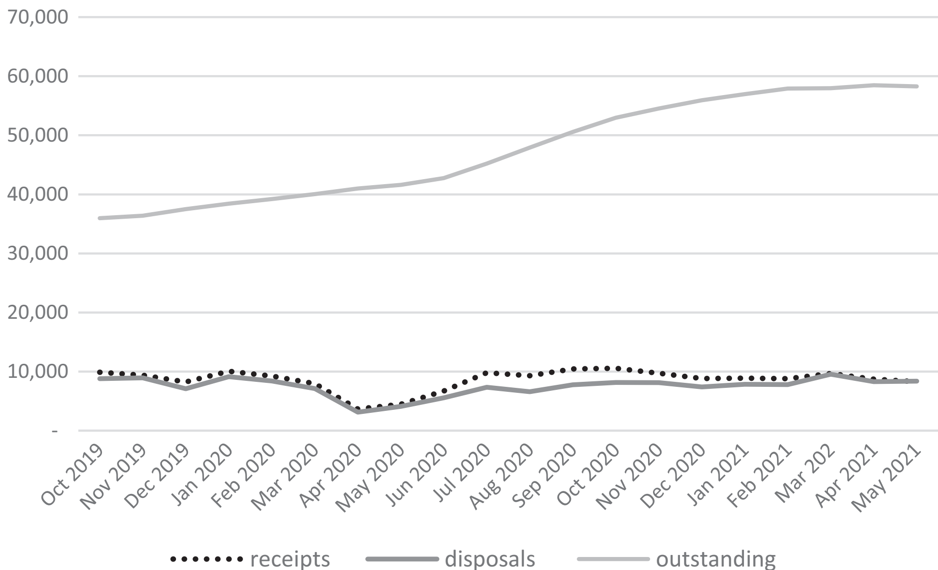

Fig. 2 Receipts, disposals, and outstanding cases, Crown Courts, October 2019 to May 2021. (Taken from Ministry of Justice Figures[1]).

staff to carry out recovery measures, and safety measures such as plexiglass screens helping to ensure that jury trials could safely take place in four hundred courts (and to reduce the possibility of cases being delayed when more than one or two jurors were ill), with more remote hearings, and extended opening hours (HMCTS 2020a, 2020d).

By 10 May 2020, a cloud-based video platform was live in 34 magistrates' courts and 12 Crown Court centres, and more than 2,000 hearings had taken place via this system. By February 2021, the number of Crown Courts resuming criminal trials increased and two new Nightingale courts were opened. Although strict timetabling of attenders continued in the magistrates' courts, more and more cases were dealt with remotely. (HMCPSI 2021:18). The police we interviewed stated that defendants and witnesses continued to be absent due to Covid, causing adjournments; and legal advisors reported that the increase in opening hours in some

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courts was undermined as they struggled to be staffed by legal advisors, CPS prosecutors, and defence solicitors. A few Crown and magistrates' courts began to hear multi-hander trials, where a number of co-defendants were dealt with simultaneously. However, by March 2021 the immediate crisis and the crisis management measures imposed by HMCTS seemed to have at least stabilised court backlogs (in magistrates' courts at least), but the impacts of delays continued to be felt in the system.

The impact of the backlog; domestic abuse and beyond

In their September 2020 update, HMCTS acknowledged that the backlog constituted more than a logistical or managerial problem. The failure of the courts to quickly recover criminal caseloads to pre-COVID-19 levels would, they stated, adversely impact all court users (victims, witnesses and defendants, particularly those in custody awaiting trial), criminal justice system partners such as the CJS, and the legal professions, including judges and magistrates (HMCTS 2020d). A report by Crest, commissioned by the Hadley Trust, talked of 'a catastrophic risk to public confidence, procedural fairness and effective enforcement of the law' (Crest Advisory 2020: 5). Domestic Abuse (DA) Leads in police forces throughout England and Wales reported their frustrations:

> 'I'm really disappointed with the courts [...] we are all asked to use innovation, aren't we, and we haven't seen it from there' (Superintendent, Midlands Force 2)
> 'And we have an HMCTS who are very, very, slow to the party around innovating and moving forward... where our target date for first hearing is 28 days; well, its 90 days to first hearing and that just is just far too slow for domestic abuse - it is a bit of a perfect storm' (Chief Constable, Southern Force 2)
> 'I just find that the courts are, um, it just feels like they're behind everybody else ... I just feel very frustrated that we have now got such huge backlogs in the criminal justice system. And that's only going to have a detrimental impact on victims and witnesses' (DCI, Midlands Force 1)
> 'We've got a lot of rape and sexual abuse and child sexual exploitation trials that are long and have been backlogged. Which is bad news, bad news' (Superintendent, Midlands Force 2).

The Senior Presiding Judge Thirlwell LJ, the CPS, and HMCTS all agreed that cases, where defendants posed the greatest danger to victims and the public, should be expedited (HMCPSI 2020: 51). As stated earlier, all domestic abuse cases were considered to be Priority 2 (just after remand cases) and therefore guaranteed to be heard more quickly than other cases, but the delays were still considerable. The length of time from charge to court disposal more than doubled in the magistrates' courts between April and October 2020, from an average of six weeks to 14 weeks (MOJ 2020). The situation was worse in the Crown Courts. James Mulholland, QC, chair of the Criminal Bar Association, alleged that some cases entering court for the first time in 2020 were being listed for trials in 2023. Other lawyers reported that the Crown Courts had stopped giving trial dates far into the future in the hope that spaces became available before then (Bowcott 2020, 2021). As police respondents noted:

> 'Prior to COVID you were charged and in court within 5 working days weren't you and it was great, it felt really comfortable knowing that was going on and the victim had a result. Now we're talking months and months and months before you get to Crown Court' (DCI, Northern Force 5)
> "I have a trial for a high-risk domestic violence victim. She was the victim of GBH. He pushed her downstairs and she cut her head so deep that it cracked her skull and that is going for trial

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> in April 2022 … They keep their life on hold. A lot of the time because the closure of a trial is a closure of that chapter in their life for some of them, and they feel that they were able to move on. But you ask them to wait 18 months... It will re-traumatise them if they go back to court and they're not willing to do that. Which I get sometimes, you know, I really do get it". (Witness care officer, Southern Force 2)

Former Chief Constable of both Cheshire and Greater Manchester, Sir Peter Fahy, commented on the 'misery for victims', a sentiment echoed by the Victims' Commissioner for England and Wales, Dame Vera Baird: 'Without sustained and significant investment in the courts system to eliminate chronic backlogs and delays in cases, the implications for victims and witnesses are severe' (Townsend 2021). There is, of course, a considerable strain on victims who are waiting for cases to be dealt with and offenders to be sentenced. These strains can be exacerbated when cases undergo multiple adjournments, As one police respondent pointed out:

> "DV assault that occurred in September 2019 and the trial was booked for April 2021. And there was a delay in charging, so the defendant didn't get charged until 2020. But the case management hearing was due to be heard on the 15th July. And because of COVID restrictions around the court, when my staff updated that in July that had been moved, she was already angry and she then made the retraction statement and then the case management hearing set the trial and the victim said she's not willing to attend. She's only just get managed to get her mental health back on track and she is not going to put her mental health in jeopardy by waiting for the trial … To tell them that it's going to take 12 to 18 months for it to come to a conclusion—for them I personally don't think that's probably worth it." (Witness care officer, Southern Force 2)

Since the courts restarted trials following the end of lockdown restrictions, there have been significant numbers of witnesses, victims, and defendants (and also jurors) who contracted the virus or who were forced to self-isolate for a number of days. The courts were unable to proceed with trials, which were pushed further back as the backlog of cases waiting for first hearings was bolstered by delays in cases that should have been dealt with. It was the case that defendants who pleaded not guilty, which necessitated fixing another hearing for the trial and possibly another adjournment to impose the sentence, all added to the court backlog and weighed heavily on police resources whilst cases continued through the system for ever-longer periods (https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2021/criminal-court-statistics-quarterly-january-to-march-2021).

The caseloads of the Police Witness Care service in one southern police force doubled between 24 March 2020 and 8 December 2020. Already facing the well-established problem of victim attrition, particularly in relation to cases of domestic abuse before COVID, the police feared that the backlog would cause many cases to fail simply because the victim had lost faith in the criminal justice system or could not face the strain of the wait for court (HMCPSI 2020: 51), for example,

> "And the real pressure is going to be keeping victims on board in an area of business where it's bloody hard anyway. Yeah, you know, yeah. It is going to be a challenge. I don't have any solutions to that" (DCI, Northern Force 4)
>
> "The longer the point between the victim making the complaint and the perpetrator being arrested means they're likely to disengage" (DI, Midlands Force 3)
>
> "… absolutely pulling their hair out because of the backlog. I think we've done as best we can. But notoriously, getting domestic abuse victims to court is always difficult … we probably have lost quite a few along the way … it's causing significant trouble". (DI, Welsh Force 1)

1 https://www.gov.uk/government/collections/criminal-court-statistics

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> "The frustration that we've had in relation to courts is that it's growing day by day in. In fact I am. I'm due to retire [soon] and it really worries me that the backlog in trials is up to four years for courts. That's truly upsetting, and the level of attrition with victims will be awful. And I can't emphasize enough the need for the courts to be a part of the solution moving forward" (DCI, Midlands Force 4)

To summarise; COVID was a public health emergency. The social impacts of the attempts to stop the transmission of infection were acute with the potential to cause long-lasting disadvantages and difficulties for the victims of crime and the courts that were supposed to provide them with access to justice. As was stated in September 2020 by HMCTS: 'The impact of COVID-19 on the criminal courts, despite the implementation of the emergency response measures … has been stark' (HMCTS 2020d: 3). The question remains: is COVID solely to blame for the crisis which has overtaken the court system?

Discussion: the long-term causes of the crisis in the courts

The House of Lords Select Committee on the Constitution (22nd Report of Session 2019–21 HL Paper 257 COVID-19 and the Courts) were quite explicit in their view of the backlog, describing it as 'unacceptably high before the pandemic' (p.41), 'neither acceptable nor inevitable' (p.6) and caused by long-term underinvestment in the criminal justice system. The joint report published by Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI 2020) speaks of delays in the system affecting victims and witnesses that had been present for years. More succinctly, one Chief Constable stated, 'I think it's fair to say HMCTS was an organization in dire straits before COVID crucified it' (Chief Constable, Southern Force 2).

For the last ten years, austerity measures introduced across the public sector have bitten hard into the court system and have cast a long shadow. A sustained court closure programme shut approximately a third of all magistrates' courts in England and Wales over a ten-year period and reduced the number of magistrates from 25,710 in 2012 to 14,348 in 2021 (IFG 2019) The closure of 129 magistrates' courts since 2012 and cuts to the Crown Court system also severely restricted the number of days available for judges to sit. According to a spokesperson from the Criminal Bar association, the courts were 'paying the price of years of cuts that began under Chris Grayling' (Minister for Justice 2012–15) long before COVID struck (Dearden 2020a). Treasury statistics show a significant reduction in funding for the courts under Grayling and his successors. Their Annual Resource figures show a decrease of over 20% between 2010/11 and 2014/15; continuing through to 2019 (House of Commons 2019:33). However, the courts had been losing the capacity to deal with recorded crime, not since 2010, but for the last fifty years, as a result of lower and lower levels of investment. Home Office recorded crime increasingly far exceeded cases arriving at court (receipts) from the 1970s onwards. The courts did not increase their throughput for the four decades before COVID, nor did they get anywhere near dealing with all recorded crimes (see Figure 3):

The answer to reducing and then eradicating the backlog is, therefore, according to some commentators, to backfill austerity measures with a sustained period of financial investment. The Institute for Government calculated that the government would need to spend at least an extra £55m to £110m a year for at least two years on innovations such as the increased use of remote hearings. HMCPSI noted that £142m had already been committed to enlarge capacity in more than 100 courts, although some of the Nightingale Courts that had alleviated the problems of court closure in 2020 had reverted to their non-judicial local authority/commercial roles by June 2021. This would also enable 750 more courtrooms to conduct remote hearings. An additional £20m was also announced for improving prison videoconferencing facilities. However, they also concluded that this 'may not be sufficient given historic underinvestment in the

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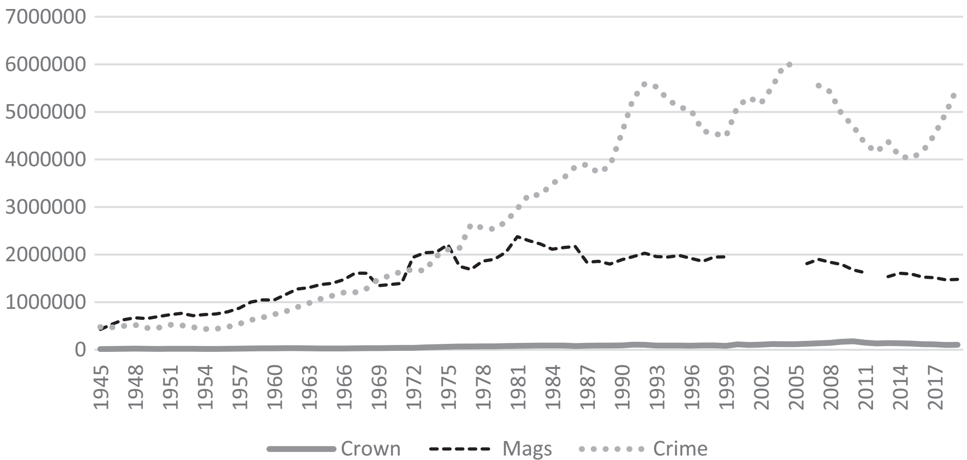

Fig. 3 Recorded crime and number of receipts at Crown and Magistrates' Courts, England and Wales, 1945–2019. (Figures taken from HMPCSI 2020). https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2021/criminal-court-statistics-quarterly-january-to-march-2021.

criminal justice system' (HMPCSI 2020: 51). Lord Burnett of Maldon, the current Lord Chief Justice agreed, warning the House of Lords that the envisaged increases in jury trials facilitated by the re-animation of existing Crown Courts and the addition of new Nightingale Courts would have only a small effect (Ames and Baski 2020). The Criminal Bar Association went further, declaring that the increase of under five thousand Crown Court sitting days was 'derisory' given that the government had cut over fifteen thousand days the previous year (Dearden 2020a).

The 2020 Crest Report suggested that far more significant levels of investment were required throughout the court system. They concluded that court capacity would need to double in both magistrates and Crown courts in order to stabilise the backlog and bring the flow of cases into equilibrium (Crest Advisory 2020). Nevertheless, both the CPS and HMCTS have been optimistic about their ability to manage the crisis and very positive about their strategies for recovery using more radical measures (HMCTS 2020d). They asserted that the pandemic had not overshadowed 'the innovative and "can do" attitude that has been at the fore of the CPS's relationship with the judiciary and HMCTS locally and nationally' (HMCPSI 2020:47). This contrasts dramatically with the views of police officers interviewed as part of the Shadow Pandemic project where there were multiple complaints about 'bottlenecks' (DCI, Northern Force 2), 'the sausage machine' being broken (DS, Midland force 2), that relationships between the CPS and police were poor, and that communication between the police and HMCTS about delivery of services was virtually non-existent.

In a survey of Superintendents carried out on behalf of the Police Foundation (2020), 53% of respondents thought that courts had been 'very ineffective' or 'fairly ineffective' in adapting and functioning during the lockdown; 27% thought that the CPS had been fairly or very ineffective and only 15% felt that they were either very or fairly effective. The cross-CJS working group structures developed during the COVID emergency were designed to facilitate better communication which could provide an effective response to tensions arising out of differing organisational positions. (HMCPSI 2020). Certainly, both a better relationship and more fluid and informed decision-making processes extending between the police and the CPS, would be beneficial to the delivery of justice (Burton 2011) On their own, however, these would still be insufficient to reduce and eradicate the backlog.

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In what follows, the potential impact of out-of-court disposals (OOCD), digital technology in the courtroom, and the reconfiguration of the jury trial to accommodate more cases are discussed as ways of both alleviating the current backlog in cases, and ensuring greater throughput efficiencies in the courts' delivery of justice.

Pre-hearing processes: out of court disposals

Since the introduction of out of court disposals (OOCDs) twenty years ago, nearly two million have been dispensed by the police (MOJ 2020) Their use saves millions of pounds for the criminal justice budget and they are clearly a critically important part of the system of justice in England and Wales (House of Commons 2019). A simplified two-tier approach to OOCD—imposing a conditional caution or community resolution—will be introduced across all police forces in 2021, which could be a way of reducing the backlog by reducing the stream of cases into the courts (Gibson 2021). Doubling the number of OOCD imposed on defendants should, in theory, considerably reduce the number of cases reaching court. The impact would be greatest in the magistrates' courts because OOCDs replace summary rather than indictable charges. An extension in their use would not significantly affect the Crown Courts. Nevertheless, there is no doubt that many cases are resolved more quickly using OOCD in place of formal prosecution, and there have been recent moves to include more serious and more complex cases, including domestic abuse, within their remit (Office for Criminal Justice Reform 2010).

Until recently, prevailing advice from the Director of Public Prosecution was that use of restorative justice interventions as an OOCD in domestic abuse cases concerning intimate partners was 'inappropriate, ineffective and potentially dangerous' (HMIC 2014: 101). However, between 2012 and 2015 Hampshire Constabulary was given permission to divert men who had admitted domestic abuse away from formal prosecution as part of a conditional caution. This was reserved only for use in standard and medium risk cases (Mason 2020). Evaluations of Hampshire's Operation CARA (Cautioning and Relationship Abuse) by the Hampton Trust (https://hamptontrust.org.uk/program/cara/) found that it significantly reduced reoffending, and so it was extended for use in other forces (Strang et al. 2017). During the pandemic some forces were able to continue with OOCD using online interviews with both victims and perpetrators (for example Southern Force 5; Midlands Force 4). One senior officer described this as a way of 'turning the demand off, but also helping the perpetrator to become a better person, safeguarding the victim, and any family and witnesses' (DCI, Midlands Force 4). Northamptonshire Police increased their use of OOCDs for low-level domestic abuse as a strategic response to the court backlog (Why me 2020). This approach was critiqued by Westmarland et al. (2018), who expressed concern at the 'widespread use of OOCD happening 'under the radar', commenting on the creep of OOCD into police decision-making around domestic abuse. Yet, they found that all police forces used some kind of out of court resolution for domestic abuse: 'The key finding here is that out of court resolutions were not restricted to familial forms of domestic abuse but were also being used in intimate partner abuse cases by all of the 39 forces that recorded this information' (Westmarland et al. 2018: 7; see also Neyroud 2018).

In the light of criticisms such as these the significant extension of OOCD is likely to raise questions around which offences and types of behaviour should reach court, whether the police should hold such discretionary powers, and whether judicial scrutiny of police decision-making is robust enough to control biases in awarding OOCD or prosecuting in court (see Slothower 2014; Neyroud and Slothower 2015; Neyroud 2018; and Westmarland et al. 2018). In terms of reducing the backlog it seems likely that the diversion of complex and often serious cases (such as domestic abuse) would cut back on a small number of cases that were thought suitable to have OOCD. In general, their extended use may well prove be counterproductive as well as contentious.

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However, it is important to note that many of the cases which result in an OOCD would never have been prosecuted in court in the first place. Many would simply have been discontinued had OOCD not been introduced, so their effect may have been net-widening rather than significantly reducing the number of cases going to court, and therefore their capacity to eat into the backlog should not be over-stated (Snow 2015). Yet despite this potential, numbers of OOCD have virtually halved over the last ten years, from 407,618 imposed in 2012 to 216,713 in 2020 (MOJ 2020). These latest figures are not an artefact resulting from the impact of COVID—almost fifteen thousand fewer OOCD were imposed in 2019 than in 2018. To reverse this trend, it would take a virtual doubling of OOCD in 2021 just to achieve the numbers of OOCD imposed in 2012. At best, it seems that greater use of OOCD would be useful in helping to reduce the rate at which the backlog grows, rather than eradicating it. However extending OOCD use into domestic abuse and more complex and serious cases would raise public concerns about its appropriateness, efficiency and legitimacy.

Pre-hearing processes: reducing ineffective trials

Over the last ten years, the courts have attempted to ensure that more trials are effective and that fewer 'crack' on the day (by the introduction of pre-trial reviews). These prophylactic arrangements increased during COVID with weekly meetings between legal advisors, CPS and defence solicitors to ensure that not-guilty pleas were still firm, that all witnesses had been warned to attend, and that all evidence had been made available to both sides, and so on. These meetings were deemed to be especially important for domestic abuse cases, because they were, and are, so prone to cracking. The withdrawal of prosecutions for (usually but not solely) domestic abuse after charge but before trial, had long given rise to considerable frustration amongst the police and the CPS (Ellison 2002). Prosecutions continued to take place when victims withdrew their support for a prosecution before trial (sometimes making retraction statements), *if* there was still sufficient evidence to proceed, and if there was sufficient notice given so that prosecutors were armed with the proper evidence bundle in court. However, many cases were fatally undermined by the lack of evidence to put before the court when vital witnesses, primarily the victim, withdrew (Cretney and Davis 1997). Evidence from our respondents suggests that this was especially true for the COVID period when the illness (or social isolating processes) of witnesses and defendants caused multiple adjournments. The local Criminal Justice Board in one northern region discussed their concerns about victim attrition in domestic abuse cases with the Recorder of that area, pressing the need to prioritise domestic abuse cases through the courts (Police and Crime Commissioner, Northern Force 1; and see Hester 2006). Digital evidence through body-worn cameras provided by police officers as part of an Evidence Led Prosecution (ELP) and *res gestae* statements (taken shortly after police arrive at an incident which are spontaneous and contemporaneous enough to be taken as a true account), are now seen as invaluable when victims withdrew support for a prosecution, as our respondents reported:

> "So we really need to be thinking about every time that we pick up a call for domestic abuse and every time a uniform cop goes out to respond. Maybe we need to be thinking 'worst case scenario', 'victim withdraws support'. How else can we corroborate? You'll be able to push through that investigation with Evidence Led Policing" (DCI, Southern Force 1).
> "ELP was planned anyway but lockdown enabled it to be accelerated" (DCI, Southern Force 2).

Other digital innovations were accelerated as a result of the pandemic. Phone-call applications for search warrants for example, and remote hearings for Domestic Violence Protection Notices/Orders have been well-received by family courts, police officers, and victims ('if we can

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do virtual courts in COVID, then we can do it out of COVID', DS, Midlands Force 5; 'it's a really efficient way to do it', Superintendent, Northern Force 1). The Single Justice Procedure had already allowed magistrates to churn through thousands of low-level motoring offences (cases that had no live defendants). This allowed legal advisors to hear cases remotely with single—or occasionally two—magistrates sitting in their own homes, quickening the pace of proceedings for low-level offences where the defendant pleaded guilty by post and did not want to attend court. Although perhaps seen by magistrates as more administrative than judicial in form and practice, the online Single Justice Procedure courts have been widely accepted. These innovations permit the clearing of the backlog of low-level offences, freeing court time to focus on more complex cases.

The introduction of ELP has been more contentious and clearly, there are issues around its use (see for example, Blair 1997; Buzawa and Buzawa 2013; Messing 2014; Ward 2015). As with the greater use of OOCD, the greater use of e-filing in the back office, ELP, digital DVPN/DVPO hearings have all increased the effectiveness of the system but not in a way that seems to have had any real impact on the backlog. Perhaps for that reason, these processes have not been publicly identified as the answer to the backlog question in the same way as have remote hearings.

Hearings: use of cloud video platforms

In June 2020, HMCTS announced that they would extend the use of remote hearings conducted via cloud-based video platforms. The majority of court staff including legal advisors, and managers were issued with laptops, and homeworking was permitted (HMCTS 2020a). Between June and September 2020, when the courts had reopened with social distancing measures in place, over 30,000 Cloud Video Platform hearings took place in magistrates' and Crown Courts (HMCTS 2020d). Research for *Justice* (Mulcahy et al. 2020) found that virtual trials had the necessary 'gravitas', that jurors were comfortable with the technology, and that defendants were treated with more respect than they would have enjoyed at court. In a Bar Council survey, 68% of barristers stated that they would welcome targeted use of remote hearings in future (IFG 2020). *Crest Advisory* stated that 'the public do support greater use of digital technology, such as remote hearings, which have grown since the start of the pandemic. The government should prioritise reform in these areas' (Townsend 2021). They save costs by reducing prisoner transportation, and reduce the number of ineffective hearings due to the defendant failing to appear (Matthew et al. 2010). The Institute for Government agreed that video platform hearings had been effective in stopping the backlog from growing still larger than it already had done by October (IFG 2020). Convinced that CVP and the increased use of remote hearings would allow the CPS and the courts to get on top of case progression and preparation, HMCTS identified technology as one of the main 'Building blocks to Recovery' (HMCPSI 2020; HMCTS 2020a).

However, before COVID-19, the implementation of remote hearings had been delayed by consistent criticism from lawyers and judiciary that the appropriate use of remote hearings had not been properly thought through (IFG 2020). The reaction to COVID-19 facilitated greater speed of thoughput, and perhaps over-rode some of the concerns being raised by court-users, particularly those with specialist support needs, and the judiciary (Rossner et al. 2021). The problems identified were poor technology, underfunding, and alienation of (particularly vulnerable) court users and judiciary. Poor internet connections, unreliable technology and a lack of user familiarity with the new systems meant that remote hearings did not routinely proceed smoothly in magistrates' courts where low-grade equipment and poor Wifi provision was endemic (IFG 2020). Some magistrates and District Judges thought that the court had more difficulty in imposing its authority 'remotely', and perceived that defendants took the process less

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seriously than they would if they appeared in person. However, the main problem appeared to lie with witnesses' and victims' engagement with remote hearings. Rossner and McCurdy's (2020) evaluation of remote hearings for civil, family and tax matters (published just before COVID in 2020) discussed how 'coercive remote spaces' impacted on court processes and dynamics, and how they disadvantaged vulnerable users (see Byrom 2020). The Judicial College (2020:1) commented:

> "Now, of all times, as we try to work with new technology, we must strive to ensure fair process for all courts and tribunal users […] We know that the pandemic has left many cases languishing and the natural inclination is to get them heard ASAP. But that understandable imperative must be tempered by natural justice considerations"

The Equality and Human Rights Commission (EQHRC 2020), noted with concern that some defendants and witnesses will lack the equipment or know-how to utilise remote devices, echoing claims that remote hearings can disadvantage particular users.

A fair trial can only take place if and when remote hearings can replicate (or improve) face-to-face hearings, when witnesses and defendants can access timely legal advice before and during a trial, and where testimony is received by sentencers and juries without obstruction or hindrance. Without hindrance does not mean doing things at a rush. The time pressures resulting from the court running fixed 15-minute slots were judged by some magistrates and District Judges as risking delivering 'hasty justice', or a perception of such (Matthew et al. 2010). However, it seems that delay rather than haste still dogs the remote system. Technical difficulties combined with organisational problems in coordinating online access between prisons, courts, and police stations to mean that some remote cases, frustratingly, were taking longer than face-to-face hearings (IFG 2020).

Some of these concerns reflect a 'bedding-in' process as people adjust to using the technology, and it may be that remote hearings will be more efficient in the long run (IFG 2020). Although the Lord Chief Justice has already said that nobody will be forced to use digital engagement with the courts if they are not able to do so when the COVID emergency is over, HMCTS seem content to normalise the use of remote hearings in the future (HMCPSI 2020: 52). 'We will all have been struck by the very quick technical response to the Covid 19 pandemic [and whilst remote hearings] are by no means the new normal, no doubt they will continue to have a place in the future.' (Judicial College 2020:1–2)

Remote courts may have been effective in 'propping up' the court system through the lockdown and tiered restriction periods of 2020 and 2021. It is difficult to tell, as statistics on their use were not published until 2021. The use of remote hearings tripled through the initial March to June 2020 lockdown period (HMCTS 2021b). However, by September 2020, remote courts had been used in less than 15% of cases. HMCPSI concluded that 'it now seems that there is a clear judicial preference for in-person court attendance. Given the severe problems in the growing listing backlog, this is a lost opportunity. (HMCPSI 2021:18). More radical and dramatic changes may be necessary, such as fundamental reform of the jury system and the management of 'either-way' offences.

Hearings: reconfiguration of jury trials

As we have shown, the courts are indeed in trouble. 'The justice system is facing its gravest crisis since World War Two,' commented David Lammy, Shadow Secretary of State for Justice and Shadow Lord Chancellor (Reuters 2021). Although COVID has brought it more clearly into public focus, it is a crisis long in the making. As Jess Phillips, the Shadow Minister for Domestic Abuse commented to us, 'if you invest in crisis, you get crisis. If you invest in prevention, you get

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prevention, and all we ever do is invest in crisis ….' (Interview March 2021). Similarly, some of the system innovations, accelerated by COVID, have been in place for the last few years. They have ameliorated the backlog but have not addressed the core issue: the courts do not have capacity to deal with the cases forwarded to them, and major investment of the kind that would allow them to do so is unlikely to be delivered. More radical reforms have been mooted by Lord Burnett: 'I've no doubt there's going to have to be some imaginative thinking from government and parliament because it will need primary legislation to adjust the way, at least temporarily, that jury trials are conducted' (Ames and Baski 2020). Lord Burnett also stated that removing jury trial was 'an option only in extremis', adding that 'parliament would take a deep breath before authorising judge-only trials, even temporarily, until collectively parliament was satisfied that less radical measures that might ameliorate the situation were not good enough' (Ames and Baski 2020). David Lammy agreed that emergency measures were needed, suggesting: 'temporarily cutting juries to seven members, as was done during the war' (Reuters 2021).

Changing the configuration of the jury alarms some academics. Quirk (2021) invoked Naomi Klein's concept of 'shock doctrine' to describe proposals to bring in trial without jury. The public too, seemed uneasy at the prospect. A survey, commissioned by Crest Advisory, suggests the public supports substantial reform to help tackle the unprecedented backlog of court cases that has built up in England and Wales during the pandemic. However, there was also reluctance to back fundamental changes, with 47% admitting they felt 'very' or 'fairly uncomfortable' at abolishing jury trials for certain offences (Townsend 2021). It may be that the public and academics are more comfortable with a single magistrate deciding guilt/innocence and imposing sentence in Single Justice Procedure courts, or in the tens of thousands of cases that are presided over by District Judges sitting alone each year (as they have done since the middle of the nineteenth century across England and Wales). However, there is more concern over more serious matters being heard by sole magistrates, or by Judges deciding verdict and sentence. The Right Honourable Lord Justice Auld attempted to consider these issues in his Review of the Criminal Courts of England and Wales in 2001 (Auld 2001).

Many of the recommendations in his comprehensive review were taken up and put into practice (establishment of Local Criminal Justice Boards, greater use of restorative justice and fixed penalty notices, and perhaps significantly, the greater use of remote hearings) but three major recommendations never found their way into practice. He saw considerable merit in extending court opening hours in order to increase accessibility, which, as discussed in this article, has been mentioned as one way of reducing delays. His major suggestion for reform, was to replace Crown and magistrates' courts with single Criminal Courts comprising three divisions: A Crown Division, constituted as the Crown Court now is, to exercise jurisdiction over all indictable-only matters and the more serious 'either-way' offences allocated to it; the District Division, constituted by a judge, normally a District Judge or Recorder, and at least two magistrates, to exercise jurisdiction over a mid-range of 'either-way' matters of sufficient seriousness to merit. In trials by judge and magistrates in this Division, the judge would be the sole judge of law, but judges together with the magistrates would be the judges of fact, each having an equal vote, and would have sentencing powers of up to two years' custody with the Magistrates' Division, constituted by a District Judge or magistrates, as magistrates' courts now are, to exercise their present jurisdiction over all summary matters and the less serious 'either-way' cases allocated to them. Magistrates would decide mode of venue at a preliminary hearing of an Anticipated Not Guilty Plea court. Defendants would lose the right to decide where their either-way trial would be held.

In a survey conducted amongst its members by the Magistrates Association in 2020, 58% would have welcomed the courts opening for longer on weekdays, and 45% would welcome weekend opening. Approximately eight out of ten respondents (79%) were prepared to sit in

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alternative venues. Approximately nine out of ten magistrates were willing to sit with a Crown Court judge in either-way offences if they could both decide guilt/innocence and participate in the sentencing exercise; this fell to 60% if only deciding verdict not sentence. However, both statistics are quite clear. Magistrates welcomed the recommendations of the Auld Report if this survey is representative of general feeling amongst the 14,000 magistrates in the UK, but questions remain.

The first question is whether it would have any impact on the backlog. Certainly, there has been no other proposal that brings about change on this scale. Approximately 50,000 either-way offences are tried in the criminal courts each year, which could all be dealt with under Lord Justice Auld's proposed system (MOJ 2020). This is approximately the same number of backlogged cases in the Crown Courts at the moment. This proposal would have the 'heft' to make a significant change. The other questions are whether politicians would be bold enough to make such a radical change, and whether the public and judiciary would be prepared to embrace a change to a long-standing part of the British establishment - the right to jury trial. This has long been a totem for liberal democracies but such nostalgia may not be enough to overcome the very real issue that many people in the UK are having justice delayed, and, by dint of that, denied. We would say that the real choice is between making this significant change in order to secure justice for victims of crime, or to let people wait months and/or years to have their cases heard in a creaking and virtually-broken criminal justice system.

CONCLUSION

The magistrates (if not the Crown) courts are now dealing with as many cases per week as they did pre-COVID. Nevertheless, a huge backlog remains. As one police officer described it, 'the courts are in a bit of a pickle' (witness care officer, Southern Force 2). They certainly are, and the effects on victims, and on the delivery of justice, are dire. There are now some attempts to reconfigure and reconceptualise the backlog as an artefact of the process. From this viewpoint we should accept that there are always thousands of cases going through the courts, and the throughput created what looks like a backlog, but these are just cases taking the usual amount of time to go through the system. At best, this post-hoc justification sounds hollow to victims, especially domestic abuse victims, facing long delays in getting their cases heard in court. At worst, it legitimates and normalises the criminal justice system's lack of response towards innovation and speedy justice all of which preceded Covid-19.

The COVID period has left its mark on the criminal justice system by accelerating and extending some initiatives and reforms which were in place before March 2020, and by exacerbating some of the long-term structural resource problems in the system (particularly in the court system). The impetus the health emergency has created is the space for more radical reform and may be the opportunity to address some of the existing severe problems inherent in the system, such as the growing backlog of cases., not least by enacting some of Lord Justice Auld's reforms, and finally and dramatically, dealing with the crisis in the courts.

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