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Criminal legal aid and access to justice: an empirical account of a reduction in resilience

Abstract: This paper examines the work of criminal legal aid solicitors and the state of practice under challenging conditions for the sector. Drawing on an empirical study in south Wales containing 20 semi-structured interviews, it provides original data on the frontline of criminal practice. It is argued – using vulnerability theory – that the challenges facing criminal legal aid solicitors deplete their and their client’s resilience but at the same time bolsters the resilience of the police and prosecution. It further urges that vulnerability theory be used to examine criminal justice in practice, particularly the dynamics between various actors.

Introduction

Within this paper we examine the contention that legally aided criminal defence is in demise, utilising empirical data to explore some of the challenges facing lawyers. In doing so, we draw upon our earlier work on lawyer vulnerability (Dehaghani and Newman, 2017) and how this affects suspects and defendants (clients of those lawyers). Using vulnerability theory, we reflect on the interconnectedness of criminal lawyers and their clients. Yet, we take our argument further than we have done before. We posit that the issue is not simply that lawyers are unable to meet the needs of their clients, but rather that the practical realities – fee cuts and stagnation – that have reduced the lawyer’s – and thus client’s resilience – have, at the same time, allowed the resilience of police officers and the prosecution to increase. Thus, we follow Cape’s (2013) assertion that the undermining of criminal defence could result in a rise in miscarriages of justice. We urge that the changes to the criminal legal aid landscape be considered in this broader context and that the ripples of reducing resilience in one area are acknowledged to have the effect of increasing resilience in another. We start with detailing the right to legal advice before examining how this has been undermined. Thereafter we discuss vulnerability theory before moving onto explore our data. We conclude by considering the need to understand how this reduced resilience impacts access to criminal justice, but also by considering how such developments may have improved the resilience of the police and prosecution. Before doing so, however, we provide some detail on methods.

Methods

In this paper, we draw upon data from a project on the experiences of criminal justice in Wales,¹ specifically 20 semi-structured interviews with lawyers² – drawn from 16 firms of varying size – who were engaged in legally aided criminal defence work across south Wales. The interviews – lasting between 29 minutes and 2 hours 2 minutes, with an average of 1 hour and later transcribed and coded using thematic analysis³ – were premised upon the criminal defence practitioners’ experiences of interacting with clients and how interactions had been constrained by cuts to funding.⁴

Before proceeding, it is important to acknowledge the studies that have gone before. Typically, research on criminal legal aid lawyers in England has shed a rather negative light on the profession, with *Standing Accused* (McConville et al, 1994) as chief reference point (see Thornton, 2020). Travers’ work (1997) differed significantly by producing a positive account of the profession. Whilst Newman (2013) attempted to integrate positive and negative accounts (communicating the perspectives of lawyers while also subjecting them to interpretation), it has been suggested (Thornton, 2020; Welsh, 2017) that this account was negative overall. More recent (English) interview-based studies (Thornton, 2020; Welsh, 2017) have sought to redress this balance by giving primacy to the voice of lawyers and locating these within their political-economic context. Thus, to understand how lawyers’ experience practice, we should approach their accounts in good faith and understand that deviation from an ideal standard – the zealous lawyer (Smith, 2013) – may be due to factors outside of their control. The study, from which this paper is derived, is the first to provide a qualitative account of criminal justice in Wales.⁵ This paper examines the impact of criminal legal aid cuts on lawyers and clients.

Suspects’ rights and entitlements, the role of the lawyer and the crisis in criminal defence

Under Article 6 of the European Convention on Human Rights, individuals are provided with the right to a fair trial (which also extends to pre-trial procedures (*Teixeira de Castro v Portugal* (1998) EHRR 101). The right to a fair trial requires the state to provide legal advice and assistance to individuals

¹ For more detail on methods see Newman and Dehaghani (forthcoming).

² We use the term ‘lawyer’ to refer to solicitors, paralegals, legal representatives and legal executives. We thus focus on the police station and the Magistrates’ Courts, to the exclusion of the Crown Court (although we acknowledge that barristers are also facing significant difficulties).

³ This is a method for identifying, analysing and reporting patterns across a data set allowing the authors to draw out new insights (Braun and Clarke, 2006).

⁴ This paper examines lawyer experiences and uses these as the basis for an analysis of the lawyer-client relationship. By focusing on interviews with lawyers, it is not our intention to assert definitively whether or not defendants and suspects are getting a worse deal. This is beyond the scope of our paper. To establish such would, for example, require interviews with clients. Such an approach is to be encouraged as it would deepen understanding of the lawyer-client relationship beyond the existing literature – see also Newman (2013).

⁵ Although Wales will not form any significant element of discussion herein – See Dehaghani and Newman, forthcoming.

suspected of committing a criminal offence (*Salduz v Turkey*(2009) 49 EHRR 19).⁶ At the police station in England and Wales, the right to legal advice and assistance was first formally introduced through the Police and Criminal Evidence Act 1984 (PACE) section 58, which (subject to certain limitations – see 58 (6), (8) and (8A)) sought to balance the vast police powers that PACE had – at least formally – introduced (Dixon, 1997: 283). At the police station, advice and assistance is free (i.e. state funded) and independent, although can often be offered over the telephone (such advice is often used in relation to ‘less serious’ offences (see Skinns 2009)). Representation can also be offered at the Magistrates’ (and Crown) Court but state funding is subject to satisfaction of both the means and merits tests. Restrictions imposed by the means test⁷ can interfere with a defendant’s ability to access justice; with regards to merits, defendants charged with non-imprisonable offences are likely to fail the test (Gibbs, 2016). Thus, whilst in principle defendants may obtain publicly funded legal representation at the Magistrates’ Court, in practice they may not.

The criminal process can be alien and bewildering and sits firmly outside of the comfort zone of most, if not all, suspects and defendants (Mulcahy, 2007; Newman, 2016). As such, the lawyer should be present to provide a *helping hand* and redress the power imbalance between the state and the individual. Such a safeguard is especially pertinent given the adversarial nature of the criminal process in England and Wales (Fuller, 1978). In ensuring equal justice, lawyers must be able to practice active defence (Jackson, 2016) and therefore unpick and expose weaknesses in the prosecution case (Roberts and Zuckerman, 2010). Yet, the position of the defence has, in recent years, been significantly undermined.

As McConville and Marsh (2020) have recently highlighted, the criminal justice system in England and Wales has long been on its knees. Of particular relevance to this paper is the issue around fees payable to criminal legal aid lawyers for their work. As Welsh (2017: 584) explains: ‘the impact of successive changes to legal aid policy...means that the quality of legally aided defence services suffers’ (see also, for example, Cape and Moorhead, 2005; Sommerlad, 1999; Tata, 2007). Criminal defence work has also been devalued by the introduction of a New Public Management (NPM) approach (which attempts to make public services more ‘businesslike’) (Sommerlad, 1999) and a broader managerialist agenda such as the introduction of the Criminal Procedure Rules (and their imposition of case

⁶Implementation of this right across Europe has not been unproblematic – see, for example, Blackstock *et al*, 2013.

⁷ Those with less than £12,475 per annum income may obtain legal aid at the Magistrates’ Court should they pass the merits test but otherwise their eligibility at the Magistrates’ Court depends upon the full means test; for those earning above £22,325 no public funding is available (Legal Aid Agency, 2020).

management duties on the defence) (see Auld, 2001; Leveson, 2015; Johnston and Smith, 2017). At the same time, prosecution disclosure is not always forthcoming (Smith, 2017). For Thornton (2020: 250), ‘the combination of systemic issues that make criminal law particularly unpleasant to work in, aggravated directly and indirectly by the effects of financial reductions...is potent’. Along with funding cuts, such developments have undermined the ability of the lawyer to advocate for and represent their clients in a rigorous manner.

Yet, at both the police station and the Magistrates’ Court (and indeed in between and beyond), defendants are both excluded from and forced to participate in the proceedings against them (Owusu-Bempah, 2017). Suspects’ rights and entitlements are often ignored or side-stepped at the police station (see, for example, Choongh 1997; Dehaghani, 2017; 2019; Kemp, 2013; McConville, Sanders and Leng, 1991; McConville, et al. 1994; Skinns, 2009). At the Magistrates’ Court – which is at once mundane and puzzling (McBarnet, 1981) – cases are rushed (Newman, 2013; Welsh, 2017). Whilst legal advice and representation should remedy these issues, the result of legal aid cuts has rendered it increasingly difficult for lawyers to be a zealous advocate (Smith 2013),⁸ thus weakening access to criminal justice (Cape, 2013; Welsh, 2016).

One could go further still: by requiring the defence to identify the *real issues* at an early stage and provide information about written evidence, witnesses and points of law, lawyers have, in effect, been co-opted to work *for* the prosecution (McConville and Marsh, 2014). Further, as firms have suffered losses, the police have been afforded more power and summary justice has become the norm,⁹ with trials often being avoided entirely such that ‘the police station [has become] the location of the trial’ (Cape, 2013: 16; Jackson, 2016). Working under managerialism and other structural and systemic issues, defence lawyers have become limited in their potential to help those suspected and accused of crimes. The danger, as per Cape (2013: 17), is that miscarriages of justice are being designed back into the criminal process. Yet, we posit that these developments have at once reduced the resilience of the defence and increased the resilience of the police and prosecution.¹⁰ It is along this thread that

⁸ It is worth noting that cuts and fee stagnations have not been the only trends to adversely affect suspects and defendants. As Quirk (2013) notes, the adverse inferences from silence under s 34 of the Criminal Justice and Public Order Act (CJPOA) 1994 have not only diminished the right to silence but have also devalued legal advice and representation.

⁹ See, for example, the Sentence Discount Principle.

¹⁰ The court is not neutral in this balance of resilience. Notably, magistrates and other judges may ignore prosecution disclosure failures by, in essence, suggesting that the burden of proof lies with the accused to establish innocence rather than on the prosecution to establish guilt. See Johnston (2020); see also McConville and Marsh (2014).

we present our argument and in the section that follows we present vulnerability theory (Fineman 2010; 2013) before examining the data.

Vulnerability theory

Whilst vulnerability has been used in multiple ways to describe a myriad of conditions, situations, and problems (Brown, 2015), our use of the term deploys Fineman's (2010; 2013) vulnerability theory. Fineman does not argue that vulnerability is a condition inherent only to – or found within – certain groups or individuals. Instead, she argues that vulnerability is inherent to the human condition because of our embodiment and embeddedness. For Fineman (2013), embodiment relates to our existence as embodied human beings and our embeddedness signals our place within relationships and institutions. By highlighting these ontological realities, Fineman emphasises the interconnectedness and interdependency of the human condition.

Specifically, for the purposes of this paper, it is worth considering the interdependency of clients on their legal advisors and the (inter)dependency of lawyers on the institutions within which they work (namely, the criminal justice system, but also the provision of criminal legal aid). It is resilience – which allows us to 'address and confront misfortune' (Fineman, 2013: 269) – that provides the counterbalance to our vulnerability. Such resilience can be provided by – and indeed reduced or removed by – relationships and institutions. Institutions – such as, but not limited to, criminal legal aid – can also be vulnerable (see Fineman, 2013: 18; Dehaghani and Newman, 2017). Vulnerability theory urges that the state be 'built around the recognition of the vulnerable subject' (Fineman, 2013: 10) and 'constituted for the general and "common benefit", not for a select few' (Fineman, 2010: 274). Following this line, the state should ensure that all individuals have, for example, access to legal advice and representation. Yet, following years of government policies and practices (discussed in brief above), criminal defence resilience has been eroded and, as such, suspects and defendants have been unable to adequately and properly access to their right to a fair trial. Along this thread, we posit that as resilience for the suspect/defendant and lawyer is depleted, so too is the resilience of the police and prosecution bolstered.¹¹

In the sections that follow, we examine the precarious position within which criminal legal aid lawyers find themselves and the resulting implications for their clients. In doing so, we expand upon our

¹¹ It is worth acknowledging that the police and prosecution have also suffered from cuts within the criminal justice system – see Dehaghani and Newman, 2017; Dehaghani and Newman, forthcoming.

previous work (Dehaghani and Newman, 2017), which we follow up throughout but namely in the conclusion. In our discussion, we take resilience to mean the ability of the lawyer to zealously defend their client's case and the ability of the client to access justice. In respect of the police and prosecution, we take resilience to mean the ways in which they can successfully win the case (either by avoiding the possibility of prosecution or otherwise being able to put forward a case that is not adequately scrutinized by the defence).

Reduced resilience: the reality and its implications

At the police station

As noted above, PACE formalised the suspect's right to legal advice at the police station. The lawyers in our sample discussed the value of their role – particularly as one that opposed the police and prosecution – but admitted that it was increasingly difficult to provide such a service in practice. They felt limited by an inadequate system of funding and confined by how they were treated by and in relation to the parties acting for the state (police and prosecution). We were frequently told about the importance of representation at the police station, as DS4 expresses:

The Police and Criminal Evidence Act 1984 was a tremendous piece of legislation.... I had experience of the way the police treated suspects, which was terrible. There was then a massive improvement.

Yet, the formal rules do not necessarily ensure that the suspect's detention is successfully 'balanced' by the right to legal advice, as the police find ways to work around the requirements under PACE:

But what you see over time is the police trying to get round those safeguards, because from their point of view the end justifies the means. (DS4)

Thus, the formalised role of lawyers at the police station was not realised as it could be. Whilst understanding – and being able to invoke – one's right to legal advice may provide a suspect with resilience, previous research has illustrated that police may circumvent the right to legal advice by discouraging suspects from enforcing their rights (see Dehaghani, 2019; McConville, Sanders and Leng, 1991). Those with little-to-no experience of the criminal process may fail to understand their rights, may be of the (not entirely mistaken) belief that availing of legal advice may result in an extended

period of detention (Kemp, 2013; Skinns, 2009) and/or may worry a positive request is indicative of guilt (Blackstock et al, 2014). As such, some suspects may fail to avail themselves of legal advice; the implications may be long-term:

I dealt with a chap yesterday who'd had a caution for having a baseball bat in the back of his car. Didn't have a lawyer. That was at the police station...said, "Oh I didn't even know, it was my mate's bat, I didn't even know it was in my car, but I had a caution for it." I said, "Well, why did you have a caution if you didn't know it was there?" "Police told me to." So there's loads of that in the police station. If they're unrepresented they're at the mercy of the officer, especially if it's a voluntary, so there's no Custody Sergeant, they just administer the caution, and then it's on their record and they've had no advice, and there's nobody checking it's the right thing to do. (DS1)

This quote illustrates, in part, the vital role lawyers play in ensuring suspects understand the implications of what happens at the police station and the impact that this may have on the rest of their lives. It also illustrates the importance of the lawyer in demystifying the process and challenging police malpractice. In doing so, the lawyer can provide resilience to their clients; failing to do so can enable the police to circumvent rights and entitlements (and thus provides resilience to the police). Yet, the resilience provided by the lawyer to the client depends upon access at the police station: whilst lawyers recognised the value of their work here, they nevertheless viewed police station duty work as one of the worst aspects of their job (Newman, 2013). The low fees paid for police station work means that firms, to remain viable, must take on large volumes – this is a major strategy through which many firms are able to survive (Newman and Welsh, 2019; Sommerlad, 2001). The stress caused by the relentless nature of volume, sausage factory work (Newman, 2013), can be seen below as one important factor, but so too is the unpredictable and demanding nature of police station work:

I've only got so many hours in a day. I was a twenty-four-hour duty solicitor...from six o'clock last [night] 'til six o'clock tonight...up until ten o'clock we'd had ten calls, ten new cases, which are ongoing as we speak in the police station. So you've got to deal with those. Each one of those files has got to be opened.... I had a call at half past three this morning that I took. He was too drunk, but I still had to take the call, and speak to the police.... When I could get through to them, nobody was on. Spoke to the Custody Sergeant, they gave me a bit of information, and then I said, "Well can I speak to him through the cell intercom?" "Oh, no, he's pissed." So, I've been up since half past three just to be told someone's drunk. And then

you're trying to go back to sleep and that's not happening because you end up having at one o'clock in the morning, so I'd had two and a half hours sleep by then.... You know, it is, it's just not fair. They don't, they don't care about us, and the pressures we're under, and we're under a lot of pressure. (DS15)

This account of a duty shift highlights how tough it could be for lawyers; the police station could be a gruelling site of work. Due to the unpredictable but invariably anti-social nature of being on call for the police station, duty work was frequently cited as a reason that lawyers would leave criminal legal aid. That many lawyers choose – or feel compelled to – abandon such work, can reduce the resilience of both individuals – lawyers and their clients – and of the profession, more generally (Harris, Dehaghani and Newman, forthcoming). Added to its unpleasant nature, the lawyers we interviewed explained that the fee structure created barriers to making police station work profitable:

You lose money hand over fist on your general police station work, unless you've got a load of people in, and you get picking up standard fee. Standard fee in the police station's a hundred and sixty-nine. Pounds. And that's regardless of how many times you've got to go back. So you can do up to, I think it's sixteen hours' worth of work, for your hundred and sixty-nine pounds. So you lose money on that. (DS1)

What emerged from the impact of funding restrictions was a model of volume work in the police station. Fundamentally, lawyers need to be as quick as possible at the police station and process as many cases as possible to render their work financially viable:

But I think it, yeah, you know, what we get a hundred and sixty-six pounds as a fixed-fee for the police station? So if, if you know, the incentive is there to get in and get out? So, and if you can deal with sort of five or six cases in one day rather than spend six hours in one case, there's the incentive. There's the financial incentive.... So you have to be, you know, you have to be able to do enough of these cases to make it work, otherwise, yeah, the finances don't work. (DS9)

Such an approach means, however, that lawyers were not necessarily giving cases the due care and attention they required: as DS9 highlighted, lawyers are incentivised to 'get in and out'. Another aspect of this sausage factory model was the regularity with which the firms we spoke to practiced discontinuous representation, i.e. that defendants would see someone different at various stages of

their case (see McConville et al, 1994; Newman, 2013). DS9 explained how discontinuous representation impacted their work and also addressed the way it allowed them to avoid the police station as much as possible:

They will certainly see somebody different, generally they'll see somebody different in the police station to court... one of the case workers at the police station. I do some police stations because you have to do so many to retain your duty qualification. Frankly if I didn't have to, didn't need to do that I wouldn't be in the police station. It's not a waste of my time, but I can spend my time better. So they would see one of our case workers in the police station.

If it were not to retain the duty qualification, DS9 suggested that he would not conduct police station work. The disincentivisation resulting from paltry fees meant that the suspect would likely see one legal representative – unlikely a solicitor – at the police station and another – a lawyer – at court. This may have an adverse impact on the lawyer-client relationship and lawyer's knowledge of the case. This would not necessarily be unproblematic of itself but should be considered alongside the time a lawyer has to prepare a case for court, which – as we will explore later – is insufficient. Such can further undermine the lawyer's ability to represent their clients, thus further reducing their – and their client's – resilience.

Lawyers also frequently complained about the fixed fee system and how it impacted on the work they felt able to put into a case:

A lot of firms cut more corners or do less...we try to make sure it doesn't impact on the client or the quality of the service they get. But, you know, ten years ago things were being dealt with quite differently.... I remember when you used to get paid on an hourly rate for police station work. And I think it's only natural, if you're getting paid a fixed fee, that you don't particularly want to be there for hours. Because you're not getting paid for hours. (DS1)

They therefore restricted the amount of work conducted on behalf of clients at the police station; they did not feel able – or perhaps willing – to give the full service that they might have once provided. This lawyer explains how the fees have framed the nature of what they do in and around the police station:

There are things that we don't do now. So we wouldn't go to a charge if it was just, if there was no issue over bail. We wouldn't go to an ID procedure because we don't need to.

Contractually we don't need to, and in the quality standards we don't need to, so we don't.... There's a lot of things we used to do. I can remember the days going into police stations and looking at unused material, and they used to give you the boxes and you used to just go through them and then photocopy what you wanted...but now you get a schedule and it's just whether you challenge that schedule because you know that there's a load of stuff that's not on it. You know, seeing witnesses...we used to, if they couldn't get here, go to them. We don't do that anymore. They've got to come here. Site inspections, take photographs. We used to go to site on incidents and take photographs of the site, so that the barrister could get a better view of where it happened and what it looked like. Don't do that anymore. Basically it's stripped back to the core stuff that we have to do to provide a Lexcel-compliant service and for our file quality to be okay. But I don't think the clients get the sort of service they used to. It's not as comprehensive as you used to, because it's now all fixed fees. And some of the fixed fees are really rubbish. (DS1)

The reality is thus that lawyers are not doing the work that is required to provide their client – and their client's case – with the attention that may be required to successfully defend the case. Instead, they are simply doing enough to ensure that they are offering a service that is compliant with their regulators. This, at a basic level, means that suspects and defendants are not getting as good a service as may be required to successfully challenge the case against them. It also means that clients are not provided with the important resilience mechanism provided by zealous advocacy and that, crucially, the level of work required of the police and prosecution to counter the defence may decrease.

Yet, not only were there limits to the type of work that a lawyer would conduct on behalf of their clients, there were also limits to when they would be present, as DS7 notes:

It depends on the circumstances. If someone is being charged with a very serious offence, and they know they're not going to get bail, we'll have spoken to them about that while we're there. And if it's two in the morning when they're being charged, and I've gone home at that stage, I'm not going to drive down to the police station just to pick up a charge sheet. I'll speak to them on the phone at that point...we wouldn't be there for charging in those circumstances.

Whilst the lawyer has presented this as relatively unproblematic, their absence may well have implications for the client's understanding of this procedure, thus further undermining the client's resilience in the face of police questioning (which may, in turn, require less of the police).

A further example is shown by DS17 discussing suspects being bailed:

The police station fee...is very minimal for what we actually do because it can include us attending bail backs. There's no extra fee. The fee only includes giving advice to the client at the police station and advising them on the procedure. That procedure for some goes on for weeks and weeks.... It's very hard for us to justify going to that when it's part of the same fee – it shouldn't come down to a financial issue, but it often does.... So it's, you know, it's unfair to them, I think, more than anything, not to us, but to that individual...defendants who are answering bail, you're still going back into that police station, you're going into the custody suite, you're surrounded by police, the custody sergeant, it's still an intimidating environment, I think, whether nothing's going to happen to you or not, isn't it? So, I think you should have a solicitor with you but it's not always feasible, sadly.

This lawyer, unlike DS7, underscores the importance of the lawyer's presence – when a suspect is arrested and detained or answering bail, they are on police territory (Hodgson, 1997); that they are on police territory can have the effect of reducing their resilience (Dehaghani, 2020). Lawyers therefore think carefully about what they view as necessary and what can be avoided:

You have to be conscious of what you're prepared to do for clients. For instance, a police station fee at Newport Central is, I think it's a hundred and sixty-three pounds. So for that we have to go to the police station, any time the client is at the police station, but quite often a client will have lots of other issues at that time, like property they've taken off him.... You know, sometimes you have to make a decision whether you are prepared to spend days and days chasing police officers, because it's time-consuming, and not getting paid for it. So at some point, and, you know, you have to say to a client, "Well look, you know, we get, we've already been to the police station with you three times, we've worked seven, eight hours on your case being at the police station and that's not to mention all the stuff we haven't put on the time recorded on the file because we've made phone calls and sent emails and letters chasing your phone and we still can't get it back." You know, there's a limit on what we're prepared to do. (DS7)

This has implications for an individual: without the support of the lawyer, requests for the return of their belongings may fall on deaf ears. Indeed, in Choongh's (1997) research, suspects found it incredibly difficult to obtain the return of their belongings; in one case, an individual was threatened

with detention for insisting that his belongings be returned. In such cases, the lawyer may have been able to successfully argue for the return of the suspect's belongings. Whilst the lawyer may not have been involved in such discussions before fees were cut or had stagnated, the likelihood of a lawyer now attending for such procedures is low. Although this may not undermine the client's case, it may nevertheless be frustrating for the client. More problematically, the inability – or unwillingness (and we would argue that it is more the former than the latter, with such fee structures in place) – to spend time with a client can have a deleterious effect on the service offered and thus can, crucially, undermine the lawyer-client relationship (thus further reducing the importance resilience mechanism of legal advice and, at the court stage, representation). Yet, the concerns went beyond being unable to offer an adequate service to their clients: some lawyers worried about the future viability of police station work more generally (see also Dehaghani and Newman, forthcoming):

Criminal work for me is basically a labour of love.... I'm forty-two, I'm not that sort of age— plenty of solicitors get to a certain age and they think, "Ah, I can't be bothered with going out at two o'clock in the morning to the police station, or I can't be bothered for the phone to be going all night. I just can't be bothered to do it." (DS11)

As we have discussed elsewhere (Dehaghani and Newman, forthcoming), lawyers could imagine a future with suspects routinely unrepresented in the police station. The inability of the lawyer to effectively advise and represent their client could reduce the suspect's resilience, particularly when pitted against the state (police and prosecution). Lawyers are unable to provide zealous representation – and, indeed, adequate advice – at the police station and such has implications for – and is further exacerbated by – what happens later in the proceedings.

After the Police Station

What happens after the police station can also be hugely important if the case is being processed beyond this first stage. The lawyer-client relationship was identified as important by DS8, amongst others:

I think it builds up their rapport... I think that helps with them trusting you a bit. Some clients think the world is against them, and I think if they've got a friendly face that's been there perhaps from the start or at least for a good while, I think it just builds the relationship and does make them more comfortable.

Trust is important to the lawyer-client relationship; without it, the resilience provided through and by the relationship can be further depleted. We were regularly told that it was crucial for lawyers to build up trust with defendants. Key to this was the defendant being made to feel like they were given time:

They have to trust you, and hopefully have to like you as well...it's still important that they trust that I'm giving them the right advice and that they trust that I've got their best interests at heart, you know? I'm not just trying to get out as quickly as possible, I've got no vested interest with the police. You know, all this kind of stuff. Because – they have to feel like they've had the best possible chance, I think, and the best level of service. (DS16)

Yet, as we examined above, time is in short supply; lawyers struggled to develop any sort of relationship given the time constraints necessitated by the fixed fee system. The rapport with a client prior to the first hearing was viewed as incredibly valuable:

And let's say you had a client who's not been in trouble before, you'd like to see them before the first hearing, to prepare everything for that...and take your time and go through everything. (DS4)

We were frequently informed that clients would not come to meet their lawyers between the police station and court. As in this example, this made the police station an especially important site for giving the lawyer an insight into the client and their case:

With a lot of clients, you see, you see them in the police station and...you can make any number of appointments you wish and they won't bother coming to the office to meet with you beforehand, to go through the papers, even when that's really useful for them to do. So generally the spadework of most cases will be done at the police station and at the court when you go through the papers with them. (DS18)

One of the major impacts of not meeting clients was the inability to explore what was said at the police station. This lawyer talked about the challenges involved:

If it's an anticipated guilty plea file, we'll have barebones charge sheets, case summary, and previous convictions, that's it. And the case summary is what's written by the officer, which is

quite often misleading...there's a slant to it, a more prosecution-minded slant to what is said, as opposed to what perhaps we may write as a summary of that interview, especially when you're looking at self-defence, and the actual mechanics and the timings of certain things. An officer may write, "He admitted hitting him," as a summary of the interview. Well, that's not a summary of the interview. And we're expected to rely on that. (DS7)

This quote illustrates not only the limited information that lawyers may receive from the police or prosecution, but also how important it is to have continuous representation (in such cases, the lawyer would have been aware of what was said at interview).¹² Continuous representation, we posit, is yet a further way in which resilience can be bolstered (here through adequate knowledge of the case). Although the lawyers framed this as the client's unwillingness to engage, it is possible that the already limited engagement between the lawyer and the client causes the client to further disengage from the process, thus again damaging the client – and their lawyer's – resilience. Whilst the lawyers informed us that their clients were often uninterested in coming to meet them, there were also difficulties in the lawyers making a financial case for meeting them, as relayed by DS3:

You would be able to claim, obviously, your mileage on that for going to the prison during working hours. But if you've only got a relatively low-paying case, it's not going to make financial sense, and the firm that you're with probably aren't going to want you to go and see the client six times, because each time you're [going], it's costing the firm twenty, thirty pounds. Six visits, it soon adds up. And then that also isn't able to be spent on another case and other cases which might equally need your time and are either more valuable in terms of the actual page count and the actual fee that you get at the end of it.

This inevitably means that defendants are not getting the attention that they may well require because it simply costs too much to do so. Lawyers in our research found this practical reality incredibly difficult to contend with; they recognised how important it was to provide their client with this vital service, particularly in relation to rapport-building, but were also concerned about the practical business needs (see Tata, 2007):

I struggle with balancing giving a service and meeting the business demand, because you've got to give them the service, but you've got to be mindful of the fact that actually I'm now

¹² It also underscores the importance of timely delivery of case materials, another issue that faces criminal defence solicitors often expected to prepare cases at very short notice.

costing my firm money by going to see this client, but he wants to me, he needs to see me. Can I do three visits in one day? Because I'm going to go there anyway, and the prison go, "Oh, you can only see two." So you've got to go twice. There are so many pressures...you are so restricted in what you, financially, can do to help the client in terms of the time that you can spend, which then impacts the rapport that you have with them, so it's...important that you can build the rapport quickly because you are so restricted on time, and the ultimate page count that comes from the case at the end of it. (DS3)

One of the impediments to meeting before court was found in late disclosure being provided by the prosecution. This then rendered pointless an earlier meeting, as DS1 and DS17 explain:

Disclosure from the prosecution is getting later and later and later. And then there's no point having a client coming in when you've got nothing to discuss with them. So last week, three trials, we'd had the summary, but the witness statements on the one got served two days before the trial, and the unused, and the other one the witness statements and the unused got served the afternoon before the trial.

I think there's too much pressure of "It's got to be done now, at this very first hearing." If that's going to happen then I think the Crown Prosecution Service need to be serving things, not on the day of a case, they need to be serving it two weeks before. And then perhaps that will allow us to see the client in full, have legal aid at that stage, and advise them on all their options before we even get to court...it's a catch twenty-two: we can't see the client and take their instructions until we've got legal aid; a lot of people are not in a position to pay privately, so 90% of the time we're turning up at court, applying for legal aid on the day, getting the paperwork on the morning, and then we've got, you know, an hour or so with the client for them to decide there and then... So, I think there's far too much pressure on that very first hearing to indicate what you're going to do when you haven't had an opportunity to consider, you know, do you want to get an expert report? Do you want to speak to a barrister first? What about your defence witnesses? Are they—because we can't do any of this stuff until we've got funding.

Not only does the prosecution serve papers at a very late stage in the proceedings, such late disclosures can delay decisions on legal aid. The lawyers are thus in a difficult bind: as fees are so paltry, they are, naturally, reluctant to conduct work without first obtaining a representation order,

but waiting for disclosure and the representation order often means having very little time to spend on preparing for the case. Such may explain why lawyers often prepare their cases on the day of the trial (see Newman, 2013). The issues work in tandem to compound disadvantage for the defence and increase the resilience of the prosecution. Failures – whether deliberate or inadvertent – in prosecution disclosure can thus further undermine the defence position, reducing the resilience of the defence whilst bolstering the resilience of the prosecution (unless, of course, the failure to disclose results in the case being discontinued (see Smith, 2017)). Further, as Johnston (2020: 17) highlights, the court is often unsympathetic to defence lawyers who apply for an adjournment before a plea is taken. The courts are therefore, as noted earlier, not neutral in the promotion – or undermining – of resilience.

The time available at court was also an issue; it was inadequate as DS13 notes:

In court, I think a lot of clients see it as a conveyor belt. I've been interrupted with clients a number of times by, for example, ushers who have been sent by the court clerks to get us into court as soon as possible, and I think people say to you that they're under pressure then to, to speed up and it makes them less willing to talk then. They feel like the system is against them before they've even stepped into the courtroom.

The ability for the lawyer to spend time with the client and become well-acquainted with the client's case provides an important resilience mechanism to the defence. Yet, it was also acknowledged that the court was far from an ideal environment to get to know a client or build up an understanding of their case. Meeting a client for the first time at court was also problematic as cases tended to be concluded so quickly, adopting a largely 'meet 'em, greet 'em, plead 'em' approach (Rhode, 2004: 12):

One of the big changes is when I first started doing the job you'd get an unbelievable number of adjournments...that doesn't happen now. Your client can plead guilty; in the old days, they would adjourn for a pre-sentence report, another two- or three-week adjournment. And now your client will turn up at court, you might meet them for the first time, guilty plea and get sentenced that day. (DS18)

The time to dedicate to the case – another way to promote resilience – was also undermined. Often, lawyers would often pick-up cases on the day, invariably doing so when on duty at the Magistrates' Court. As in this example, this meant that they would not have much knowledge of the defendant's case, thus further reducing resilience (in the form of knowledge):

There's one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve so far. Twelve cases. And they range from assaults to fraud to stalking, to breaches of a restraining order to...an affray. That's the most recent one! And a fourteen-year-old boy. So, you know, and he doesn't speak English! So it's an interesting—so there's, you know, twelve new cases that I'm going to have to get to grips with sometime today, tomorrow. One or two of those will be in court in the morning, so we'll be back here tomorrow, having known nothing about them, and start the ball rolling again. And the client will go in then, and the first thing he'll say is, "Well, what do you think about my case?" Now, I haven't got a clue. I haven't read anything about it yet! And the court will be saying "Go on, aren't you ready yet?" Like I was [this] morning. "No, the prosecution hasn't sent me any papers yet." I've rung them fifteen times. (DS15)

Such points to an issue addressed above: a failure on the part of the prosecution to provide information on the case.¹³ Whilst this reduces the lawyer's and client's resilience, it may also place the prosecution in an advantageous position (as the prosecution are met with a weakened opponent). The stress in court can further compound the issues addressed above and can render it difficult for the lawyer to discuss the case in the depth required to make – often life-changing – decisions. Such was expressed by this lawyer:

It probably impacts more on those clients in which you haven't got a relationship. So people who are charged, and this is where some clients will find it daunting at court, is because they're faced with, perhaps it isn't a straightforward matter, and they're faced with a prospect of getting the papers that morning, perhaps spending at best an hour or two in your company, and then having to plead guilty or not guilty. And some of them will struggle to make that decision...the client's decision-making may be flawed for that reason, and indeed the nature of the advice you give them may be flawed for that reason because the speed in which you're obliged to deliver that advice and they're obliged to make a decision. (DS18)

In these circumstances of time-pressure and limited information, the lawyers told us it was too much to expect defendants to be able to make informed choices. Without the ability to make an informed decision, the client's resilience is yet further weakened.

¹³ According to the Criminal Procedure Rules (CrimPR), the prosecution's disclosure obligations are ongoing throughout the trial. Johnston (2020) discusses the problems of disclosure vis-à-vis guilty pleas.

The interviews thus demonstrate how difficult it is for lawyers to get acquainted with the client or their case: they are unable to spend time with their clients and acquire the knowledge required to successfully defend the case; they are unable to realise their potential as zealous advocates and may, in many cases, be failing their clients.

Conclusion and the implications for suspects and defendants

Within this paper we have examined how restrictions and reforms affecting the practice of criminal defence impacts upon lawyers and their clients, illustrating also how challenges faced by criminal legal aid lawyers restrict their practice. By extension, police and prosecution reactively benefit (whatever their own challenges faced by, for example, austerity cuts and staffing reductions) by the retreat and dilution of the defence lawyer from their role as zealous advocate. Defence lawyer resilience is being reduced and, as such, the police and prosecution (as opponents of the defence in an adversarial criminal justice system)¹⁴ can – and have – become more resilient as the defence is unable to mount an effective challenge.

The resilience of legal aided criminal defence lawyers is waning but, in such circumstances, so too is the resilience of their clients. Without legal advice and representation, suspects and defendants may journey through the process unaided – or minimally aided – and may be unable to effectively – and meaningfully – participate in their case (see Owusu-Bempah, 2017). The lawyer is an important resilience mechanism for their clients, but the resilience of lawyers has been diminished by the manner in which their work has been devalued and the ways in which they have had to respond to fee cuts and stagnation. Their work at the police station – an important aspect of the criminal process as the first and often only stage (Jackson, 2016; Pivaty et al, 2020) – is diminished because of the fixed fee system (which provides an incentive for lawyers to spend as little time attending the station as possible) and the wider requirements to take on volume work. The balancing of competing demands between financial and client interests raise potential ethical questions – and the risk that some duties towards clients may not be met – which speaks to Tata's (2007) notion of "ethical indeterminacy".¹⁵ The problem is also partly that in diminishing the safeguards for suspects, the police can approach the

¹⁴ It may be argued that because the defence are, under a managerialist criminal justice system, co-opted to work for the prosecution. This is possibly a reality now but should not be accepted as the normative position.

¹⁵ Newman (2012) has suggested that remedying the problems of low pay and its impact on the lawyer-client relationship may take more than simply addressing the inadequate remuneration. He further argues that there should be attention given to the lawyer's ethical training, given that potential bad practices may have become embedded within the profession. Further research is required to examine the ethical implications of low pay on lawyer's attitudes and behaviour toward clients, in addition to how to rectify these ethical issues.

process with relative impunity; whilst the resilience of the defence lawyer and their client is diminishing, so too can the resilience of the police increase. As Dehaghani (2019) discusses, for example, police officers – including custody officers – can breach PACE requirements with, as they saw it, few to no repercussions, and the reason for such an approach was that they were fully cognisant of the fact that lawyers did not have time to carefully sift through evidence to detect a breach of PACE. The problem is not necessarily remedied at the courts – supposing the case reaches this stage – because lawyers (both solicitors and barristers) simply do not have the time to meet with the clients in advance, let alone explore the intricacies – or even basics – of the case (see Newman, 2013). This, we believe, is particularly concerning: when, in the past, lawyers may have been able to challenge police officers for illegal or questionable practices (even if they were unwilling to do so) or to scrutinise the – police¹⁶ and – prosecution’s case, they now simply do not have the time. Thus, it is very possible, as Cape (2013) has suggested, that miscarriages of justice are being designed back into the process.

Newman (2013) has shown that clients are rendered reliant upon their lawyers; the criminal justice system is confusing, self-referential, and alienating. Lawyers act as translators meaning the relationship between the two is at the heart of access to criminal justice. Fundamentally, lawyers should operate to redress the imbalance of power that the lay person faces when they find themselves against the might of the state in the police station or court. A vulnerability analysis alerts us to the ways in which lawyers, the institutions within which they work, and their clients may have reduced resilience following years of fee stagnation and cuts. It also alerts us to how resilience may wane for some and thus increase for others. To echo Smith and Cape (2017: 13), ‘the prospects for criminal legal aid in England and Wales are bleak’. Yet to take this further, the prospects for access to justice more generally for suspects and defendants appear even more miserable. There is a need to consider how, by stripping resilience from one aspect of the system, we are attributing further resilience to another. The issue may not be resolved with increased funding alone, but it must nevertheless be resolved if suspects and defendants are going to be provided with the resilience to realise their fair trial rights. Further study should examine in greater detail the relationships dynamics between defence and prosecution in practice. Such would be especially pertinent when focused on antagonistic (or supposedly neutral) parties, considering McConville and Marsh’s (2014) hypothesis that the contemporary defence lawyer effectively works with other parties (police and prosecutors, also judges) to cause widespread miscarriages justice.

¹⁶ As the police construct this case for the prosecution (see McConville, Sanders and Leng, 1991).

This paper aims to set the intellectual agenda and urges that greater use is made of vulnerability theory when examining the relationships between prosecution and defence. Vulnerability theory alerts us to the interconnectedness of human reality: reducing resilience in one domain can have the effect of increasing resilience in another. There is a need to explore how depletion of defence resistance has a knock-on effect with other parties, and how that impacts access to justice. To understand the resilience of lawyers and their clients in such trying times for criminal legal aid will require looking more closely at their relationship to one another and the wider system.

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