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Title: The dichotomy of “first timer” and “regular” and its implications for legal advice and assistance

Abstract:

When an individual is suspected or accused of committing a criminal offence, they are brought into the realm of the criminal process. This process can be complex and alien, and the accused person may not understand – or be able to engage with – elements thereof. This paper examines how experiences of the criminal process are framed by lawyers, drawing from interviews conducted with lawyers (N = 36) as part of a larger project on the experiences of criminal justice in (south) Wales. Lawyers, when discussing the experiences of the accused, made frequent distinctions between “first timers” and “regulars”. Whilst this distinction has been touched-upon in previous studies, it has not yet been subject to much exploration and interrogation. Within this paper, we explore and critique the how and why of this distinction, querying the utility and limits of such a distinction. We argue that whilst an accused’s experience should be accounted for, it is unhelpful to frame “regulars” as not needing – or being undeserving – of attention.

Introduction

When an individual is suspected or accused¹ of committing a criminal offence, they are brought into the realm of the criminal process. This ‘process involves convoluted procedures and unfamiliar linguistic conventions, resting on a mass of highly technical, interlocking and overlapping laws stretching back centuries’ (Dehaghani and Newman, 2017). Social control is imposed in both courts and in police stations (see Carlen, 1976; and Choongh, 1997). The criminal accused can thus be alienated and therefore precluded from adopting an active role during the process (see McBarnet 1981; Owusu-Bempah, 2017; Welsh, 2022). Further, the accused is at once compelled to participate in proceedings against them, but also prevented from actively participating in these proceedings (Owusu-Bempah, 2017; Quirk, 2017). There are various mechanisms and safeguards available to the accused. At the police station, as a suspect, the accused is entitled to free and independent legal advice (s 58 of the Police and Criminal Evidence Act 1984) and, if that suspect is considered ‘vulnerable’, they are also

¹ The term ‘accused’ will be used throughout as a catch-all to cover suspects and defendants, although specific terms may be used where necessary/appropriate.

entitled to have an appropriate adult present (see Dehaghani 2016). Yet, the provision of such support is conditional upon the custody officer who, as McConville *et al* (1991: 42) highlight, is nevertheless ‘a police officer with collegial and institutional ties’ with other officers. Within the adversarial criminal process, the custody officer is, in essence, an opponent of the suspect and, within police custody, the police may have a significant degree of control - territorial, informational, and physical (Hodgson, 1994; Dehaghani, 2019; 2020). The accused is also provided with support for their case more broadly, in the form of legal advice and representation (see Article 6 ECHR; *Salduz*). However, such advice and representation, in England and Wales, is conditional on the significantly restrictive means and merits tests when moving beyond the police station (see, for example, Legal Aid Agency, 2020).² Further, criminal defence lawyers are increasingly under-resourced and overworked and may, therefore, spend an insufficient amount of time both with their client and in preparation for their clients’ case (Newman, 2013; McConville *et al*, 1994; Welsh, 2017; Dehaghani and Newman, 2017; XXXX and XXXX, 2020a; Thornton, 2020).

Previous research has indicated that the support that an accused receives or the way in which they are treated may be premised upon whether that individual has had previous experience of the criminal process (Dehaghani, 2017; 2019; Jacobson *et al*, 2016; Kemp and Hodgson, 2016. See also Quirk, 2017; Wooff and Skinns, 2018),³ yet the ways in which experience of the criminal process is influenced by an individual’s previous contact with the criminal process has been subject to little attention. Within this paper, we draw upon findings from an empirical study examining how the accused experienced or was said to experience the criminal process. Specifically, we examine the frequent comparisons made between “first timers” and “regulars” in respect of their feelings towards or within the process, knowledge and understanding of the process, reason for contact with the criminal justice system, and

² It should be noted that the right to a fair trial is a limited right, i.e., the right can be derogated from in times of war or national emergency. Access to state funded legal advice and representation is subject to restrictive criteria, however, at the police station, advice is free for all suspects (but may be limited to, for example, telephone advice for ‘minor’ offences).

³ Wooff and Skinns (2018: 568) point to the fluidity of emotion within the context of police custody, noting differences between the emotions felt by someone on their first arrest (‘devastated’ – CV_DET4) and a later arrest (‘oh no, not again’ – CV_DET4). Wooff and Skinns note (2018: 568), *inter alia*, ‘the importance of time and the impact of unknown outcomes’, on emotional responses to police custody, particularly for the ‘booking-in’ procedure. The perception of ‘first timer’ and ‘experienced’ is also found beyond England and Wales – see, for example, Blackstock *et al* (2014).

the need for a lawyer. We also query the assumptions made by lawyers, drawing upon the interviews of those who acknowledged that even “regulars” may struggle with(in) the process.

Whilst it is undoubtedly true that some accused persons may require more – or different types of – assistance than others, and that lawyers should adapt to the needs of their clients, we caution against the use of blanket assumptions. All accused persons, regardless of whether it is their first- or fiftieth time journeying through the process, require support and assistance. Within the adversarial process, this support should – and must – be provided by the lawyer. Lawyers should, of course, be responsive to their client’s needs, however, the deployment of a binary categorisation (if indeed a binary *is* adopted in reality) may result in those who require support being assumed to not be in need of support.⁴ This paper, therefore, makes two contributions. First, it explores the “first timer” and “regular” dichotomy in detail based on lawyer interviews. Whilst these binaries have been touched-upon elsewhere, they have yet to be subject to in-depth treatment. Second, it highlights some of the problems with making blanket assumptions about the accused and their experience of, knowledge about, and feelings towards the criminal process. Before exploring the data and the core themes⁵ therefrom emerging, we provide some detail on our research methods.

Methods

The data examined within this paper focuses on 20 semi-structured interviews with solicitors (DS1-DS20) and 16 semi-structured interviews with barristers (BS1-BS16).⁶ Solicitors were drawn from 16 firms of varying sizes and barristers came from five chambers. All practitioners

⁴ As raised in the conclusion, lawyers face significant time and resource constraints owing to restrictions on legal aid (see XXXX and XXXX; XXXX and XXXX) and may, therefore, be reluctant – or unable – to offer all clients with a significant level of support. As also noted later, a “regular” accused may still require support and, given the limited time a lawyer spends with the client, it may be difficult to determine precisely the level and type of support required.

⁵ As will be apparent, there is some overlap between themes, which suggests that feelings, knowledge, confidence, and the subsequent need for a lawyer are all inextricably bound.

⁶ As part of this project, we also interviewed those suspected and/or accused of crimes, as well as family members of those suspected and/or accused. The focus of this project was on experiences of criminal justice, or perhaps more accurately, of the criminal process. The “first timer”/“regular” comparison did not emerge in interviews with those suspected and/or accused, or in interviews with family members. However, we acknowledge that this is an area ripe for exploration.

interviewed were engaged in legally aided criminal defence, working across England and Wales, but based in south Wales. Interviews focused on work at the police station, the magistrates' court, and the Crown Court, and were premised upon defence practitioners' experiences of interacting with clients and how these interactions had been constrained by cuts to funding (see XXXX and XXXX 2021 for a discussion). Questions included a focus on practitioners' perceptions of the accused's experiences (inter alia, thoughts, feelings, understanding, and ability to engage) of various stages of the criminal process (namely, stop and search, arrest, police station interview, first appearances at court, and at/during trial). Interviews ranged from 29 minutes to 2 hours 2 minutes, with an average of 1 hour, and were transcribed and coded using thematic analysis.⁷

Categorising clients: the “regulars” and the “first timers”

Binaries are not uncommon within discussions of the criminal process. Indeed, experiences of and support made available to individuals may depend upon how they are categorised. Typical binaries or dichotomies in the criminal process manifest in the form of victim/offender, vulnerable/non-vulnerable, “good criminal” /“villain”, deserving/undeserving, guilty/not guilty (or innocent), serious/not serious (or minor), trivial/complex (see, for example, Drake and Henley, 2014; Dehaghani 2017; 2019; Jacobson et al, 2016; Kemp and Hodgson, 2016; McBarnet, 1981; Quirk, 2017). Within the realm of youth justice, for example, children are recognised as both vulnerable and in need of protection, and transgressive and in need of punishment (see Phoenix 2008: 364; Brown, 2015; Kemp and Hodgson, 2015). False dichotomies are often made between “victim” and “offender”, particularly within (British) political discourse (Drake and Henley, 2014), even though the roles of the accused and the victim are often interchangeable (Welsh et al, 2021. See also Ahearne, 2020). Often, these binaries can result in differential treatment. Special measures, for example, are available to vulnerable victims (and other non-defence witnesses) (Youth Justice and Criminal Evidence Act 1999), yet the vulnerable defendant – who can avail of special measures only at the discretion of the trial judge (see *R (on the application of C) v Sevenoaks Youth Court*; as confirmed in *R v Cox (Anthony Russell)*) – is unable to access the

⁷ A method for identifying, analysing, and reporting patterns across a data set, which allows researchers to draw out new insights (Braun and Clarke, 2006).

‘same statutory rights to help and support’ (Jacobson and Talbot, 2009: 1). Binaries may help us order the world around us, but these categories are not mutually exclusive – individuals can occupy more than one category at once and can move between categories once or indeed multiple times.⁸ Binaries can create disparities in how people experience the process (through differential treatment) and can also result in difference vis-à-vis the support with which individuals are provided. This too applies to the criminal accused and the binary of “first timer” and “regular” as offered by the lawyers interviewed. These binaries seem taken for granted, with very little critical interrogation of whether they reflect reality.

When asked about the accused’s experience, lawyers stated that it would depend upon whether upon their experience of the process, namely whether the client was a “first timer” or a “regular”. DS2, for example, ‘always split [clients] ... up into two... clients which [sic] have experience of the legal system, [and] client’s that don’t’;⁹ DS3 went further by explaining that there was a tendency ‘to get complete polar opposites... either career criminals or first-time offenders’ with ‘not many in the middle really’.¹⁰ The accused’s experience ‘would completely depend upon whether [it was their] thirtieth arrest or [their] first arrest’ (BS11).¹¹ These differences were based on feelings towards and experiences and knowledge of various aspects of the criminal process. The “first timer” was typically one who experienced stress and anxiety about the process, who knew little of the process, who came into the process through happenstance, and who needed the lawyer to guide them. The “regular”, by contrast, was someone who was comfortable within the criminal process, who had knowledge and confidence, who accepted their involvement as a ‘cost of doing business’, and who knew the system well enough to engage with it meaningfully.

Feelings: stress versus comfort

⁸ One clear example would be moving from innocent to guilty, particularly considering that the individual is presumed innocent until proven otherwise, but, of course, a victim could become a perpetrator, a perpetrator may have been or may become a victim, and so on.

⁹ DS2 explained that our questions ‘would be answered in a completely different way if I referred to our “regulars”.’

¹⁰ Even the ‘career criminal’ would have been a “first timer” at some point and, moreover, would have later occupied the space in between.

¹¹ Again, failing acknowledge the space in between.

The first stage(s) of the criminal process - arrest and detention – were said to be ‘very daunting’ (DS12) for someone who had not experienced arrest previously – this person’s experience would be marked by negativity. The isolation of detention was also claimed to be particularly disconcerting for a “first timer”:

...we don’t get to see them until the police are ready for interview. So they can be there for a number of hours, and we’ll get there and they’ll be a complete mess, you know? (DS12)¹²

This lack of knowledge and/or experience betrayed a certain naivety among accused people; “first timers”, when faced with unusual and uncertain circumstances, could be said to act in a manner that was not necessarily congruent with their own best interests:

...someone who has never been arrested and finds the whole thing, I imagine, very daunting and very stressful. I know that because you’ll see people saying silly things in interview... and doing things that probably had they had the benefit of hindsight or had a bit more time to calm themselves down and thought about it, and were in a better frame of mind, probably wouldn’t have done or said. (BS8)

Those who had ‘never been in trouble with the police before’ were acknowledged as experiencing ‘massive shock’ (DS4); the worry of ‘being incarcerated’ (BS8) could render the “first timer” ‘usually... quite distraught [and] tired, very emotional, very worried about their house, dependents...’. (BS8). The role of the lawyer was to get the “first timer” through the ‘worst experience of their lives... let them know that... life isn’t over’ (DS6).

By contrast, the “regulars” – ‘those who are always in trouble with the police’ (DS2) – were viewed as ‘pretty happy with it, as long as they don’t have anything on them...’ (DS2). The shock experienced by “first timers” did not extend to those who had ‘been in trouble with the police lots and lots of times before’ (DS4) for whom the experience of arrest and detention (and potential criminalisation) was viewed as ‘not very pleasant, but ...not so much of a shock’

¹² Wooff and Skinns (2018: 575) note how the first – and only – experience of police custody – that which was ‘frightening and horrible’ (SS_DET3) stayed with the detainee.

(DS4). “Regulars”, or those who had experienced the process before, were said to be much less apprehensive (in this particular instance at the police station):

There’s a marked difference between people that are seeing a police station for the first time or people that’s been in there quite a few times. Fear generally. If it’s the first time they’ve been there... Where some of the clients ... who we’ve acted for on multiple occasions, ... been in custody many times, they perhaps don’t get quite as apprehensive about the interview process and about what’s going to happen next. Just familiarisation I suppose (DS8)

Thus, “regulars” were purported to be less apprehensive about the process as compared with “first timers” – ‘familiarisation’, for DS8, diminished the accused’s apprehension.

Knowledge and/or confidence: uncertainty versus routine

“Regulars” were therefore claimed to be able to ‘usually cope fairly well’ (DS6) owing to their familiarity with the process. For “first timers”, however, the process was said to be uncertain and often unpredictable. One of core factors influencing the experience of the “first timer” was this shock with the operation of the process; it was somewhat of a rude awakening for those who did not anticipate how the process played out:

The clients that we deal with who have never been arrested before, professionals or just someone who's never been, you know, in that sort of area before, they find it very shocking... They're always shocked at how the system is because they just never see it, and just think, "I've never done anything wrong, why would I ever need a solicitor? Why would I ever even read about it or look about it?" (DS7)¹³

The fact that many “first timers” did not know what to expect within the first stage – arrest and detention – or subsequent stages – such as interviews – was regarded as causing them panic. The shock is reportedly exacerbated by a lack of knowledge about the system, and, as

¹³ The notion of ‘professionals’, for example, struggling more with the ‘stigma’ of being a suspect in a criminal investigation is explored in further detail later.

illustrated below, by the manner in which the system operates and/or how dire it has become. The shock could be exacerbated by the speed at which decisions were made – often last minute – and the unpredictability of the process. This is arguably because there is less time to process and come to terms with the information provided:

...It seems to be that they will be told—for example, in a police station they will go into an interview today and be told in a months' time, "You've got to come back for an interview." Then they will be phoned, usually by their solicitors' firm, the day of the interview, to say, "Well actually your interview is not today; it's gone off for another three weeks," and they haven't been told. And then they suddenly panic. (DS3)

The process was said to be frustratingly slow, and this surprised the "first timers". Such individuals were also shocked by the apparent lack of information provided to them.¹⁴ Within the police station (see generally Skinns, 2011; Skinns and Wooff, 2019; Dehaghani, 2020), for example, the uncertainty and lack of knowledge can be particularly disconcerting for the "first timer", as DS3 acknowledged:

I tend to get the clients who are first-time offenders. They have never been a police station, even, before, so it is completely new. And it's, to them, it's frustrating because it takes so long, and they find it difficult trying to get the answers. Any answers. So it's... all they want is an update. They just want to know what it is going on.

The 'efficient' and routinised nature of the magistrates' court also caused considerable concern for "first timers" who expected spectacle at the Crown Court, as is often portrayed in televised dramas (Gibbs and Ratcliffe, 2019). The speed at which magistrates' court cases

¹⁴ It may seem contradictory that the process is both slow and efficient. First, the process is made of different components, stages, and actors – it can, thus, be slow in some parts and fast in others. Second, the process – with these various components – may be chaotic in the sense that some aspects are approached with too much speed and efficiency (and, therefore, a lack of careful consideration and planning) and that other aspects appear to 'drag on' for weeks, months and years. The lack of information provided to the accused at various junctures can make some processes appear slow and yet the information comes like a bolt from the blue. The magistrates' court has been noted as particularly chaotic, whereas the Crown Court is viewed as more formal and better organised (XXXX and XXXX, forthcoming. See also McBarnet, 1981; Jacobson et al, 2016). It could be queried, however, whether the pandemic has led to greater chaos in the courts. Other chaotic aspects of release under investigation (see Law Society, 2019) and prosecutorial disclosure (Smith, 2018).

are heard was viewed as particularly distressing for “first timers” who lacked knowledge of the criminal process:

They'll have worried about this case for months, or whatever, and then actually they'll come to court, and instead of maybe in the Crown Court it being three, four, days of big stuff, dramatic stuff, it's over in an hour and a half, two hours. And there's lots of district judges, particularly, who will massively confine the evidence to, "Put your case."... Lots of them don't necessarily want the whole background and the building up of the story you'll get in the Crown Court, where people are giving evidence for a few hours. They don't have time for that, because they've maybe got four trials listed in a day... And I think if I was a defendant, in those circumstances, I'd be a bit confused as to how quick it was over, and how such a big decision could be made on a really short piece of evidence... they must feel that they just go through that machine. (BS14)¹⁵

Yet, it was not simply the “efficiency” in the magistrates’ court that was bewildering, the court buildings themselves, particularly at the Crown Court were said to be intimidating (Jacobson et al 2016; Mulcahy, 2013), especially so for the “first timer”:¹⁶

...It depends on the client. If you’ve got a client who is a first time offender, who has never been through the system before, they haven’t got a clue, and it’s frightening. And if you go over to XXXX [Crown Court], it’s a very intimidating court: all wood panels, high ceilings, judge way up on high. (BS4)

In particular, the hierarchical nature of the court and use of legal language (Newman, 2013) was said to be new and unknown for the “first timer”:

¹⁵ BS14 initially reflects upon their experience of the “first timer”, but then goes on to imagine what the experience would be like for them if they were their client in the same circumstances. This is, therefore, in some ways, two different types of data.

¹⁶ Note also that police custody, particularly ‘the physical space of the charge desk’ was noted as ‘intimidating’ (SS-DET10) for a first-time detainee in Wooff and Skinns’ study (2018: 570).

And they don't know how to project their voice, they're very intimidated, it's very stuffy, it's very authoritative and they're not used to that... They're not used to using titles to address people, that's a huge difference. They're not used to saying, "Sir," or, "Ma'am" or, "Your honour" if they're in the Crown Court. It's terms which are completely alien to them. And lots of court language—arraignment, adjournment, words that we would just say without thinking. To them it's completely new language. (BS11)¹⁷

As noted above, “first timers” were said to lack knowledge of the process. It was the ‘fear of the unknown’ (DS16) that caused a significant degree of anxiety for the “first timer”, a fear which was ‘probably worse than the reality of it’ (DS13). Thus, the first experience of the process was viewed as ‘traumatic’ (DS6) for “first timers” owing to their lack of knowledge, whereas for those who had ‘been through the system before’ (DS6) would ‘know what’s expected of them and what is going to be happening’ (DS6) such that the process would not ‘be such a problem for them’ (DS6). The assertion was, therefore, that those who had been arrested, detained, and processed through the criminal justice system would find the process ‘less scary’ (BS14) than those who have ‘never been arrested before’ (BS14):

I think after the first time, like anything, it [detention] becomes less frightening, perhaps. I mean obviously it does depend on the circumstances, but I imagine once you’ve gone through that first period, it isn’t as frightening or daunting the second time around, and the more it happens, the more used to it you get. (BS13)

The “regulars”, through their accustomisation, were seen to treat the process as ‘routine and trivial’ (BS7), which BS7 claimed was ‘almost baffling’. The process, for the “regulars”, had become so routine that, in contrast with the shock and distress felt by “first-timers”, it seemed like part of their day-to-day:

People tell me about the shock they feel, sometimes distress. And then you’ve got coming into the process the people that are used to it and it just becomes part of their

¹⁷ This reflects further taken for granted assumptions made by lawyers – that their clients would understand the legal language of which lawyers were so accustomed to using.

daily life and as, you know, as significant to them as going to Tesco's to buy a pint of milk is for you or I. (BS10)

Thus, the experience of those who are purportedly “used to” the criminal process is said to be something akin to daily life, as simple as shopping for groceries. It was claimed, however, that those who had been through the system more than once were “well-versed”; they were allegedly able to predict how the process would unfold, in contrast with the “first timers” who were said to find criminal process alien and bewildering.¹⁸ Yet, there were also contrasts made between the nature of contact with the criminal process – a choice for the “regulars”, but a mistake for the “first timers”.

Happenstance and stigma versus doing business and breezing through it

The “regulars”, in contrast with the fearful “first timers”, were also said to perceive their contact as an ‘inconvenience’ (BS11). For those who ‘have been arrested hundreds of times’ (DS5), their contact with the criminal process was said to be an ‘occupational hazard’¹⁹ (DS5) (see also Dehaghani, 2017). “Regulars” were also perceived as viewing the process as ‘a game’, particularly those who have ‘been there a million times before’ who become ‘completely cynical, and sort of numb to it’ (BS3). It was claimed that those who were ‘career criminals’ (BS12) found the process ‘routine’ and would ‘go in, keep the cards close to the chest and will do what they need to do’ (BS12) (see also Quirk, 2017).

Bound-up with these notions of ‘inconvenience’ or ‘gaming the system’, the “regulars” were perceived as those who had actively chosen a particular path in life. The “first timer”, by

¹⁸ Some accused may have gained exposure, not simply through their own prior contract with the criminal justice system, but also through their involvement in “crime families” (see Newman, 2013). Dehaghani (2019: 96), when examining how vulnerability was interpreted by police custody officers, was told that those from ‘criminal fraternity family’ (CO27-M) would be used to ‘criminality going on around them’, may be unemployed, and because of the minimal social impact of being arrested, would ‘glide through the process as if nothing’s wrong’. By contrast, those who would experience significant social and ‘family personal’ impacts were considered vulnerable when going through the police custody process (Dehaghani, 2019: 96). A lack of understanding of process was also considered a vulnerability – those with experience were less vulnerable than those without (Dehaghani 2017; 2019. See also Kemp and Hodgson, 2016). The suggested factors influencing the social impact of a conviction are explored later.

¹⁹ The term ‘occupational hazard’ appeared frequently in reference to the “repeat offenders” (BS15; BS16).

contrast, was largely viewed as someone who had come to the attention of the criminal justice system by happenstance or misfortune:

They need someone that they can trust to get them to the other side of this particular nightmare that they've found themselves in, but of course that's the sort of, the typical defendant that I like to represent, but you also have those for whom, of course, charges and court cases are merely a risk that they've taken on in order to support a lifestyle that they've chosen, and they can usually cope fairly well. (DS6)

At the other end of the spectrum you've got people who are, you know, pitched into something that is totally alien to them, and you know, you think, "God," you know? This is one of the problems, isn't it, where a lot of people say, you know, "Don't get in trouble!" Alright, fine, well you'll find out when you find yourself in the impossible position where you've knocked somebody over on a zebra crossing or whatever and you've killed them, then you're in trouble and then you can come back to us and say, you know, "Don't get in trouble," ... a lot of people find themselves in a position which is not necessarily their own doing. (BS15)

BS15 described an unfortunate set of circumstances that can bring someone into the realm of the criminal justice process – such a person will likely only ever be a “first timer”. Such suggests a level of moral innocence for the “first timer”, which stands in contrast with the view of “regulars” as ‘not necessarily innocent’ (BS5).²⁰ Yet, these notions of moral innocence – or worthiness – were also linked with respectability and thus the stigma of the accused label. One such example was the ‘tidy, respectable A-Level student on his way to university who has just drunk fifteen pints of Stella, gone out, got into a ruckus, and ended up booting someone repeatedly on the ground’ and who had made a ‘small mistake’ that could ‘ruin [their] life’ (BS2). The individual with fewer or no convictions would feel ‘embarrassed’ (BS14) ‘even if [they’d] done nothing wrong’ (DS7) – there was ‘stigma attached to just being

²⁰ BS5 explained that those who have ‘been in the system [are] well-versed in it, [and] understand how it works’. Dehaghani (2017) found that the notion of moral innocence applied more frequently to those who were “new” to the system than those who were more experienced. An individual’s previous experience of the system was enough to challenge perceptions of innocence.

arrested' (DS7). There were frequent references made to sexual offences, particularly where arrests were made at the family home (BS16), such as 'a teacher [who] gets arrested for something he didn't do' (DS7), 'a man of good character' who is arrested at work following a rape complaint (BS9), or a 'young male, the university student, who has gone out into town, had fifteen pints, has gone home with a girl' who later makes a rape allegation 'and [the student's] suddenly pulled out of lectures ... and he's arrested' (DS9).²¹ These examples appear to be influenced by social standing and, crucially, class: the middle class man – be he a teacher, a university or A-Level student, or otherwise “respectable” – would find his experience of arrest to be 'very dehumanising' (BS16) and could respond 'like a rabbit in the headlights' when 'thrown into this foreign interview room' (DS9). This “first timer”, along with the other “first timers”, was said to struggle immensely with the criminal process:

... you have to spend that time to begin just trying to get their attention and make sure they're focusing on, you know, on the conversation that you're having, and focus on the interview rather than what's going to happen at the end of the case (DS9).²²

The lawyer's role in assisting the accused is therefore vital for those who are experiencing the process for the first time and whose naivety and lack of experience may interfere with their understanding.

The need for a lawyer: completely naïve or 'knowing the system better than I do'

As noted by DS6 (above), the experience for the “first timer” can be a 'nightmare' and the role of the lawyer was, as such, 'to get them to the other side'. The “first timers” were viewed as those who needed a great deal of guidance and assistance from their lawyer(s). It was

²¹ Also discussed in BS12's interview: 'the people accused of maybe child porn offences on the internet. People like that, that never think they're going to get caught or maybe a rape complaint that somebody just didn't, it's come out of the—well obviously doesn't come out of the blue, but maybe the person whose allegedly perpetrated that thought there was nothing wrong in that situation that happened two weeks ago.' (BS12). It would be interesting to probe the possibly class – and gender – assumptions that underpin these perceptions; it is possible that BS9 has empathy with those occupying the same (or similar) social class. Gender may influence perceptions of vulnerability (see Dehaghani, 2019. See also Brown, 2015). Offence type can also be seen as relevant, as may race (along with class). On this latter point, BS14 commented that the embarrassment of being accused was 'such a, like, white middle class thing' and likened it to 'being called out in class' (i.e., school).

²² This is interlinked with the stress that the “first timer” may experience.

claimed that the job of the lawyer 'is to know how a client feels and to adjust to that specific client, to provide the level, the level of care that you need to' (DS5).²³ The sense of familiarity with the criminal process was said to have an impact upon the engagement – or otherwise – of the accused. In particular, those who were inexperienced would ask questions that would indicate both their lack of knowledge and their high levels of anxiety. As DS6 noted, "first timers" experience 'confusion, fear, and helplessness'. The first time was viewed as 'very troubling' (BS1); the criminal process was 'completely alien' because 'they've never been through the process before' and thus the lawyer has to 'keep in mind, explain thoroughly the situation and try to get them to understand what's going on' (BS11). This was also acknowledged by DS11:

The worst time for anybody is the first time that they're there. There's, solicitors are there to take them through the process, so a big part of it is to speak to them as soon as you can, make that connection, and then take them through the process. So there is, solicitors would, I'd say, take a bit of pride in being able to make sure that they do understand.

"First timers" were 'a little bit blind to what is going on'; 'criminal defence solicitors are [there] to plug that gap' (DS3). One particular concern was the understanding of legal terminology for those appearing in court for the first time:

What if that person is appearing in court for the first time, believes they're not guilty, and is unrepresented? Doesn't bother with the duty solicitor? How are they supposed to know what the criminal procedure rules say? How are they supposed to know what the hell an issue is?...When they're asked, "Well, do you agree the evidence of so-and-so," and they haven't even seen it, how do they know to say, "Well, no, I don't," rather than feeling that they've got to go with the flow and say, "Yes, that's okay." (DS6)

It was also felt, however, that the inexperienced accused may decline legal advice and representation owing to their lack of knowledge:

²³ As above, there may be gendered, classed, and racialised narratives that shape the level and type of treatment.

So, people who are inexperienced, I think they see it as, "I've got to look as, as though I'm not guilty... I can't have legal representation. I've got to be as helpful as possible, by providing lots of answers and hopefully they'll see through it," which is quite a naïve perspective. (BS3)

"First timers" were viewed as 'most anxious to come and see' their lawyer, such that the lawyer could 'go through the whole thing with them' (DS4) (i.e., explain the process to them). Spending time with the client prior to court was seen as particularly important, most certainly in the context of, for example, explaining how the process would unfold:

For somebody who has never been in that environment before, that's probably where it's very important to speak to them before they go to court, to make them understand that, look, you're not going to be sentenced—well, you know, if you plead guilty then you could get sentenced today; if you plead not guilty it's going to be put off. (BS12)

By contrast with the "first timers", the "regulars" were deemed to have a better understanding of the processes and procedures:

Those who've been in trouble time and time and time again, do you know what? We probably won't see them before the first hearing, because they know the procedure in any event. A chat with them over the phone sometimes is enough, because we can tell them very quickly what we think is going to happen. (DS4)

The first timer is... more worried about the process. The hard lag is more worried about are they going to get lifted and spend time in custody awaiting trial for six months, or are they going to get bail. So that tends to be their main interest, really. (BS2)

Those who had been through the system more than once, particularly those who had been through the system routinely, were viewed as "well-versed" and were purported to understand how the system works. It was also claimed that some accused individuals would

have more experience of the criminal process than the barrister (or solicitor) who was representing them (see also Dehaghani, 2017; 2019):²⁴

You've got a client who's got forty previous convictions, their experience with the criminal justice system is at times, particularly if you're very junior, more familiar than yours. They've been in court more times [laughs]. Particularly in the early days, if you're defending, they've been to court more times than you have. And so there's that, there are defendants who know the system. (BS14)

Regular clients? They'll ask, ask questions left, right and centre... they know the system pretty well. They don't know the fine intricacies, but they know a rough outline of it, they've been doing it long enough, probably longer than I have. So, they'll ask questions. People who don't get in trouble with the law very, very often, they just sit there sometimes, and they nod, and they say, "Okay, well whatever you think is best, whatever you think is best, I'll just go with whatever you say." ... You have to encourage them to ask questions... And I always say, "Look, is there anything you want to ask me, anything at all? Do you understand what's going to happen next?" I kind of coax their lack of understanding out of them. (DS2)

Notably, "regulars" were also said to make decisions that ran counter to the advice of their defence lawyer, such as choosing to plead not guilty:²⁵

In the Crown Court, ... they will run things to trial because they know that they won't get bail, or whatever, and they'll just be wanting to stay out, particularly around Christmas time... You've done everything that you should do in terms of advising them, "The evidence is so strongly against you here I think you're going to be convicted, I think, if you run this at trial." And they'll say, "Okay, okay, well I'm going to plead not

²⁴ In Dehaghani's (2017) research, there were some suspects who were purported to 'know the system better than some of the cops... there's no risk, there's no stress, there's no concern' (CO4-W Interview). It is worth noting that even "regulars" may struggle to actually understand the police caution, for example (see Fenner, Gudjonsson and Clare, 2009: 90).

²⁵ Making an unwise decision is thus, in different contexts, the sign of being a "first timer" and in others the sign of being a "regular".

guilty." When you speak to them a bit more about that... they'll explain to you that their grandchild is going to be born or whatever, or Christmas. (BS14)

The impression is thus that the "regular" understands key elements of the process and is able to make informed choices regarding, for example, whether to plead guilty or not (although see Helm et al, 2021). It can certainly be said that someone who has gained experience and knowledge may be more confident and assertive, and therefore less anxious. However, it cannot be assumed that all outwardly confident and assured "regulars" understood and/or were able to follow the process and procedure. Indeed, their nonchalance may be borne out of resignation or frustration.

Querying the binary

There was a recognition (albeit from a minority of barristers and solicitors) that those who had been through the system on previous occasions, particularly only a few previous occasions, could find the process frightening. BS3, for example, noted that the process would be 'scary and intimidating overall... unless they [the accused] are really, really seasoned'²⁶ – those who had been through the system 'a few times... still find it scary and intimidating' (BS3). This therefore suggests that there is not a binary in operation here, but instead a spectrum, with "first timers" at one end, "the really, really seasoned" at the other, and those, depending on their level of experience, falling in-between. Yet, two barristers queried whether 'experienced' (BS14) or 'seasoned' (BS11) criminals fully comprehended the processes, procedures, and language of criminal justice:

Again, different ends of the spectrum. With an experienced criminal, "Here we go again." I would think. A lot of them have confidence. You hear a lot of them will say confident things after arrest. But I suppose equally they'll say, yeah, a lot of them will say confident things maybe after the arrest but equally there's probably a good number who don't.²⁷ (BS14)

²⁶ Those who are 'really, really seasoned', according to BS3, 'do think it's probably a bit of a joke, and they understand the system', thus reflecting a similar view to other lawyers, as explored discussion above.

²⁷ The term 'spectrum' was also used by BS2: 'you see both ends...: people for whom it is terrifying, and people for whom it's nothing really to write home about'.

Even with... those who have been in and out of the criminal justice system, you do often think, well, you know, "How are they seeing this? Do they understand? Do they still understand a lot of the court legal jargon? Do they understand what's going on?" (BS11)

BS11, thus, recognised the value in taking time to communicate with the accused and doing so in a comprehensible, non-technical manner:

I think I've always tried to include them; in discussion with them before and after, try to avoid jargon, avoid difficult language, explain words that the judges use. An obvious one is the difference between a concurrent and consecutive sentence. Concurrent means, "running with", consecutive runs afterwards... A lot of clients just wouldn't understand that type of language. So just take the effort then to explain to them afterwards.

DS17 also queried their own assumptions, but framed these on the basis of 'enjoyment':

Yeah, perhaps I shouldn't distinguish because obviously any time you're arrested, like any person whether they've been arrested hundred times or once, is never going to enjoy that experience.

There was also some divergence in how experience was framed; it was claimed by DS12 and DS4 to be dependent on broader circumstances:

it all depends on the offender; the offence; the stigma attached to the offence; the stigma attached to the offender; the offender's educational level; the offender's familial circumstances. So there's a lot a lot of things which you have to play; you have to play it as you see it. (DS12)

It depends on the type of person it is, their experience of the criminal justice system, and the level of charge they face, and the likely sentence for that offence if they're convicted or if they're pleading guilty. (DS4)

Blanket binary assumptions

Overall, the lawyers' perceptions of the accused's experience is framed in a dichotomous manner. "First timers" are perceived as feeling more fearful and anxious, whereas the "regulars" (or those with some experience of the process) are viewed as indifferent and unconcerned. Further, "first timers" are purported to have little to no knowledge of the process, are shocked by the process as it unfolds, and are uncertain about the next steps. "Regulars", by contrast, have significant knowledge of the system – going through the process is as routine and mundane as doing one's groceries. "First timers" are framed as those who are interacting with the process through happenstance, whereas "regulars" are engaging through choice. There was, however, some acknowledgment of the nuance, suggesting instead that some lawyers perceive the experience as a spectrum.

Whilst "first timers" may indeed experience aspects of the criminal process in contrast with how these aspects are experienced by the "regulars", the problem arises where assumptions are made regarding the accused's feelings towards and/or ability to meaningfully engage with and understand the process. Jacobson et al (2016) have shown that even those who are routinely processed through the criminal justice system may fail to understand and be able to meaningfully engage with the alien, impenetrable, complex, and interlocking processes and procedures (see also XXXX and XXXX, forthcoming; McConville et al, 1991). Further, whilst a lawyer should adapt to their client's specific needs, it is imperative that those needs are accurately and adequately assessed. Lawyers play a vital role in supporting, advising, and representing their clients, but may become complacent when engaged with those who have been previously through the process. Given the limited time that a lawyer may spend with the client (see, for example, Newman 2013; Welsh and Howard, 2019), we are left unconvinced that such needs have been so assessed. This can have serious negative implications for the accused's ability to effectively and meaningfully participate in the

process. It is necessary to respond to the client's needs; the deployment of a blanket binary frustrates this goal.

It is also worth interrogating whether this binary is reflective of reality: it is possible that lawyers use this binary as an organising device in order to make sense of the accused's experience, but that in their interactions with their clients they adopt a much more individualised response. It is similarly possible that lawyers simply remember the extremes: the particularly 'difficult' and 'demanding' clients, the suicidal clients, the clients with whom they have regular contact, the incredibly fearful clients, the falsely accused clients, and the clients who have been a victim of circumstance. Yet, it is also possible that most accused person's fall under the banner of "first timer" or "regular" and therefore are those with whom lawyers deal with most frequently. Further research is required to understand how lawyers make sense of the accused's experience.

Conclusion

It is evident that lawyers make sense of the accused's experience of the criminal process through a dichotomous lens. However, it is also clear that there are factors outside of the "first timer"/"regular" binary that may influence lawyer's perceptions. The binary itself – if it does indeed exist – is not, however, the problem. Rather, the issues emerge with how the deployment of this binary influences treatment and attention. The "first timer" may receive more regard because they were perceived to be fearful, a victim of circumstance, and were naïve and lacking in knowledge. The "regular" did not require the same hand-holding that the "first timer" received as the "regular" was self-assured (and often cocky), had basic knowledge of the process, and had (often) made an active choice to offend. The "first timer", whether because they are respectable or fearful, is worthy of attention; the "regular" is not (at least not the same extent or in the same manner). But this may be misleading: a nonchalant "regular" may not be nonchalant because they do not care or because they know what is going on; rather, the "regular" may have developed coping mechanisms, may have become resigned to a life of criminalisation, or may have realised that resistance is futile. It is also worth acknowledging that the treatment of "regulars" may not impact upon the service offered if the lawyer believes that the "regular" may instruct them again in future. Lawyers

may not hold the same belief in respect of a “first timer”. This may therefore mean that a lesser service is provided to “first timers” compared with “regulars”. Further research is required to drill further down into this binary to fully understand how it plays out in practice and how – and in what ways – it influences the service provided.

Smith (2013) has set out a model of the zealous advocate as the ideal criminal defence lawyer. Such is based on the classic statement of adversarial from Henry Brougham during the trial of Queen Caroline in 1820:

‘[An] advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty.’

The defence lawyer should offer balance to the prosecution and has an ethical obligation to their client to promote the client’s interests through proper and lawful means. Though not without its critics, the Brougham Philosophy has remained at the heart of adversarial criminal defence for two hundred years. It forms the foundation for Smith’s (2013) valuable conceptualisation of the archetypal, adversarial criminal defence lawyer. As Newman (2013) has explained, access to a criminal legal aid is not enough in and of itself to ensure access to justice; the lawyer-client relationship must be meaningful and effective in protecting and promoting the client’s interests. Defence lawyers could develop an effective, rather than tokenistic, practice that sees them actively defend their client, systematically exposing weaknesses in the prosecution case through investigation and advocacy, and presenting positive arguments on behalf of the accused. Despite developments such as the Criminal Procedure Rules, such an approach suggests that it is not the role of the defence lawyer to assist the prosecution in convicting their client; access to justice requires a lawyer who is fully committed to their, placing their them first. Smith’s (2013) model helps to give practical understanding to how this relationship could function for the needs of those suspected and accused for crimes. It helps to work out how to characterise a well-functioning lawyer-client relationship.

By Smith's (2013) model, the lawyer has three roles, representing the public, the court and the client. Duties to the public (fairness) and duties to the court (procedural justice and truth-seeking) are significant but duties to the client are the most important under this model. This ideal conceptualisation of the criminal defence lawyer suggests that the defence lawyer: be a vigorous and fearless partisan for the client (partisanship); represent, without judgement, any client regardless of the quality of their cause or character (detachment); and protect any information pertinent to the client's case, disclosed to the defence lawyer in confidence (confidentiality). There are limitations to this duty balanced by the other duties, such as the need to avoid lying or misleading the court; however, this model posits that the endeavours of the defence lawyer should prioritise their client, who takes precedence when a conflict of interest arises. The question that emerges from his setting out the model is whether this ideal is becoming redundant as a description of the realities of practice considering the pressures of and on criminal legal aid practice that have developed over recent years (Thornton, 2020; Welsh, 2022; XXXX and XXXX, 2022).

We need to understand the implications of such labelling as has been outlined in this paper, whether and how it impacts on the role that the criminal defence lawyer could play as an agent of access to justice. In what ways is a client dealt with differently if they are a "regular" compared to one who is a "first timer" and does this potentially work to their disadvantage? Such exploration will elucidate the importance of the emergent distinction in perceptions of suspects and accused.

On the matter of the accused's actual levels of understanding, future research could test whether "regulars" do indeed better comprehend criminal process and procedure when compared with "first timers". On the question of perceptions of the accused's experience, factors such as gender, age, race, class, family involvement in the criminal process, educational level, and offence type and how they influence lawyer's perceptions of the accused requires further examination (e.g., whether someone entering the system for the first time and from a 'crime family' is considered a "first timer" or a "regular"). Research is also required to ascertain what factors may influence the accused's experience of the process

from the accused's perspective. As to the matter of the effect of these factors on the lawyer-client relationship, again, further research is necessary.

It is worth recognising that lawyers may be under significant pressure owing to the cuts to – and stagnation of – legal aid fees. It may therefore be tempting to categorise clients through a binary and thus adapt the amount of care and attention accordingly. Yet, access to justice – and that which is meaningful – requires that all individuals are provided support, advice, assistance, and representation when faced with the state as opponent and the potential restrictions on – or deprivation of – liberty.

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