

## “We’re vulnerable too”: an (alternative) analysis of vulnerability within English criminal legal aid and police custody

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### Abstract

This paper considers criminal justice through the lens of vulnerability theory, drawing attention to unexplored or underexplored vulnerabilities in the criminal justice system of England and Wales. We address three layers of vulnerability. The first identifies those who have more traditionally, although not unproblematically, attracted the label ‘vulnerable’; suspects in the criminal process. The second examines the vulnerability of those who, as humans, can be appreciated as vulnerable, but, within their roles in the criminal process, are not typically considered vulnerable – custody officers and defence lawyers. The third, least considered, explores the vulnerability of institutions – the police service and criminal legal aid system. Institutional failure to provide resources, and thus bolster the resilience of suspects and practitioners, can serve to further exacerbate vulnerability. Using empirical data, we explore how vulnerability manifests within the crucial early stages of the criminal process. In doing so, we provide a more holistic and critical account of vulnerability within the criminal justice system.

### Key words

Austerity; neo-liberalism; lawyers; police; suspects; access to justice; vulnerability

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**Resumen**

Este artículo llama la atención sobre las vulnerabilidades poco exploradas del sistema de justicia penal de Inglaterra y Gales. Nos ocupamos de tres capas de vulnerabilidad. La primera se identifica con los sospechosos. La segunda examina la vulnerabilidad de los oficiales de custodia y abogados defensores. La tercera explora la vulnerabilidad de las instituciones - el cuerpo policial y el sistema de asistencia penal. La omisión institucional al proporcionar recursos, y por tanto al reforzar la resiliencia de sospechosos y profesionales, puede exacerbar la vulnerabilidad. Utilizando datos empíricos, analizamos la forma en que la vulnerabilidad se manifiesta en los primeros y cruciales momentos del proceso penal y proporcionamos una explicación más holística y crítica de la vulnerabilidad en el sistema judicial penal.

**Palabras clave**

Austeridad; neoliberalismo; abogados; policía; sospechosos; acceso a la justicia; vulnerabilidad

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## 1. Introduction

Vulnerability in criminal justice must be properly considered in order to understand the functioning of the criminal process and the values of access to justice – issues that appear especially relevant in times of austerity. The use of the term 'vulnerability' is increasing in public, political and academic discourse (see Misztal 2011); it has been used to refer to the neediest within society or those facing difficulty, risk or exposure. Derived from the Latin '*vuln*' meaning 'to wound', vulnerability refers to the '[exposure] to the possibility of being attacked or harmed, either physically or emotionally' (Soanes and Stevenson 2008, p. 1621).<sup>1</sup> Vulnerability has also been used as a theoretical tool through which to compel the state to be more responsive to its institutions and citizens. Fineman has developed a theory that explains why the state should take responsibility for people and protect them from life's hardships, setting out an alternative to the (classical) liberal theory that equality leads to justice.<sup>2</sup> Kohn (2014) describes the theory such:

The central thesis of Fineman's theory of vulnerability is that all human beings are vulnerable and prone to dependency (both chronic and episodic), and the state therefore has a corresponding obligation to reduce, ameliorate, and compensate for that vulnerability.

Everyone is vulnerable, although some people are more resilient than others. For Fineman (2008, p. 10), it is more likely that justice occurs if the state is 'built around the recognition of the vulnerable subject'. The state should 'act to fulfil a well-defined responsibility to implement a comprehensive and just equality regime that ensures access and opportunity for all' (Fineman 2010, pp. 273-274). Fineman argues that most people benefit from the state and its institutions; however, some have better access to it than others. So far, vulnerability theory has been applied mainly within a family law context but its analytical insight can readily be transferred to criminal justice. For example, anyone can access a court in theory and some people benefit from doing so – however, many lack the funds to pursue a case in court and therefore do not have realistic access to the courts. It is in situations like these that Fineman argues that the state has to step in and iron out the differences between the advantaged and the disadvantaged. Under vulnerability theory, 'the state is constituted for the general and "common benefit", not for a select few' (Fineman 2010, p. 274). For this reason, the state falls under a responsibility to prevent the privileged from gaining greater access to resources than those who lack privilege. With recognition of our differing levels of resilience through this theory, the inherent vulnerability of those brought into contact with the criminal justice system in various ways should create a duty for the state to properly fund the key institutions of criminal justice. Deviation from such obligations by restricting funding to produce a criminal justice system that does not properly protect the less resilient could be construed a dereliction of such duties. It will be the contention of this paper that neoliberal ideology, and the austerity agenda it has promoted in recent years, is acting to preclude the state from fulfilling such duties as regards the criminal justice system of England and Wales.

In this paper we will consider the vulnerability of (1) those suspected and accused of crimes, (2) the practitioners involved with them, and (3) the institutions within which the practitioners work. We will highlight that neoliberalism and austerity serve to further exacerbate vulnerability and reduce or undermine resilience. The paper will utilise mostly unpublished original empirical data from two ethnographic studies, one addressing police custody (Study 1) and the other addressing criminal legal aid

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<sup>1</sup> Dictionary definitions can be criticised for their inherent focus on wounding, external injury, mistreatment, and exploitation (Misztal 2011, p. 1). It is not necessarily something negative such as 'being at risk' but can also be something positive such as 'being in touch with one's feelings' (Levine 2004, p. 396).

<sup>2</sup> Equality has numerous limitations, most arguably that it does not recognise the needs of people and does not give the state a positive reason to intervene where people are in need.

(Study 2). These studies are brought together in a novel analysis that seeks to provide a more holistic approach to the impact of funding pressures on those suspected and accused of crime than has previously been offered. The particular analytical lens of vulnerability is offered as holding the potential for fresh perspectives on the experiences of suspects and defendants, and the effects of cost cutting on key institutions of criminal justice. Indeed, this theory has been largely unexplored in the context of criminal justice: engagement within the criminal justice literature has been somewhat limited. This paper also applies, for the first time, this theory to criminal justice actors and the institutions within which they work. It seeks to stimulate future debate on access to justice, contributing to new directions of analysis in the future.

The argument in this paper is an admittedly contentious one, intended to provoke debate and discussion into how best to understand the operation of criminal justice and uphold the principle of access to criminal justice. Many readers will find strange the notion of extending the – more easily accepted – notion of vulnerability for those suspected and accused of crimes to others involved in the criminal process such as police and lawyers. Due to the hierarchies and power dynamics involved in relationships between these representatives of the state and those the state acts against, such a move will feel instinctively problematic if not actually dangerous to some. A conventional popular view of vulnerability in the criminal process would be one that ties vulnerability to victimhood, those wronged by another who the state sees fit to (try and) sanction. Travers (1997, p. 359) suggests that "academics are simply out of step with British society (...) as a large proportion of the British electorate hold very different assumptions about (...) the purpose of criminal justice". As scholars we must recognise, then, that less support would be found in public debate (as judged through political or media discourse) for broadening the vulnerability label to cover those suspected or accused of crimes but, it seems fair to suppose, that many working within academia would not be overly troubled by such a premise. Indeed, it appears at the heart of a great deal of socio-legal scholarship such that it may appear as the traditional academic view in this field. As such, readers of this paper should be comfortable with the assumption that the defendant is in a vulnerable position, because others such as the police (or lawyers) have power, thus meaning that principles should protect defendants.

Such a traditional view might be found among those influenced by important socio-legal work such as Carlen (1976) or McBarnet (1981), for whom the criminal process acts as a means of social control with an effort made by key players to circumvent the democratic rule of law and manage problem populations. What we see, then, is that those suspected and accused of crimes are alienated from the criminal process and thus dominated by the state. The idea that the police who control their liberty while constructing cases against them (McConville *et al.* 1991), or the lawyers who push them towards guilty pleas and manipulate clientele to serve their own ends (McConville *et al.* 1994) might be seen as vulnerable somehow on a par with the inherently weak individual who has the might of the state pitched against them might appear perverse. Indeed, as both authors of this paper began researching criminal justice due to our interest in miscarriages of justice and how to challenge the power of the state, it feels somewhat odd to challenge this traditional view and give such credence to the powerful parties in this relationship. However, we feel it is important we do because criminal justice increasingly evidences a cycle of vulnerability, whereby the weaker – less resilient – parties at the bottom of the system will only ever lose out to a greater degree as economic crises hit harder.

Once taken into the criminal process, those suspected and accused of crimes are rendered largely reliant on those practitioners funded by the state such as police officers and legal aid lawyers. Fair treatment and procedural justice are bound in with such practitioners meeting due process ideals that ensure, for example, that custody officers keep suspects safe and legal aid lawyers allow defendants to have their voices heard. Austerity justice under-funding key institutions such as the police and legal aid systems means that practitioners are vulnerable as they are unable to operate at

their optimum level and this predisposes them to malfunctioning as an increasingly threadbare service invites corners be cut. Working within and on behalf of these institutions, professionals such as officers and lawyers are vulnerable as they no longer feel able to do their jobs to the best of the abilities and thus compromise their standards in order to get by in a chastened financial climate. The net result is that, those suspected and accused of crimes are likely to be more vulnerable as the chances of officers and lawyers behaving badly increases. The doubts that critical scholars may hold about the extent to which police and state-funded lawyers can be trusted to uphold the ideals of due process access to justice after, for example, being implicated in causing or exacerbating so many prominent wrongful convictions over the past half a decade should be felt even stronger when these institutions are overstretched and the professionals feel pushed. It is, then, important to recognise that even those powerful institutions and professionals are vulnerable – even if doing so might feel uncomfortable.

We offer this paper to stimulate argument through an open dialogue rather than looking to shut down conversation or assert the definitive rightness of our approach. We simply believe it is a line of analysis that might be fruitful for forwarding understanding of criminal justice in theory and practice so the reader is invited to respond, whether they agree with part/all of the argument or, in contrast, holds reservations about the approach. At the heart of it, remains an interest in how best to promote citizenship. Seeing properly funded criminal justice as focused on defending rights, institutions such as legal aid must be championed as an offspring of the welfare state, as an instrument for social equality that allows individuals to "protect their badge of citizenship" (Stein 2001, 1). The authority that the state enacts through the criminal justice system will not be respected if it is imposed, but needs to be accountable, legitimate and justified (Faulkner 1996, 6). In ensuring that criminal justice can achieve social justice, the role of the practitioners addressed in this paper is vital.

We begin by providing a discussion on neo-liberalism, austerity and vulnerability before considering criminal justice as a particular example. After outlining the nature of the two studies, insights from each are offered in turn. We first discuss vulnerability in police custody, and the pressures and worries experienced by custody officers as they deal with detainees. Thereafter, we look at vulnerability in the lawyer-client relationship, depicting a criminal defence profession that feels increasingly unable to provide personalised, client-centred service to defendants. Finally, the paper concludes by suggesting areas of future research that can build on this introductory exploration of alternative vulnerability in the criminal process.

## **2. Neo-liberalism and austerity**

The principle of access to justice is loudly proclaimed as a hallmark of democratic states across the world but the reality is that these values are all too often lacking in substance and face ever-increasing political challenge. Access to justice is central to the negotiation of proper relations between citizen and state and thus the constriction of the modern citizen (Rhode 2004). Access to justice values have, however, been increasingly undermined as state provision has been increasingly eroded, with ever larger sections of society missing out on essential public service, *inter alia*, justice (quantity and/or quality of provision). This is symptomatic of the rise of neo-liberal ideology, the politics of which has seen cuts in social spending, alongside greater emphasis on efficiency and deregulation (Pinedo 2011). Neoliberalism has stripped-back the traditional rights-based conceptualisation of access to justice, with a focus now on resource constraints. Choices must be made in the name of the greater good, which negatively impact upon those on the lower rungs of society such as suspects and the accused (Mattei 2009).

Repressive criminal justice policies, emanating from the United States in last 25 years, have spread across the world (Wacquant 2009). The neo-liberal politics of

Reagan has clear influences in Thatcherite policies with 'less tax and more law and order' (cited Gottschalk 2006, p. 186), and whilst in this era it was the Conservatives who reclaimed 'crime' as their issue, it was New Labour, under Tony Blair, that continued populist punitiveness. Blair (1993) out-toughed the Tories by being 'tough on crime, tough on the causes of crime': his three successive New Labour governments introduced one new offence for every day in power, a fast-track for suspects (including the influence of the Criminal Procedure Rules), and more emphasis on victims and witnesses. Both rhetoric and policy proposals aimed to curb the *fat cat lawyers* (Hynes and Robins 2009).

The UK had not, however, descended into Wacquant's (2009, p. 273) US (wherein penal policy can be labelled 'a social vacuum cleaner for the undesirables'), as the same era saw the introduction of progressive measures such as the Human Rights Act 1998 (HRA) and national minimum wage. Matters have, however, worsened during the 'ConDem' Coalition and Conservative majority governments from 2010 onwards (following the crash in 2007/8). Indeed, in her first Conservative Party Conference speech as Prime Minister, Theresa May (2016) garnered perhaps one of the biggest cheers of the morning for her attack on 'left-wing human rights lawyers'. Criminal justice in recent years has exemplified neoliberalism and the austerity agenda used to justify it (see Bell 2011): namely, using financial efficiency as an excuse to marginalise the vulnerable, signaling what Bell (2011) and others (see Garland 2001) refer to as the 'punitive turn'.<sup>3</sup> Neoliberalism, beyond the obvious punitive measures, also has more insidious effects. As Welsh (2013) highlights, sentences are getting harsher but the state is also being stripped-back (see also McConville and Marsh 2014). Socio-legal research can properly interrogate the impact of efficiency drives on those passing through the system (Newman 2016b).

Neoliberalism entails a process of 'capital accumulation by dispossession', funneling assets away from the state (or the service users who rely on it) (Harvey 2006). Though it is formally justified as making economies more efficient, there is little economic evidence of this (Ostry *et al.* 2016). The austerity narrative represents a particular form of dispossession, which Krugman (2015) has identified as popular in neoliberal circles for using the alleged dangers of debt and deficits as clubs with which to beat the welfare state and justify cuts in public spending. The poor, as public service users, are an encumbrance and must be cast aside before they ruin the state.<sup>4</sup> This has led to the particularly prominent aspect of neoliberal ideology, austerity, which is "the progressive destruction of our collective provision against risk" (Levitas 2012). Austerity combines an increasingly punitive attitude to the poor alongside the sale of public assets, the degradation of public services, and the redistribution of income and wealth from the poor to the rich. Such is evident in criminal justice, with Skinns (2016, p. 3) noting that 'coalition government penal policy has moved the penal system in the direction of putative managerialism based on punishment and outsourcing undertaken within the leitmotif, austerity'.

Public sector spending has been slashed and austerity has become the justifying mantra for Coalition social and economic policy – £35bn was cut under the coalition, with plans, by the post-Coalition government, to cut a further £55bn by 2019. Exploring the impact of austerity on state-citizen relations, Hayes and Moore (2017) have identified the manner in which the neoliberal state has worked to reduce the rights-bearing capacity and legal entitlements of citizens in England and Wales. Neoliberalism has allowed the state to justify and explain the change of mentality towards public service provision; austerity is justified on the grounds that this will help future generations as more of the budget is left for them. Requiring assistance is seen as an individual and not a social problem; such a paradigm shift has had

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<sup>3</sup> Although the punitive turn is declining in respect of young people in the justice system (Dehaghani, forthcoming).

<sup>4</sup> A case in point being the response to the global financial crisis of 2007/8, where the elites placed responsibility on the overuse and misuse of state provision rather than internal problems within capitalism.

impact across the welfare state, including criminal justice. The Ministry of Justice budget (including legal aid) fell by 29% under the Coalition, the Home Office budget (including policing) by 19% with overall criminal justice spending falling by 12%. Despite such cuts, the impact of austerity on criminal justice has been little considered to date and represents a topical area of great importance that should be properly engaged with in order to understand the reality of justice in contemporary England and Wales (Newman 2016a).

### 3. Vulnerability theory: countering the neo-liberal discourse?

Recent developments in the vulnerability discourse have seen the term being used as an alternative to human rights (stemming from the United Nations Universal Declaration of Human Rights 1948 and the European Convention on Human Rights (ECHR) 1950, and contained domestically under the HRA). Out of respect for the dignity of the rational, rights-bearing individual, the human rights approach seeks to restrict the power of the state (Sanders *et al.* 2010, p. 28). In the context of the criminal process, the strengthening or clarification of suspects' rights and protections can be traced back to the decisions of the European Court and the European Commission (Cheney *et al.* 1999, p. 3). The most notable rights engaged during varying stages of the criminal process are enshrined in Articles 3, 5, 6 and 8 ECHR. Some of the rights have more force than others – the strongest of which is Article 3, an absolute, non-derogable right that prohibits the use of torture, inhuman or degrading treatment. At the opposite end of the scale is Article 8, a qualified right, which enshrines the right to respect for family life. And on the spectrum between absolute and qualified rights are strong rights contained within Article 5, the right to liberty and security, and Article 6, the right to a fair trial and the presumption of innocence (see Ashworth and Redmayne 2010). The right to a fair trial also extends to pre-trial procedures (see *Teixeira de Castro v Portugal* 1998)<sup>5</sup> and places an obligation on states to provide legal counsel to individuals suspected of committing a criminal offence (see *Salduz v Turkey* 2009).<sup>6</sup> Article 6 makes no mention of suspect vulnerability while the focus on fairness is not without problems as fairness is a variable standard (Greer 2006, p. 251). Ultimately, the ECHR has come under attack for providing 'little more than a minimalist safety net' (Sanders *et al.* 2010, p. 32), a low level guarantee that the state can formally satisfy without necessarily upholding the values that underpin it in practice.<sup>7</sup> The vulnerability discourse may therefore provide a compelling alternative.<sup>8</sup>

Vulnerability theory, as discussed above, is also set out in opposition to neo-liberalism. However, the potential problems should first be recognised and addressed. Firstly, the terms 'vulnerability' or 'vulnerable' have also been used, within the political arena, to justify the restriction of resources to certain groups or individuals, i.e. some individuals are insufficiently 'vulnerable' and thereby are not 'entitled' to receive assistance (see for example, Ryan 2015). Furthermore, vulnerability has insidious uses – as Munro and Scoular (2012, p. 189) have pointed out, whilst vulnerability may be utilised to facilitate improvements in social justice and to, thereby, 'identify, problematise and compel state responses to a universal condition of precarious dependency', it may also be 'used as a category of neo-liberal governance which legitimates state encroachment whilst constructing vulnerable individuals as "risk-managers" who must behave "responsibly" in the face of disadvantage'. The use of the term 'vulnerability' is therefore particularly important, and problematic, against the backdrop of austerity measures and neo-liberal politics. Vulnerability is, moreover, an ill-defined concept – 'the exact meaning and

<sup>5</sup> Indeed, some such legal protections are enshrined in the Police and Criminal Evidence Act 1984 (PACE) – see Dehaghani 2016, 2017.

<sup>6</sup> However, implementation across Europe has not been unproblematic – see Blackstock *et al.* 2013.

<sup>7</sup> Sanders *et al.* (2010) outline a competing freedom perspective that sees rights as a minimum safeguard but the maximisation of freedom as a normative ideal extending beyond the Human Rights Act.

<sup>8</sup> The inter-relation between vulnerability and human rights has been set forth by Turner (2006).



parameters of [vulnerability] remain somewhat elusive' (Munro and Scoular 2012, p. 189). Even within the academic literature, it can mean many things – it refers to innate characteristics or conditions (factors such as youth or old age, learning disability, sensory impairment, pregnancy, physical or mental ill health); circumstances (such as being a sex worker, part of the Roma community or from a low socio-economic group); space (geographical vulnerabilities); risk (with connotations of calculation and management); or a characteristic of the human condition (Brown 2015).

Fineman's earlier 'vulnerability thesis' approaches vulnerability by virtue of embodiment. Rather than characterising, as Turner (2006) suggests, misery and suffering, vulnerability can instead be used as a conceptual tool through which to compel state responsiveness (see Fineman 2013). With regard to the vulnerability thesis, Fineman (2013, p. 21) has previously noted that vulnerability is 'universal and constant when considering the general human condition, [but] must be simultaneously understood as particular, varied, and unique on the individual level'. Further, in this earlier work, Fineman (2013, p. 21) recognised two forms of difference – the first being 'physical: mental, intellectual, and other variations in human embodiment' and the second being 'social and constructed, resulting from the fact that individuals are situated within overlapping and complex webs of economic and institutional relationships'. Our embodiment exposes us to harm: as Fineman (2008, p. 8) notes, 'individuals can attempt to lessen the risk or mitigate the impact of such events, but they cannot eliminate their possibility'. She draws attention to the problems with the use of the term 'vulnerability' to refer to only those conceptualised as victimised, deprived, dependent or weak (2008, p. 8) and, while there is such thing as varying vulnerability, there is no such thing as invulnerability (see Fineman and Gear 2013). Yet, it is not simply the conceptualisation of all as vulnerable that Fineman (2008, p. 18) seeks to highlight as she also recognises that:

Institutions as well as individuals are vulnerable to both internal and external forces. They can be captured and corrupted. They can be damaged and outgrown. They can be compromised by legacies of practices, patterns of behavior and entrenched interests that were formed during periods of exclusion and discrimination, but are not invisible in a haze of lost history.

This institutional vulnerability can alter the response of the institution towards individuals and may serve to further perpetuate disadvantage, whether intentionally or otherwise (see Fineman 2008, p. 18). Whilst Fineman's earlier work recognised these two forms of difference, she has since moved away from a notion of varying vulnerability; her more recent work focuses, instead, on an embedded vulnerability, allowing vulnerability to be conceptualised in a broader sense, encapsulating institutions as part of this vulnerability spectrum. This more recent work focuses less on the inherent or innate vulnerability of the individual and more on the embeddedness of the individual within the institutional web. Crucial here are issues of resilience. As Fineman (2010, p. 269) notes, 'the counterpoint to vulnerability is *not* invulnerability, for that is impossible to achieve, but rather the *resilience* that comes from having some means with which to address and confront misfortune'. Resilience can be provided by institutions, which also provide the resources to cope with adversities (Fineman 2010, 270);<sup>9</sup> institutions are instrumental 'in lessening, ameliorating, and compensating for vulnerability' (Fineman 2010, p. 269). The state must, then, be responsive to human vulnerability when considering 'the effectiveness and the justice of the operation of those institutions' (Fineman 2010, p. 269). It is the institution that creates or exacerbates this individual vulnerability: we are not atomised, separate beings; we are inter-connected and it is this interconnectedness with others and our position within these institutions that results in vulnerability. Criminal justice has been a thus far little considered area with regards to vulnerability

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<sup>9</sup> As Fineman notes, institutions can provide 'five different types of resources'. These are 'physical, human, social, ecological or environmental, and existential' (Fineman 2010, p. 270).

despite the important role played by the state towards the individuals who are drawn into the criminal justice system in varying ways. It is this lack of state responsiveness and the subsequent generation of vulnerability that we seek to highlight herein.

#### 4. Vulnerability and criminal justice

The relationship between vulnerability and criminal justice is not straightforward. The criminal justice system has been 'rebalanced' towards victims; victims are more readily recognised as vulnerable and can attract 'special measures' under one or more of the categories contained within the Youth Justice and Criminal Evidence Act 1999 (YJCEA). The YJCEA recognises youth (being under the age of 17 at the time of the hearing), mental impairment or disorder, or physical disability or disorder as 'vulnerabilities'. Further, experiencing distress or fear can also make one 'vulnerable' and factors such as the nature and alleged circumstances of the offence, the social and cultural background and ethnic origins of the witness, the domestic and employment circumstances of the witness, and the political or religious beliefs of the witness, will be taken into account. The court will also consider the behaviour of the accused, his or her family or associates, or anyone likely to be considered an accused or witness, towards the witness.

Whilst some 'special measures' may be implemented for defendants at the discretion of the trial judge (see *R (on the application of C) v Sevenoaks Youth Court* 2009;<sup>10</sup> as confirmed in *R v Anthony Cox* 2012) this does not equate to the 'same statutory rights to help and support as vulnerable witnesses' (Jacobson and Talbot, 2009, p. 1). There is a 'vast hidden problem of high numbers of men, women and children with learning difficulties and learning disabilities trapped within the criminal justice system' as 20-30% of offenders have such issues 'that interfere with their ability to cope within the criminal justice system' (Loucks 2007, p. 1) and very little research has specifically examined prevalence of these conditions among those who appear before the courts (Murphy and Mason 2007). This vulnerability may have an impact on the defendant's fair trial right under Article 6 ECHR, particularly where the necessary support is not provided (see *R ((TP)) v West London Youth Court* 2005 and *SC v UK* 2005). The Solicitors Regulation Authority (SRA) (2011) Code of Conduct requires that lawyers recognise the vulnerability of their clients and adopt an approach that 'takes into account the individual needs and circumstances of each client' thus allowing clients to make informed decisions throughout (see also Law Society 2015). Vulnerability is, however, dynamic, can shift between contexts and may be exacerbated by poor service, meaning lawyers must be aware of the particular needs of their clients and not treat them as an amorphous mass (Legal Services Consumer Panel 2014).

Suspects may also be considered vulnerable when in police custody if 'mentally vulnerable' (those 'who, because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies' (Home Office 2017, Code C, Notes for Guidance 1G), 'mentally disordered' (those with 'any disorder or disability of the mind' – see Home Office 2017, Code C, Notes for Guidance 1G in combination with the Mental Health Act (MHA) 1983, s 1(2)), or below the age of 18 (see generally PACE 1984, Code C 2014). Suspects recognised as vulnerable are entitled to have an appropriate adult (AA),<sup>11</sup> who can be present during various stages of the police custodial process. In police custody, a custody officer must determine whether an AA is required, i.e. whether the suspect meets the vulnerability

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<sup>10</sup> The claimant (a 12-year-old with serious psychological problems) sought judicial review of the Youth Court's decision to revoke the appointment of an intermediary. His application was granted as, whilst the court had no statutory power under the YJCEA, it did have sufficiently wide powers so as to ensure that the child's right to a fair trial was respected. Thus, special measures could be invoked on behalf of a defendant at the court's discretion.

<sup>11</sup> The appropriate adult is required to support, assist, advise, facilitate communication and ensure that the police are acting fairly.

criteria set out under Code C, and can consult with a healthcare professional (HCP)<sup>12</sup> if desired.<sup>13</sup> The custody officer need not, though, establish vulnerability with absolute certainty.<sup>14</sup>

The criminal suspect/defendant is vulnerable in other ways, as they are placed in a weak position, relative to the state – the criminal process involves convoluted procedures and unfamiliar linguistic conventions, resting on a mass of highly technical, interlocking and overlapping laws stretching back centuries. The state prosecuting has, near enough, unlimited access to the necessary expertise required to properly navigate the system (see Ashworth 1996). Criminal justice venues can be used to exert social control (see Carlen 1976 in respect of the Magistrates' courts; and Choongh 1997 in respect of police custody). The physical arrangements of the courtroom setting and the behaviour of magistrates, court staff, and police work to alienate defendants. The law can also serve to alienate individuals and preclude them from being able to take on active roles in their own trials (see McBarnet 1981). The need for defence lawyers is somewhat self-evident to redress this vulnerability, though the assumption that such lawyers will always work in the best interests of their clients cannot be taken for granted (McConville *et al.* 1994). Indeed, Binder *et al.* (2004) suggest the lawyer-client relationship should mimic the relationship counsellors have with their clients, recognising that clients require a holistic approach. This approach requires time but legal aid remuneration increasingly works against this.

It is the custody officer who should assume responsibility for the suspect's rights and welfare whilst they are in police custody (although this is not say that this always happens). The custody officer is responsible for (in combination with HCPs) ascertaining whether the detainee or suspect may be 'at risk' or may pose a risk to others during his or her time in police custody (see College of Policing 2013); they must also ensure that the PACE and its associated provisions are adhered to – for example, they must advise the detainee or suspect of his or her rights and entitlements, and subject to certain caveats, must ensure that these rights are enforced (see ss 56 and 58 PACE). Custody officers, on the basis of their responsibility towards detainees and suspects, may face scrutiny and oversight from a range of sources, including, but not limited to, the courts, their superiors (such as Inspectors and Superintendents), Independent Custody Visitors, the Independent Police Complaints Commission (IPCC), Her Majesty's Inspectorate of Constabulary (HMIC) and Her Majesty's Inspectorate of Prisons (HMIP), and solicitors or other legal representatives. They may also face criminal or civil liability for mistakes or errors at work (although not for breaches of Code C – see s 67 (10) PACE)).

Custody officers may be placed under pressure because of their duty of care; this may be exacerbated by institutional vulnerabilities, such as reductions in policing budgets (which can lead to precarious employment for support staff and reduction in the number of custody officers on-site); and a reduction in funds available for provisions such as HCPs, mental health workers, and AAs. Significant cuts in police funding were made from the period of 2010/11 to 2015/16 which amounted to a reduction of 22% in real terms. As budgets are predominantly spent on salaries, the number of police staff has been radically reduced. A total number of 37,400 positions

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<sup>12</sup> HCPs are responsible for safeguarding the welfare of detainees (to include assessing fitness for interview), prescribing and administering medication, and examining injuries. They may also be involved in decisions regarding the AA safeguard (see Dehaghani, forthcoming, 2018). Mental health workers, by contrast, are typically responsible for making decisions in relation to the MHA 1983 (although may also assist with more general aspects of detainee welfare). For further information, see Skinns 2011. For general information see Her Majesty's Inspectorate of Constabulary (HMIC) n.d.

<sup>13</sup> According to Annex G para. 5, the HCP should decide whether an AA is needed when assessing fitness for interview (Home Office 2017, Code C).

<sup>14</sup> Custody officers, in order to identify vulnerability, must first construct this definition, drawing (hopefully) upon legal definitions contained within Home Office 2017, Code C. The definition of suspect vulnerability is, therefore, subject to human construction and interpretation – see generally Dehaghani 2016.

were removed, which included 17,000 police officers being lost – a 12% reduction. Police forces in England and Wales face further budget cuts from the Home Office of 20-40% by 2020. The National Audit Office (2015, p. 6) criticised the government's approach to cutting police funds, stating that police forces will be unable to deal with 'more complex risks'. The funding cuts could see a further 20,000 jobs lost by 2020. The reduced headcount within the police may have an impact upon crime detection but, most notably, negatively impacts on officer welfare as documented by Elliott-Davies *et al.* (2016). Funding cuts to other services such as the NHS have resulted in an increase in the number of duties a police officer is expected to perform. Reduced levels of staffing, as a result of austerity measures, has led to an increase in officer welfare issues, which in turn led to an increase in injuries and stress, causing increased sickness rates and reducing staffing levels. Reduced funding, by virtue of neo-liberalism and austerity, has also led to civilianisation and outsourcing (otherwise known as privatisation):<sup>15</sup> as Skinns *et al.* (forthcoming, p. 3) note, the 'mixing of public and private sector actors in police custody is intimately connected to changing macro-level political, economic and social structures' (see also Skinns 2011, White 2014a, 2014b). Reduced funding has affected not simply the numbers of police officers in both the streets and the custody suites, but has also affected the type of staff (and thus their modes of working) (see Skinns 2011, Skinns *et al.* 2017, Skinns *et al.* forthcoming). For example, in both suites within which Dehaghani was observing, the custody suites were moving towards privatised contracts for detention officers.<sup>16</sup> Some custody suites have an almost entirely privatised workforce (with the exception of the custody officer) whereby staff are measured according to efficiency and are required to process detainees and suspects with greater speed but not necessarily with fairness and due care (Skinns 2011, p. 154). This standardised approach, that focuses on quantity rather than quality (Skinns 2011), may serve to further exacerbate vulnerability of suspects (and may leave custody staff also vulnerable to things going wrong). The institution, and therefore the custody officers and suspects, may also be vulnerable due to cuts to NHS or local services budgets, particularly the use of police cells as 'places of safety' for those detained under the Mental Health Act 1983; police forces are being forced to 'fill the gap' in NHS provision (see BBC 2015).<sup>17</sup>

With regards to criminal legal aid, state funding of, what has been labelled, 'the least loved arm of the welfare state' is inherently tenuous (Freeland 2006). The media offers a general disdain for lawyers *milking the system*, while their clients are presented as an *underclass* (Newman 2013a). This has allowed successive governments to hack away at the legal aid budget because it enables reductions in public spending without offending most of the electorate. Criminal legal aid expenditure decreased 12% in real terms in the second half of the New Labour period (National Audit Office 2009) and the Coalition government that followed cut fees by 8.75% (with threats of further cuts to come). The disincentivisation that results from lawyers feeling fees are insufficient (and only likely to worsen) leads to an inferior product being offered to clients (Fenn *et al.* 2007). Even the most committed lawyers, dedicated to public service, reach a point where they feel the need to compromise their principles for practical business concerns (Johnson 1980). Tata's (2007) idea of

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<sup>15</sup> It is worth noting that civilianization is common but outsourcing is not (Skinns *et al.* forthcoming).

<sup>16</sup> Detention officers (if police staff) can take fingerprints, photographs, footwear impressions, conduct intimate and non-intimate searches, and conduct searches so as to ascertain identity. Detention officers may also assist with booking-in (with duties such as measuring the detainee, physically searching the detainee and their property, and assisting with the recording of information) and ensuring detainee welfare. Skinns (2011, p. 48) provides an excellent overview of the various roles within police custody, where she also highlights the emergence of new roles such as the detention supervisor whose role had arisen to, *inter alia*, 'free up custody officer's time [and]... speed up the booking-in process'.

<sup>17</sup> Whilst in theory, there have been steps taken to avoid using police cells as a place of safety (for example through the establishment of mental health triage teams), police custody suites were still being used as places of safety for some individuals in a mental health crisis during author 1's study (and particularly at Site 1). The Mental Health Crisis Concordat has, however, resulted in some positive changes (see Paton *et al.* 2016).

ethical indeterminacy highlights that corners will be cut when lawyers are faced with the choice of the best but lengthiest and therefore more expensive course or a cheaper, quicker option that would be, at best, good enough. The firms adopt Rhode's (2004, p. 12) 'meet 'em, greet 'em and plead 'em' approach. Less profitable firms will go out of business and the only ones that can survive will be those that process a large amount of clients thus focusing on volume work, pushing through clients under the 'sausage factory' model (Newman 2013b): this approach puts speed and efficiency above all other considerations so that firms treat clients as standardised problems, reducing them to the status of cheap and easily processed produce.<sup>18</sup> Such an approach does not allow for vulnerabilities or particular problems that may require greater care and attention among clients.

## 5. The research projects

This paper draws upon two separate pieces of empirical work. Both research studies have been reported in part elsewhere, Study 1 on police custody officers (Dehaghani 2016) and Study 2 on criminal defence lawyers (Newman 2013a). For the present paper, though, the authors have returned to their original data to develop and disseminate previously unreported data. This material reflects similar trends to those identified in the foregoing studies but is used anew here to make a broader argument as to the value of applying insights from vulnerability theory to the experience of those suspected and accused of crimes in the round, drawing out alternative vulnerabilities within the criminal process. As such, the results of the studies are complimentary but are offered here side-by-side as befits them representing two independently conceived research projects. There follows a brief methodological note on the research but further, in-depth detail is provided on each in the above cited publications.

Study 1 addressed how vulnerability (in relation to adult suspects) was identified and defined by police custody officers. This empirical research involved non-participant observation of custody officers at the 'booking-in desk', and semi-structured interviews with 23 officers towards the end of the period in custody. The paper was conducted at two sites across two forces. The sites were selected for practical reasons (prior links with a senior gatekeeper at Site 1 and a chance encounter with a senior gatekeeper at Site 2). Ethics approval was granted, subject to certain requirements (that informed consent was obtained from custody officers and implied consent from detainees). Consent was obtained from 31 custody officers (20 from Site 1 (CO1-20) and 11 from Site 2 (CO21-24, 27-31, 33)). 5 officers from Site 1 and 3 officers from Site 2 could not be interviewed due to practical reasons. The interview schedule was guided by the observations. The researcher employed grounded theory (see Charmaz 2006) for doctoral work but thematic analysis was used herein. Whilst the researcher's predominant focus was on how custody officers made sense of suspect vulnerability, it became clear that custody officers often felt vulnerable themselves.

Study 2 considered the vulnerability of defendants with regards to their reliance upon defence lawyers to guide them through the criminal process, especially at a time with of perceived crisis in legal aid funding. This data collection occurred prior to the Coalition's austerity policies taking hold but amidst cuts to the legal aid budget of £600 million and under an avalanche of negative comment from New Labour politicians, whereon lawyers were facing huge pressures following the publication of the Carter Report. The empirical research involved a 12-month fieldwork split between the three largest law firms specialising in legally-aided criminal defence in one medium-sized English city. The firms each had between nine and ten lawyers conducting criminal work and the city housed the main courts for its wider region. Participant observation of nine months was split equally between the firms, followed

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<sup>18</sup> Criminal Defence Service (CDS) Direct is one method of cost-cutting, but one which can undermine the right to legal advice as suspects may be concerned about the privacy afforded to them when speaking to legal advisers (see Pattenden and Skinns 2010).

by a month each of semi-structured formal interviews with the same lawyers. For the participant observation, all lawyers were followed, selected on an ad hoc basis for a day at a time, capturing a variety of clients and cases, occurring naturally and in real time. Thereafter, interviews, informed by participant observation, were conducted (serving also to draw a line under previous events and achieve closure). Consent was obtained from 10 lawyers at Firm 1 (CD1), nine lawyers at Firm 2 (CD2) and 10 lawyers at Firm 3 (CD3) – as well clients encountered in the course of lawyer-client interactions. Interviewees had been followed in observation and thus comprised all fee earners working criminal legal aid during the duration of the fieldwork. The focus of the research was initially intended to be the vulnerability of the criminal defence profession as an institution and the lawyers as practitioners considering the pressures being placed on legal aid; however, as the research went on, it became apparent that clients were in a vulnerable position as, both, lay persons in the criminal process and the weaker party in the lawyer-client relationship. The research was analysed using thematic analysis: a method for identifying, analysing and reporting patterns across a data set (Braun and Clarke 2006), updated and refined for the present paper.

Within the following sections we will examine vulnerability throughout the early (often, only) stages of the criminal process, looking at what happens in police custody and at the Magistrates' court. In so doing, the paper asks the questions, who are the forgotten vulnerable of the criminal justice system and what can we learn by taking these parties seriously as potentially vulnerable components of the criminal process? By talking to practitioners with expertise in the workings of the criminal process, we draw on deeply situated knowledge that allows us to reach toward a more nuanced understanding as to the reality of vulnerability within the criminal process. In recent years, British politicians have tended to deny the vulnerability of those who are suspected or accused of crimes, similarly ignoring the vulnerability of the professionals who deal with them and the institutions they represent as we have seen an increasingly victim-centred approach take shape. Victim vulnerability has been acknowledged and championed (an important development) but as Sanders *et al.* (2010) have highlighted, rights-based approaches to criminal justice are flawed. Indeed, we argue that all those involved in the criminal process should be considered as worthy of attention as widening our conceptions of vulnerability can highlight systematic weaknesses that reveal the fragility of access to criminal justice in practice, impacting on all who rely on the state to uphold justice. Further, by drawing on a range of experiences from all parts of the spectrum, the needs of all are taken into full consideration thus facilitating the best possible functioning of the principle of access to justice. Importing the notion of vulnerability may be key to this endeavour. As such, we are responding to scholars such as Cape (2004) who have identified that populist policies have seen a systemic focus on attempts to support victims of crime while ignoring – indeed, pitching them against – the rights of those suspected or accused of crimes, or the professionals and institutions they rely on for decent treatment.<sup>19</sup>

In the two sections that follow, accounts of the practitioners are offered largely free from engagement with the literature to give voice to those best placed to offer fresh insight into the place of such vulnerability in the criminal process. Our thematic analysis operates such that each account begins by talking about the vulnerability of suspects and defendants before moving on to professional vulnerabilities, concluding

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<sup>19</sup> Blair (2002) explained that 'intelligent' politicians would all 'recognise the victims of crime are the vulnerable and [they] must be protected'. The dogmatism of this statement implied other vulnerabilities by stakeholders other than victims (and other witnesses) in the criminal justice process – particularly on the opposite side of the adversarial divide – did not exist. Similarly, Lord Bach (cited Hirsch 2009), Legal Aid minister, implied that the majority of money he sought to cut from the legal aid budget would come from lawyer remuneration, and explicitly used an argument invoking vulnerability, 'sometimes it's easy to forget what the whole point of legal aid is, which is to protect vulnerable people. I do think that sometimes the debate about legal aid gets clouded over with just concerns about pay'.

with an exploration of institutional vulnerabilities. These vulnerabilities are interlinked and build upon one another.

### *5.1. Vulnerability in police custody: detainees, custody officers, and the police force*

As customary, innate notions (see Brown 2015) would suggest, vulnerability can be linked with 'age, whether they're young or elderly, or by mental capacity, what their mental state is' (CO3). These categories are largely connected with the Code C definition of vulnerability i.e. for the purposes of the AA safeguard. With regard to the safeguard, custody officers appreciated vulnerability as:

Mainly learning disabilities and mental health issues (...) there are things, there are good indications of learning disabilities (...) the literacy of the person, how they interact with how, how they speak and again what they say in relation to the questions that they're asked. (CO22)

These issues, whilst potentially making the individual 'vulnerable' (even for the AA safeguard), does not necessarily mean that they will be safeguarded. With relation to the AA safeguard, 'it depends whether they're, where they are in their schizophrenia. If they have paranoid schizophrenia, whether it's being medicated and they're fine, they're fully lucid, they understand what's going on' (CO14). Those who are 'fully lucid' would not, by the custody officer's estimation, require an AA (see Dehaghani 2016).

Vulnerability was repeatedly likened to capacity, in relation to suspects and detainees – 'disadvantaged' due to 'age', 'intellect' and 'physical or mental ailments'. Vulnerability was akin to helplessness – 'easily led' or 'open to some form of abuse or open to being controlled'. Custody officers also compared vulnerability to 'risk', offering a consciously broad definition that considered those suspects at danger from themselves or somebody else. When custody officers were asked for their interpretation of vulnerability, they appreciated that it was a multi-faceted term, so much so that it could be labelled 'a bit of a woolly term'. One interviewee noted that a vulnerable detainee included, but was not necessarily limited to, someone with:

Learning difficulties, someone who's not had education. It could be mental health issues, a physical one, brain damage, head injury or that sort of thing. Depression or drug-induced (...) it covers a whole multitude of things. (CO17)

The label vulnerable could, in effect, apply to any suspect or detainee. Whilst this was the case, i.e. that all suspects could be vulnerable, the key was often whether they were sufficiently vulnerable, as one officer put it 'whether they've crossed the line'.

When considering vulnerability and risk, custody officers were aware that their budgets were not unlimited. Budgetary considerations could, therefore, impact upon the decisions the custody officer would make as in the following interview quote:

In [another force], for instance, the [AA] scheme work twenty four hours a day, because they pay for it. Ours stops at ten o'clock at night because we don't pay for it after ten o'clock at night. So if somebody comes in with a vulnerability at ten o'clock at night, in [this force] will end up staying at night but would be dealt with during the night in [another force]. How is that right? (CO4).

Custody officers, whilst appreciating the multi-faceted nature of vulnerability, were, therefore, mindful of the limitations imposed on them by austerity cuts. This resulted in feelings of vulnerability for the custody officer (particularly when making decisions on risk) connected with his duty of care towards the suspect and the possible sanction that can follow the detainee coming to harm. The custody officer's role incorporates a large number of elements, to the point where they may feel like – as one interviewee noted – a 'jack of all trades, master of none'. Because of the complexity of their role, the availability of resources, such as the HCP, was seen as essential, particularly because custody officers are not necessarily (sufficiently or at all) trained:

We've got to be very careful that you don't overload individuals....my role as a custody sergeant, there's a job description, but what I actually do is a bit fuzzy around the edges...I don't want us to be doctors or mental health workers...you're better off leaving it to the experts. (CO28)

At Sites 1 and 2, custody officers were provided with yearly training on how to manage detainee or suspect care (see College of Policing 2013) and are provided somewhat irregular training on PACE. At interview, custody officers commented on their training – some felt it was adequate for the role that they performed, others not. In particular, some felt that their in-depth knowledge of issues such as, for example, mental health was lacking. As one commented:

As an organisation, we chuck training at it and then forget about it for a number of years (...). OK, so somebody's got bi-polar but what does that actually mean to, to a layperson? If you knew that someone had that issue, you go, 'Great, I know what that issue is now'. Does that impact on how I deal with someone? No, because I don't know what that means. (CO14)

Others felt that issues arose due to 'the gap...in interpretation' or limited resources:

Mental health training is quite limited, other than what we cover in Safer Detention (...). I don't feel knowledgeable enough in relation to identifying mental health issues. Within the constraints of training, I understand why it might be difficult to do that. (CO18)

Training comes at a financial cost, something that many officers felt impacted upon the way that they were trained – a lack of knowledge stemmed from the fact that 'the organisation doesn't train us, because it's too expensive'. Many new recruits felt that the large number of procedures made the job difficult to comprehend. Some also commented that the law was unclear – they were more aware of practicalities of the job than the 'nuts and bolts' of the legislation. Many could not remember the detail of PACE and noted that they would not be able to quote it as it had been so long since they had read it. Thus, custody officers can be vulnerable because they have not been given sufficient training or have an inadequate knowledge of the law. This, at least in part, stems from the fact that their jobs are multi-dimensional and they may not have time fully digest information. When considering the potential implications for breach of PACE, a lack of knowledge or training may have serious implications, and can leave the custody officer exposed.

Custody officers, as overseers of the investigative process, must also ensure that PACE and its Codes are being complied with. This means that they must ensure that, for example, the AA safeguard is implemented where required, otherwise they may face scrutiny from the court (although see Dehaghani 2016). Though custody officers here rely on the guidance of HCPs, both the availability of the HCP and the AA provision were widely identified as tied to budgetary constraints thus posing challenges for the officers. The custody officer (or other individuals in the custody suite) may also face physical risks from dealing with detainees. Custody officers must consider this when deciding to detain but also need to consider the risk, posed by detention, to the detainee (College of Policing 2013). Many custody officers felt uncomfortable with the level of care required. In particular, there was concern as to what happened with a death in custody, which one interviewee reflected has serious personal and professional implications:

So of that fact with a career-ender, because it is. If I decide not to listen to a word this person is saying to me, ignore all the things on our system and just get upset with them and lose my professionalism and just say 'Nah, you're not going to do anything', 'Just stick them in a cell, put the hatch up, we'll go to see them every hour' and something happens to that person, then you've only got yourself to blame because all the systems have been put in place for our protection as well as theirs. (CO28)<sup>20</sup>

<sup>20</sup> As Skinns (2011, 184-5) has noted, the buck often stops with the custody officer.



One custody officer was not available for interview during the interview period. He had, it transpired, been suspended from duties, pending investigation. During the fieldwork, the officer was witnessed opening a letter, which has been handed to him by the Inspector. It appeared to be a suicide note from a detainee he had dealt with a week ago (the detainee was in hospital following a suspected overdose). Concerns were raised regarding the detainee's welfare and discussion ensued regarding the detainee's survival. This largely centred on whether this would be considered a death in custody and the potential response of the IPCC. Officers debated how best to handle this. The letter was photocopied and sealed in an evidence bag, and the information regarding the receipt of the letter and the incident surrounding it recorded. There were comments that the officers should do their very best to 'cover their backs'.

Ultimately, vulnerability comes through exposure, and exposure arises through accountability. However, custody officers are not entirely in control over what happens within custody. In fact, there are many aspects of their role which they have no control over. When asked what was most difficult about his job, one officer mentioned "accountability (...) when things are outside of your control but it's still your fault". One particular issue was that:

A lot of the people that come [into] police custody suite are people that, by their very nature, pose quite a high risk in terms (...) of their health and lifestyles and what have you. And it appears that the buck stops with custody sergeant if anything goes wrong. And everybody else who...had anything to do with the situation seems to quickly turn their backs and wash their hands of the situation. And the spotlight is very much focused on the custody sergeant, and I do know that from personal experience as well.

Custody officers felt scrutinised for every decision made, feeling pressure at having to manage such risk. Custody officers did not necessarily feel supported by the organisation and were concerned with being treated as 'fall guys' (see McBarnet 1981).

A number of custody officer's vulnerabilities are bound-up with institutional vulnerabilities, or institutional factors. As noted above, the custody officer's training is tied to organisational budgetary constraints (it costs money to organise for someone to train custody officers. Also, custody officers will be diverted away from the custody suite on training days, requiring additional pay, if on a rest day, or staff cover, if not). The provision of HCPs and AAs is also subject to budgetary constraints. In this study, both custody suites had HCPs based in-house 24/7, however, this is not the case in every force or custody suite. In these instances, then, this resource operates on an on-call basis. As custody officers rely on HCPs for assistance in decision-making and rely on AAs to safeguard vulnerable suspects, budgetary constraints can put custody officers at greater risk of scrutiny. It could also have a detrimental effect on suspects and other detainees.

A lack of institutional funding can also have a negative impact on how custody operates. Some forces do not have a full staff of custody officers, but instead detention officers performing the role of custody officers and typically one custody officer overseeing the entire process (see Skinns 2011). Such adaptations are required because of budgetary constraints. The two forces studied did not employ this model, however, staffing was seen as an issue. One officer noted this when discussing how his role could be improved in interview, stating:

What it needs is more people trained to work here permanently and more, you know, the teams to have more staff. That will never happen because every single team in the force is sort on staff so, you know, they've got to come from somewhere because that will leave people short, so it will never happen. (CO11)

The reality is such that police custody can often be unpredictable – someone may be arrested at any time; indeed, a group of people or groups of people may be arrested simultaneously, leading to increased pressure on custody officers. Problems such as

staffing and other resources may be helped by institutional support; however, if the institution is facing constraints, such as budget cuts, these issues cannot be tackled. The negative implications of staff cuts and the greater pressure faced by custody officers had led to two custody officers going on long-term sick leave.

Institutional 'vulnerabilities', as it were, also arose in relation to the organisational structure; this organisational structure impacted upon how custody officers performed their jobs. Some felt that they needed 'a bit more support from the command teams'. Others explicitly mentioned how their decisions were undermined by command teams (see also Kemp 2014). For example, deaths in custody not only exposed custody officers to massive scrutiny, they also have implications for the institution in terms of investigations undertaken to establish how those deaths have occurred and subsequent cost implications. It was, therefore, not simply the custody officer who was frightened of a death occurring in custody, the force was also – as one interviewee put it – 'absolutely bottling it'. Even though a death in custody is a massive concern, it appeared that the identification of risk was:

Just a bit of a back covering exercise, paying lip service, the way we actually do it here (...). We can do it very quickly and cheaply by doing it with the system that we've got in place. (CO16)

The police force, as an organisation, was also seen as:

The dumping ground for other agencies [who] rather than get their house in order in respect of certain things, they just go 'We haven't got the room, we haven't got the staff, the police will sort it'. And we can never say no. We can take people to hospital for treatment; if the person argues or shouts, the hospital staff refuse to see them and they come back here. Or if someone kicks off at the hospital, they go arrest them at the hospital and bring them here. (CO13)

Custody officers interviewed felt that the force also faced great difficulties because of insufficient support from mental health services, as reflected in the following:

An awful lot of responsibility is placed on the police and (...) mental health services and the NHS don't have that same level and degree of responsibility as we do, as the police (...). It still doesn't sit well with me that, you know, the approach [that] the IPCC have in respect of someone who has been in police detention and their support and care there, where you know, a lot of these people have been in custody because the hospital have discharged them or won't treat them and have sent them here anyway. (CO2)

Cuts to the health and mental health services may lead to increasing pressure for police officers and police forces. These factors also leave the institution vulnerable or 'at risk' to, perhaps unavoidable, scrutiny. The vulnerabilities at different levels work in tandem – the detainee may be placed at greater risk because the custody officer has inadequate support and resources, and a number of these inadequacies arise through a lack of institutional funding.

### *5.2. Vulnerability in the lawyer-client relationship: defendants, defence lawyers and legal aid*

There are different ways in which those accused of crimes can be considered vulnerable with regards to their positions as defendants. All defendants can be construed as inherently vulnerable. Lawyers recognised, at interview, the vulnerability of a defendant:

No-one accused of a crime is in a fair position to defend themselves without a lawyer, it's just a fact – defendants need lawyers or else they are vulnerable. (CD1-3)

In reality, all our clients need help, this isn't something they can do themselves. That's why we are here, why the legal aid system is here. (CD2-1)

There were, though, many clients who could be identified to present with specific traits making them more vulnerable (or less resilient, to use the language of vulnerability theory) than the average client. These are the clients who would meet

Brown's (2015) depiction of innate vulnerability, where there are certain points in the life course, biological or developmental factors – such as disability – where individuals may need extra support or assistance (this is the type of vulnerability recognised by the SRA 2011 Code of Conduct). Interviews with the lawyers brought out the manner in which the particular offence that the client ostensibly presents with is often not the whole story of why the client is there that day:

Our clients have major problems a lot of the time, educationally, developmentally, in terms of their personality. Getting a handle on them is very rarely about the legal issue, you learn to look beyond that. (CD2-3)

You get all different types of clients, all sorts. They all have different issues, I don't mean crime, [I mean] problems. You call their name and it can be anything. (CD1-5)

Lawyers would sometimes lament their being put in the difficult position of having to deal with matters outside their legal expertise and quite apart from the precise criminal case that they were being paid to consider. Some would explain that it was only 'experience' that taught them how to learn to deal with these clients and that they were not properly trained or prepared to manage such issues adequately. Such perspectives accord with the findings of research conducted by Swift *et al.* (2013), which shows that lawyers are not equipped to deal with the needs of complex clients (taken to mean largely those clients with learning difficulties). Interviews showed the lawyers felt helpless at times:

It's sad, these people need medical help, social workers, some kind of intervention. They don't need lawyers, what can we do? Nothing is the answer, their issues are too far gone and we are not the experts they need. (CD2-4)

Recognising that clients could require more than simply the matters of fact outlined in their case files, interviews with the lawyers showed some acceptance that clients might require additional time being spent on them:

Some clients just require more time than others. Suppose you're dealing with someone whose first language is not English, a simple process could take forever. Supposing you're dealing with a client who is educationally disadvantaged, or has a learning disability, as opposed to a client who is able to do a lot of their work himself, and comes in with a chronology the first time he sees you. They're chalk and cheese. It is not like making widgets within the car manufacturing industry, where I know that every widget looks exactly the same and takes me five minutes to make. Because people aren't the same. (CD1-6)

While the ideal approach might be to give more time to the more needy cases, the lawyers were uniformly of the opinion that such could not be done. Time and again, lawyers would complain that they were not paid enough through the legal aid system to give clients the time necessary. The following quotes from lawyer interviews reflect this perception of time pressure:

Your ideal case is a quick in and out, and that's what it is a lot of the time – you learn to work fast, you have to these days. Sometimes, some clients derail you. They have issues, it takes more time than you have. The sad truth is that you don't spend as long as they need. You can't. Obviously, you would like to take more time but, the way it is, it has to be quick. (CD1-1)

You used to be able to take longer on a case but not anymore. Some people say we need more time for certain clients who present with particular problems. Others say that you can make it work. You have to make it work. (CD3-10)

Whilst generally restrained in the interview on issues of some clients requiring more time (either neutrally explaining the situation or expressing compassion at how difficult it must be for them) comments made during the observation were frequently less sympathetic. The following two quotes made while at the Magistrates' court show angry reactions from lawyers at clients who expected their time (despite the clients expressing themselves in concerned and polite ways):

Who does he think he is? He thinks he can just demand to see me anytime he's in court. He'll see whoever is free. Who does he think he is, asking me? (CL1-3)

I hate clients like this, waste your day having to deal with them. I have a list to do, I want to get back to the office [but] you get someone who can't string a sentence together and needs to be babied through the process and it wastes your time. (CD1-4)

Such sentiment from lawyers that appears akin to resenting the imposition on their time made by clients, especially what one lawyers referred to disparagingly as their 'high maintenance' clients was common in the observation. It seemed to reflect a group of lawyers who viewed clients as an imposition rather than recognising that it was their patronage by the clients that kept them in practice. This antagonistic attitude, almost blaming clients for the wider issues or problems that lawyers identified, formed part of a wider trend of negativity towards the clients that was largely absent from the interviews but came out in abundance during the observation. Indeed, lawyers would regularly make fun of their clients for the vulnerability discussed:

Some of our clients are thick as shit. (CD3-8)

You have to laugh at them sometimes, all puffed up like they're something but they're slow, thick, can barely follow a sentence (...) jumped up idiots. (CD3-9)

The negativity emanating from the lawyers appeared to originate, at least in part, from concerns over lawyers' own vulnerability as some manner of coping mechanism, with clients an easy target through which to channel their frustration and anger. In general, the lawyers appeared to feel stressed by having to deal with such a mass of clients and push the clients through as quickly as they could. Lawyers would talk of their practice having turned into 'factory' work and many identified with the idea of their work having become like a production line. In interview, lawyers would frequently discuss the manner in which dealing with clients quickly (and efficiently) had become the defining aspect of their work:

Our role has changed. You used to spend time with the clients, work through things. Now you just have to finish a case as quickly as possible. (CD1-5)

You can't spend too long on a case, we're advised how long they should last and we have to hit our targets really, that's what it's becoming. (CD3-6)

The push for a quick turnaround in cases meant that lawyers felt pressured, as in the following interview quotes:

It's not good for the clients [to push so many through] but it's not good for the lawyers either. It places a great deal of pressure on our shoulders. (CD2-9)

There is a great deal of pressure on us to work through our cases quickly, almost as soon as you get a client in the door you need to get them out again. (CD3-2)

As part of the push towards greater productivity, clients were also placed in positions in which they were underprepared or not prepared at all to deal with clients, highlighting the lawyers' vulnerability wherein the pressures of job compel them to proceed in ways that might not be ethically sound. In being dependent upon lawyers, it need be understood that those suspected and accused of crimes entered into another layer of vulnerability. White (1990) has offered a view of the lawyer-client relationship premised on the origins of the word 'clientem', wherein patricians in Ancient Rome saw those who patronised them take their own name – a dynamic that repeats itself in the lawyer-client relationship and can act to subsume the personality or interests of clients. Due to their reliance upon lawyers, premised upon a fundamental imbalance of power in the relationship between the two parties, a vulnerability Wendel (2007) suggests most lawyers fail to recognise. As such, the hierarchy was not articulated by the lawyers in this research but it played out in some of the decision making around how to manage clients and their cases.

Clients in the police station, Magistrates' court, and Youth Court would be routinely passed between lawyers. Attribution was not typically based on who had the most relevant expertise or who had dealt with the client previously but, rather, divided up based on workloads with lawyers given lists of what locations to cover and would sometimes swap cases on the day based on who was working through their list the quickest. Lawyers would generally receive a pile of files on the morning, between ten minutes and half an hour before heading to court. The files they received from colleagues – or surprise files received on the day – would be read while walking to meet the client. One lawyer identified this process as the 'numbers game', almost a challenge to deal with as many cases as quickly as possible – with the real skill being that they often knew next to nothing about the case. Lawyers from all firms would frequently comment to me that they had 'winged it', needed to 'bluff', would 'shout a bit' to hide their ignorance and just needed to 'put on a show' to impress clients in lieu of knowing their cases. Lawyers would often refer to such practices in jocular terms, sometimes looking for praise at 'riding my luck' so successfully. On many occasions, though, lawyers appeared to feel the pressure of having to talk to clients, conduct interviews or take part in hearings without feeling comfortable in their knowledge, or as one lawyer expressed it, 'having no control [and] hoping not to get found out'. There was acknowledgment that this working practice was neither good for the client nor the lawyer; 'nobody benefits, the reality is that we are underprepared...and that's hard'. All the same one lawyer stated that the system made 'business sense' so was 'a necessity'. Such juggling of cases creates morally dubious situations where clients are dehumanised as just another file, as in the 13-year-old boy who saw at least six lawyers and gave the interview on which his notes were made to the unqualified PhD student conducting this research. That lawyers felt compelled to partake in this undesirable method highlights the dual (often interconnected) vulnerability of them and their clients.

Most lawyers were experienced in what one referred to as 'image management', allowing lawyers to convince clients they were getting a more personalised, dedicated service than they were. Cultivating a strong image might include contrived elaborate bail applications or cross-examining of police officers, it could also include vaguely patronising attempts to change speech patterns and slang terms to fit in with how the lawyers perceived their clientele to talk. Despite many lawyers emphasising that they were well practiced in persuading clients to accept the representation provided, there were instances in which clients complained. Most frequently, a client would be disgruntled on appearing in the cells at the Magistrates' court and seeing a different lawyer to the one who saw them in the police station, as evidenced in comments such as 'who are you?' and 'I don't even know you'. Some clients would complain that 'you don't even know my case' or periodically ask for others lawyers who they recognised and trusted. Some clients were anxious when not represented by the person that had built rapport with previously, concerned that the lawyer did not know them or their case properly. Almost always lawyers were able to calm clients down, generally by ignoring their complaints and proceeding with the case. In interview, though, some lawyers expressed concern that the working practices they felt forced into by the legal aid system may alienate clients:

It hasn't happened to me, of course I would say that, but there have been complaints. Older clients, in particular, who are used to a certain type of personal service, are finding themselves frustrated. (CD1-3)

They want what they can't have: time (...). I hear more and more bickering, it's unrealistic. (CD3-10)

The vulnerability that the lawyers felt feeds into the institutional vulnerability of this branch of the legal profession and the wider notion of legally aided criminal defence. The lawyers talked pessimistically about what would happen to the profession, with many interviewees echoing this sentiment:

I fear for the future of publically provided criminal defence. I've got, what, fifteen years left. Will it last that long? I really don't know. (CD1-3)

Many lawyers felt abandoned, if not positively being attacked, as in these interviews:

Every month it seems that little bit more precarious and I honestly could not tell you who we can turn to who will be willing to fight for us. (CD 2-1)

The government wish to drive us out of business, it's as simple as that. We are an inconvenience and they will be happy when legally aided criminal defence is a thing of the past. (CD3-1)

As a result, there was a perception, most noticeable from older and more experienced lawyers, that the 'best and brightest' were not being attracted to legally aided criminal defence – 'why would they?' as one interviewee asked. The vulnerability of the whole sector, then, was an issue that the lawyers felt to be pertinent. At the centre of this reflection was some degree of reflexivity that lawyers feeling pushed into compromising the service provided to clients might not be serving access to justice. The following interviewee attests to the lawyers' fear that the profession they knew was being lost:

Am I still providing a useful function? You know, I like to think I am. I know I work very hard indeed. Is it becoming increasingly hard to make sure the work I do is useful? Yes, yes it is. And I worry that one day it will be impossible (...) what use is a solicitor who can't represent their client properly? (CD1-2)

The foregoing, then, has given an insight into these lawyers, their thoughts and experiences of vulnerability highlighting the impact of perceived or actual inadequate funding has had on effecting vulnerable defendants, making lawyers feel vulnerable and putting the whole of legally aided representation in a vulnerable position.

## 6. Conclusions

This paper has provided fresh data and new analysis from previous significant studies of vulnerability in police custody and the role of defendants in the lawyer-client relationship. Through developing these two studies together in this way, we have instigated a debate into the value of using the lens of vulnerability to shape understandings of how key players in the criminal justice system experience the process of justice at a time of neoliberal austerity. The research has shown three areas of vulnerability, interlinked in various ways and all demanding further engagement: those suspected and accused of crimes, the practitioners who deal with them, and the institutions represented by those professionals. We believe there is great potential for building on and moving beyond the exploratory analysis offered here to allow a deeper level of engagement with such issues in access to criminal justice.

Ideally, both studies would have interviewed those suspected and accused of crimes as well as the practitioners to provide a more rounded account that gave full voice to those drawn into the criminal justice system to discuss their own vulnerability. In practice, it is possible that such an approach may have compromised the integrity of the ethnography. There was the danger that the researcher relationships with the officers or lawyers might have been damaged, rendering practitioners awkward and guarded leading to restricted access and a greater effort to play up to the researcher gaze. The practitioners may have been more acutely aware that judgment was being passed on them, and wary that the opinions of those they were responsible for could not be anticipated or controlled. The subsequent research could have lacked both the depth and closeness the studies actually obtained. The trade-off for this research, though, was that the vulnerability of suspected and defendants were assessed through a combination of the literature and regulations, researcher observations of specific situations and practitioner understandings of their vulnerability. There are limitations to taking the word of more powerful practitioners over the dependent detainees and clients, not least that it offers a piecemeal understanding of the latter's

vulnerability based to some degree on the partial worldview and assumptions of those who might not want or be able to have empathy for those below them. Such is not terminal to this study as we are not focusing on the vulnerability of those suspected and accused or crimes because, while little theorised in terms of vulnerability theory, this paper is premised upon the notion that in broader terms their vulnerability has been previously recognised in traditional socio-legal scholarship. Rather, we have taken upon ourselves the tasks of expanding the understanding of what it is to be vulnerable in the criminal justice system and thus it makes sense that our data relies largely on the views of those practitioners that we think have been absent from the debate, in terms of their professions and the institutions they represents. It is logical, then, that we focus on practitioner views while also recognising that future research should be carried out from the perspective of those suspected and accused of crimes. This could entail a similar research design to those presented, but with suspects and defendants inserted in place of officers and lawyers. As suspect and defendant views or understandings will be diverse and heterogeneous – meaning it is hard to make assumptions – such would be the sensible follow-up to the present study, offering a means of triangulation, so that, in combination, the experience of criminal justice vulnerability can be more fully drawn out.

Contextualising an examination of access to criminal justice in the theory of vulnerability provides a readily defensible means for progressive scholars to argue in favour of the state and thus use their data to help fight to protect properly funded public provision of such services. Added to a wider tabloid and political discourse that stigmatises poverty and the poor in general but those who are involved in criminality in particular – as witnessed in the ongoing UK debate as to the supposed problems of human rights – then the cause of utilising supposedly scarce state resources to ensure that those suspected and accused of crimes are treated fairly will always be a difficult one to find popular support for. By rooting such discussions in the language and rhetoric of vulnerability, we have the opportunity to build a case for maintaining and strengthening access to criminal justice based on human decency and dignity. Transferring such an argument out of left-liberal academic debates and into wider discourse, of course, will remain a difficult task but by framing discussions within vulnerability, the nature of the debate could be made more amenable to the cause of protecting those suspected and accused of crimes (and those they rely on to be treated justly).

When looking at criminal justice, in particular, vulnerability theory helps to break down some of the points of tension that are at risk from underfunding. The vulnerable party in the criminal process would popularly, and in line with common sense, be identified as the victim of crime, the person who has been wronged (or the potential victim who would be). Victims can be seen as vulnerable, and are at risk from underfunding such as cuts to police officers to maintain order or investigate cases and cuts to lawyers with regards to CPS hiring practices and investigatory abilities. The vulnerability approach helps us to appreciate – and cement – the manner in which those suspected or accused of committing crimes against them can also be vulnerable, whether the latter is generally vulnerable due to their position of relative weakness to the state or because they possess one of the many impediments that those who pass through the criminal justice system have commonly been identified to hold such as learning difficulties. Seeing defendants as vulnerable subjects bolsters arguments for properly functioning access to justice that upholds their rights by recognising common humanity and keeping an open mind to human frailty. Police officers and defence lawyers are figures who would even more rarely be seen as vulnerable, both possessing a great deal of power in this process due to their state allotted position (the former have the right to detain others and the latter are a high status group, attuned to the self-referential language of the courts and with the right to speak in criminal proceedings). All the same, cuts – or threats of cuts – to services impact on practitioners and their ability to carry out their role properly, which makes

them vulnerable to stress as well as the threat of losing their employment for one reason or another.

When considering vulnerability in criminal justice, this paper has documented a number of synergies between the two studies reported, not least the shared conception of how financial pressures made their times precious – creating a barrier to carrying out their professional duties with regards to suspects and defendants. In study 1, officers talked of 'high risk' suspects who posed a threat to the overworked and under-resourced staff who would be responsible for anything that went wrong while these more vulnerable individuals were in custody. Lawyers in study 2 discussed 'high maintenance' clients, expressing frustration at how much effort had to go into dealing with the most vulnerable clients when their priority was to work through court lists. Both groups of practitioners, then, came to conceive of the vulnerability of those suspected and accused of crimes as a burden that added (unnecessary) stress to their working life. Through a combination of a lack of training and manpower, those suspected and accused of crimes who have the biggest problems are seen as a threat to legal professionals as they challenge and expose the institutional frailty upon which they operate. For Hayes and Moore (2017), austerity is defined here as a timesaving device to reshape state provision: the less time is consumed, the more money is saved, regardless of whether quality is provided. It is the challenging cases, those that require practitioners to put the time in, that highlight the extent to which quality of provision is not – to some degree, cannot – afforded as a rule within the wider economic context. The lawyers were shown to have adopted a 'factory' model, the justification law firms have to become more efficient, which realistically entails high turnover and swift throughput of clients, with little individual contact. This process is labeled 'sausage factory' like a processed meat production line because clients risk being reduced to offal, the bits that nobody really wants – at least not in non-standard, awkward shapes and sizes. Such an outcome was clearly evident among the officers also, who perceived their custody suites as having become a 'dumping ground' for those individuals that other agencies could not – or would not – put the energy into supporting. The result is that the officers are having to struggle to deal with the consequences of this build-up of more difficult cases, almost hoping for the best that nothing bad happens before they can move the suspects on. From both studies, then, we see a (self-)limited service being provided that sees practitioners who identify as vulnerable offering a degraded provision that runs the risk of letting down vulnerable suspects and defendants thus showing the vulnerable nature of these key institutions of justice.

Austerity cannot be blamed wholly for the negative practices perceived as, for example, much of what is described in study 2 reaffirms findings from earlier research such as McConville *et al.* (1994), suggesting that unpleasant lawyer attitudes to clients are somewhat embedded in the professional ideology of lawyers. Despite this caveat, in that research as in others (for example, Sommerlad 2001) it is always government cost-cutting that is identified as an explanation for deviations from best practice meaning, even if financial pressures have been internalised as an excuse for such practitioners, there is merit in trying to understand their practice (and their professional worldview) through the lens of vulnerability. Indeed, conceiving of both groups as vulnerable again strengthens the argument for maintaining access to justice, as they are not abstract labels but, rather, human beings engaged in important work subject to external pressures beyond their control. Finally, the institutions of the police and legally aided criminal defence should not have their vulnerability ignored simply because they are organisations, as they are staffed by humans, serving the purposes set by humans, and subject to the decisions of humans. As such, a human vulnerability must be understood to come into play when their functioning and longevity is concerned.

It is possible, then, to view the circular impact of vulnerability in criminal justice. Herein restrictions of state funding under neoliberalism have a knock on effect throughout the criminal process. As Fineman (2008, p. 18) has noted, institutional



vulnerability can affect how individuals are responded to and can further perpetuate disadvantage. The undervalued vulnerable institutions face crises of resources that undermine the professionals within, impacting on their ability and/or inclination to provide the services needed by those suspected and accused of crime, which, thereon, questions the value of the institution in the first place. Vulnerability theory affords us the opportunity to identify these vulnerabilities at various points in the criminal process. It will allow for the opportunity to conduct research that further draws out the process of reducing their capacity for resilience. Future studies in and around access to criminal justice, by those with an interest in standing up for the concept, should look to vulnerability theory as a means to counter the neoliberal agenda and the scarcity and cut-backs accompanying it. Those suspected and accused of crime are just caught up in the earlier stages of the retraction of the state from those considered less worthy. They would be best understood under a wider examination of the demonisation of the poor and/or welfare dependent with recognition given that an ever-larger segment of society will be drawn into this category. If it was not enough to elicit concern that the least resilient members of society are being cast adrift in some manner of social Darwinism, the argument as to who is next may have wider salience. If we push the boundaries of vulnerability to reconceptualise high status professions such as the police and lawyers as vulnerable, it thereon become possible to widen the critique of neoliberalism further and make a point about the dangers faced by a wealth of occupations when the neoliberal state absolves responsibility to protecting workers or employment. Further identifying the vulnerability of the institutions of criminal justice, properly conceived as part of the welfare state protection to all, can be constructed as part of a wider dereliction of duty of the neoliberal state to waste resources on those who cannot rely on private provision.

One area of future research this paper points towards is the value of studies that take a holistic approach to the experiences of those suspected and accused of crimes. We have attempted to do so by bringing two rich data sets together and drawing out new material to compliment the insights produced from one another. By helping to highlight the value of this approach, the paper has provided a service to studies of access to criminal justice. Yet, there is the opportunity for subsequent studies to achieve much more again by designing broader, more inclusive studies that cover both aspects of the criminal process in the same research. This provides a means to probe the issues deeper and offer a more comprehensive account of access to criminal justice on the ground. Such work might also bring into play other criminal justice agencies that work with those who pass through the criminal process, such as the probation services (see Newman and Ugwudike 2013). Further work needs to be done to fully capture the essence of vulnerability in the criminal justice in times of neoliberalism and austerity.

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