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Vulnerability, the future of the criminal defence profession, and the implications for teaching and learning

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Abstract

Legally aided criminal defence work is under significant strain at present following fee stagnations and funding cuts over the last 20 years. This has obvious implications for those working in criminal defence practice, which have been examined in the literature on access to criminal justice. However, the implications for teaching and learning within criminal law and practice have not been subject to much attention. Within we reflect on the teaching and learning challenges. Further, we use a Fineman vulnerability analysis to illustrate how the challenges faced by criminal defence practice – in the face of a crumbling criminal justice system – impacts upon criminal law and process teaching and learning. Finally, we explore how the resilience of criminal defence can be provided (or bolstered) by and within the academe.

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Introduction

In earlier work, Newman and Dehaghani explored the vulnerability of criminal legal aid lawyers and the institutions within which they work.¹ We argued that legally aided criminal defence lawyers (and, in our specific paper, solicitors), by virtue of being human, were vulnerable, but that this vulnerability was particularly heightened within the conditions of austerity and neoliberalism. Using vulnerability theory, we suggested that the resilience of criminal defence lawyers and the institutions of justice within which they work has been reduced through cuts to criminal legal aid, as a result of the wider austerity agenda. Following on from this, we received funding to further interview criminal defence lawyers (both, solicitors and barristers) on the impact of cuts.² We found that there were concerns regarding the future of the criminal defence profession, or at least of a profession that was publicly funded. In this paper we take this analysis and debate one step further: we consider how the demise of the criminal defence profession may impact upon students who are studying law, specifically those who have aspirations to go into criminal practice, and we further reflect on our position as academics teaching criminal law and the criminal process at undergraduate and postgraduate level (specifically on the LLB and the BTC)³. In doing so we highlight the self-supportive and self-undermining vulnerabilities of the criminal legal profession, students, and academics. We focus specifically on whether and how academics and universities can provide resilience to our students and to the profession within which our students may wish to work. We further examine whether the university has a role – and what that role may be – in resisting the neo-liberal demise of the criminal defence profession.

Within this paper, we utilise vulnerability theory to argue for an institutional response to the demise of the criminal defence profession. In particular, we query whether university leaders – in pursuance of their aim to ensure opportunities for students and, perhaps more obviously, in pursuance of their civic mission – should be doing more to support the criminal defence

¹ Roxanna Dehaghani and Daniel Newman, “We’re vulnerable too”: an (alternative) analysis of vulnerability within English criminal legal aid and police custody’ (2017) 7(6) *Oñati Socio-Legal Series* 1199-228.

² This work is ongoing and will be published as Daniel Newman and Roxanna Dehaghani, *Experiences of Criminal Justice: Perspectives from Wales on a System in Crisis* (Bristol University Press 2021). British Academy Grant, Ref: SRG\170958.

³ The LLB or Bachelor of Laws degree is the primary undergraduate law degree in England and Wales and an example of a Qualifying Law degree (QLD). The BTC (Bar Training Course), previously the BPTC (Bar Professional Training Course), is a specific one year postgraduate qualification allowing students to progress to be called to the Bar as part of the process of qualification as a Barrister.

profession. We begin by looking at the criminal defence profession. We highlight the importance of criminal lawyers, and the challenges faced for solicitors and barristers in practice. Next, we explore our own experience of teaching criminal law and procedure to students. We consider our teaching against the tough reality of life in criminal practice. We then move onto the ethics of teaching criminal law and procedure in this context. With all we know about how difficult criminal practice can be, we need to reflect on what and how we teach students. Thereafter, we focus on our academic and institutional obligations. Here we draw out the value of vulnerability theory in helping us to understand the role we could and should play to tackle the challenges that criminal lawyers face in practice. We conclude by highlighting the role that universities can play in providing resilience. Bolstering criminal defence is not a duty to be left to us as individual academics; it is something that the academe more widely should support.

The criminal defence profession: current problems and the shaky future

Legally aided criminal defence lawyers are crucial for access to justice in an adversarial system (as operates in England and Wales). Access to criminal justice requires that suspects and defendants can effectively participate in the case against them, enforce their fair trial rights, and ensure that they can mount an effective defence against the state. Not only should the state be required to prove their case against the defendant beyond reasonable doubt and by the procedures laid down in law, it also requires that the defendant can get a fair trial by, for example, having access to effective criminal defence. The right to a fair trial is enshrined in Article 6 of the European Convention on Human Rights and includes the right to have adequate time and facilities for the preparation of the defence, and the right to defend oneself in person or through legal assistance of the defendant's choosing. On the right to defend oneself, Article 6 also requires that legal assistance be provided for free when the defendant does not have sufficient means to pay for legal assistance themselves (albeit with the caveat: when the interests of justice so require). This right extends to pre-trial

procedures,⁴ and requires that the state provide legal advice and assistance to those who are suspected of committing a criminal offence.⁵

The role of lawyers here can be found from the way the defendant can be faced with a confusing, complicated environment once drawn into the criminal justice system. Carlen has shown how the criminal courts function as a form of social control to render defendants as “dummy players”,⁶ while McBarnet documents the way that criminal courts “alienate” defendants.⁷ In the face of this, defendants can quickly find themselves very much out of their comfort zone – left inarticulate and overwhelmed. As such, it seems necessary to provide them with a helping hand to guide them through: an expert. It is at this point that the notion of the equality of arms assumes its significance; the adversarial system depends on there being powerful arguments on both sides of the question of legal guilt. On their own, defendants would face a permanent, and telling, disadvantage against the might of the state. To avoid this, they should be provided with access to criminal defence practitioners: lawyers. Accordingly, Goriely outlines the ‘unequivocally’ held principle that ‘in the adversarial system which prevails in the courts in this country, representation is needed on both sides’.⁸ Indeed, McConville et al view ‘the need for defendants to be legally represented in criminal cases is perhaps so obvious that the fact that solicitors may be seen giving advice at the police stations to suspects who have been arrested and advocating their cause in Magistrates’ Courts hardly seems to require explanation’.⁹ The reality is that most defendants simply cannot afford to hire a criminal defence lawyer privately. As such, access to justice does not simply require access to criminal defence lawyers but, specifically, access to criminal defence lawyers funded by legal aid.¹⁰ Indeed, for Ashworth, the ability to defend oneself should not depend on

⁴ *Teixeira de Castro v Portugal* (1998) EHRR 101.

⁵ *Salduz v Turkey* (2009) 49 EHRR 19.

⁶ Pat Carlen *Magistrates’ Justice* (Martin Robertson 1976).

⁷ Doreen J McBarnet, *Conviction: Law, the State and the Construction of Justice* (Palgrave Macmillan 1981).

⁸ Tamara Goriely, ‘The Development of Criminal Legal Aid in England and Wales’ in R. Young and D. Wall (eds), *Access to Criminal Justice* (Blackstone Press Ltd 1996) 26.

⁹ Michael McConville, Jacqueline Hodgson, Lee Bridges and Anita Pavlovic *Standing Accused* (Oxford University Press 1994) 2.

¹⁰ There is no public defender service in England and Wales.

financial resources.¹¹ Following Young and Wall, ‘access to justice seems, therefore, to imply access to legal aid and lawyers’,¹² and such is the position we take in this paper.¹³

Such access to justice, though, is under threat as, per the Law Society, the English and Welsh criminal justice system is ‘crumbling’,¹⁴ in large part due to underfunding, following years of cuts to public services.¹⁵ The cuts within criminal justice system have been substantial: under the coalition government, the Ministry of Justice budget (which includes legal aid) fell by 29%; the Ministry of Justice experienced the most significant of funding cuts during the period of austerity (of £4.5bn – from £10.9bn to £6.4bn).¹⁶ Further, in the years 2012/13 to 2017/18 legal aid spending (civil and criminal) dropped from £2.2bn to £1.6bn with criminal legal aid fees stagnating throughout the neoliberal era (from the mid-1990s onwards) and bring cut by 8.75% under austerity in 2014.

Criminal defence work is not known for being particularly well-remunerated and has always been viewed as such,¹⁷ particularly compared with other areas of legal practice.¹⁸ Yet, figures from the Law Society would indicate that criminal defence solicitors are now in a particularly dire situation, having received no fee increase since 1998.¹⁹ At the same time, house prices and the cost of living have sky-rocketed: for example, since 1998 the average house price here

¹¹ Andrew Ashworth ‘Legal Aid, Human Rights and Criminal Justice’ in R. Young and D. Wall (eds), *Access to Criminal Justice* (Blackstone Press 1996).

¹² Richard Young and David Wall ‘Criminal Justice, Legal Aid and the Defence of Liberty’ in R. Young and D. Wall (eds), *Access to Criminal Justice* (Blackstone Press 1996) 6.

¹³ The text assumes the absence of a US-style public defender service whereby a lawyer directly employed by the state or federal government is provided to all those who cannot assume a private lawyer rather than the *judicare* model of private practice bidding for legal aid contracts that predominates in England and Wales. Such schemes had influenced the New Labour approach to cost-cutting in criminal legal aid as they suggested that evidence from other countries promised that properly funded salaried defenders could be more cost-effective (and provide a better service) than lawyers in private practice. A salaried Public Defender Service was piloted in England and Wales in 2001 but, as it did not meet government expectations, only four remain, including two in Wales (Pontypridd and Swansea).

¹⁴ Law Society *Justice on Trial 2019: Fixing our Criminal Justice system* (Law Society 2019).

¹⁵ See Fabian Society, *The Right to Justice: The final report of the Bach Commission* (2017). See also Young Legal Aid Lawyers, ‘Young Legal Aid Lawyers: Social Mobility in a Time of Austerity’ (2018) <http://www.younglegalaidlawyers.org/sites/default/files/Soc%20Mob%20Report%20-%20edited.pdf> [access 28/01/20].

¹⁶ Owen Bowcott, ‘Legal aid fees to be cut by 8.75%, confirms Ministry of Justice’ *The Guardian*, 10th June. (2015).

¹⁷ Hilary Sommerlad, ‘Criminal Legal Aid Reforms and the Restructuring of Legal Professionalism’ in eds, Richard Young and David Wall, *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty* (1996); Daniel Newman, ‘More than money’ in *No Defence: Lawyers and Miscarriages of Justice*, ed, J. Robins (2013).

¹⁸ Law Society, *Criminal Duty Solicitors: a Looming Crisis*. (2018).

¹⁹ Jared Lawthom, ‘Law Society warns duty solicitors could become extinct’ BBC News 17th November 2018.

in Wales has trebled (£48,294 to £162,374) such that the fees that practitioners receive is actually worth less than they were 20 years ago.²⁰ Opportunities, at the same time, seem to be dwindling; a recent parliamentary question to the UK Secretary of State for Justice illustrated the decline of criminal legal aid provision across England and Wales: in 2010/11, 1,861 firms and 2,598 offices were in operation across England and Wales, whereas in 2018/19 this had declined to 1,271 firms and 1,921 offices. When compared with the start of austerity (in 2010), there are almost a third fewer criminal legal aid firms in operation, and a quarter fewer offices that offer advice and representation. The Covid-19 pandemic is posing even further challenges for the criminal defence profession: a press release from the Law Society on 17th June 2020 announced that 120 firms had already collapsed as a result of the pandemic.²¹

Similar challenges face the Criminal Bar. Repeated cuts in real terms have been made to payments whilst the burdens placed on practitioners have increased. Over a third of criminal barristers are considering other careers, while a third say they would leave the Bar if they were able to.²² In its response to the Ministry of Justice's consultation on legal aid and measures in reaction to Covid-19, the Criminal Bar Association recently put matters succinctly: 'the financial pressures caused by Covid-19, together with the cumulative effect of deleterious policies is, without exaggeration, the greatest threat the Criminal Bar has ever faced'.²³ The impact of Covid-related problems fall disproportionately on publicly-funded barristers and the Young Bar. A recent survey of the Bar conducted by the Bar Council found that 69% of barristers up to 7 years in practice cannot survive at the Bar for a year without financial help and only 22% of those 0-2 years in practice will survive more than a year. In terms of the Criminal Bar in general, Criminal barristers said they had suffered a 75%

²⁰ Legal Aid Scheme: Companies: Written question – 227146, at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-02-28/227146/> accessed 26/07/20.

²¹ Law Society, Press Release 17th June 2020, <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/120-criminal-firms-have-collapsed-with-more-to-follow> accessed 26/07/20

²² Bar Council *Barristers' Working Lives 2017* (May 2018), available at https://www.barcouncil.org.uk/media/661503/working_lives_-_final.pdf

²³ Criminal Bar Association of England and Wales, *Response to The Ministry of Justice Consultation: The Criminal Legal Aid Review & Accelerated Asks*, 29th May 2020, <https://www.criminalbar.com/wp-content/uploads/2020/05/CBA-consultation-Response-CLAR-29.05.20.pdf> accessed 21/07/20

reduction in fee income; 38% of criminal barristers were uncertain whether they would renew their practising certificate in 2021 (i.e. whether they would continue in practice).²⁴

With fewer firms and offices in operation, with fewer criminal practitioners and pupillages, there will be fewer opportunities for graduates wishing to pursue criminal defence work. Those who do initially engage in criminal defence work are being tempted away by the higher fees earned in areas such as local authority work. In our ongoing research with criminal lawyers, solicitors were reluctant to encourage students and graduates to enter in criminal defence because “they’ll always be poor”; with barristers going so far as to say that they would actively discourage their children from entering the criminal defence profession. Added to this, is the average age of the criminal duty solicitor, which is steadily rising particularly outside of large urban areas: almost half of duty solicitors in England and Wales are over the age of 50 and in rural areas this figure creeps up to two thirds. Further, in Wales under 5% of criminal duty solicitors are under the age of 35.²⁵ Whilst on the face of it, this may not pose problems for those *entering* the profession, it does raise concerns about whether there are enough solicitors to train and mentor those joining the profession. Further, concerns have been raised as to whether criminal defence, as a profession, is sustainable,²⁶ particularly if those currently in the profession are reaching the age of retirement and there are fewer entering the profession to replace them. Added to this problem is the general decline of state welfare provision and ‘antipathy...to procedural justice and fair trial’.²⁷

Whilst these cuts undoubtedly have an impact upon those who are using the criminal justice system – and attempting to access justice – and those who work as criminal defence practitioners, they also affect those who are hoping to enter the criminal defence profession; in other words, (some of) our students. In the section that follows we examine the ways in

²⁴ The Bar Council, *Whole Bar Survey July 2020*, <https://www.barcouncil.org.uk/uploads/assets/4fb6e80c-5e2c-4cb3-859547bf9f82d946/Bar-Survey-Summary-Findings-July-2020.pdf> accessed 28.07.20

²⁵ Law Society, *op. cit.*, n. 11.

²⁶ See also James Thornton, ‘Is publicly funded criminal defence sustainable? Legal aid cuts, morale, retention and recruitment in the English criminal law professions’ (2020) 40(2) *Legal Studies* 230-251.

²⁷ Tom Smith and Ed Cape, ‘The Rise and Decline of Criminal Legal Aid in England and Wales’ in *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need*, eds, Asher Flynn and Jacqueline Hodgson (Hart 2017) 63.

which the resilience of our students may be impacted upon by wider trends within criminal justice and, in particular, legally aided criminal defence.

Teaching criminal law and criminal procedure

Criminal law and criminal procedure form a part of the syllabus across all institutions offering a Qualifying Law Degree (the academic stage of legal education) at undergraduate level across England and Wales. The study of the substantive criminal law has always been a necessary component of the Qualifying Law Degree, and both criminal law and criminal procedure will form a (relatively small) part of the proposed Solicitors' Qualification Examination.²⁸ The broader extent to which criminal law and procedure and the surrounding areas of research and study form part of the curriculum of the law degree varies from institution to institution, but most offer a variety of optional modules, often incorporating elements of criminology. In Cardiff we choose to also include contextual and socio-legal background in our first year Criminal Law module, with a particular emphasis on the incorporation of feminist perspectives.

Besides being a necessary part of the degree, crime is often considered an attractive area of study to many students. Students often report to us enjoying crime more than many of their other core subjects, partly because they can engage with the issues and it provides a subject-matter that maintains their interest. Further, when members of the public think of "law", the first image that will spring to a significant proportion of minds are those of the adversarial courtroom, the bewigged barristers and the tales of bloodcurdling offences. It is an area of law which easily captures the imagination and enthusiasm, at least at a superficial level.

For us as educators, teaching criminal law and criminal procedure reflects and concentrates many of the broader issues involved in teaching law. We must set our teaching against this background reminding ourselves why we teach law and why our students study it. The

²⁸ Law Society, *SQE1 Functioning Legal Knowledge Assessment Specification*, <https://www.sra.org.uk/sra/policy/sqe/sqe1-functioning-legal-knowledge-assessment-specification/> accessed 24/07/20.

tensions involved in the role of the law school, in particular the perceived duality between the professions and the academe, are well-documented.²⁹ Whilst we may teach so that our students learn to explore the richness and complexity of law and notions of justice within their social, political and historical context, we cannot be blind to the fact that many of our students come to us because they want to become lawyers and see their degree as one step on the path to practice. In a quick survey of our first-year students in a criminal law lecture we found that 85% of students intended to go into legal practice,³⁰ and that the second most common theme in answer to the question ‘Why did you decide to study law?’ related to employability, career prospects or a specified desire to become a lawyer.³¹

Increasingly the political and public rhetoric frames the “value” of a degree in simple economic terms; indeed the terms of reference for the Augar Review into post-18 education and funding explicitly referenced “value for money”.³² Whilst recent work such as that of Nicholson explores and evaluates the notion of “value” in this context more holistically,³³ we need to acknowledge that some students will see part of the value of a degree as an opportunity to access areas of employment which might otherwise be closed-off to them. The acquisition of a law degree (and subsequent qualification as a barrister or solicitor) has in the past been seen as a gateway to social mobility, although the extent to which academic success can outpace other factors such as class, familial connections and social capital is very much open to debate.³⁴ If our students want to become lawyers, want to earn money which allows them to repay debts or achieve other life objectives, what does this mean for those of us who teach criminal law and criminal procedure?

Against the background outlined above of consistent underfunding of criminal legal aid, fewer and fewer law students are progressing into practice as criminal solicitors or barristers. As

²⁹ Bob Hepple, ‘The renewal of the liberal law degree’ (1996) 55(3) *Cambridge Law Journal* 470, 477.

³⁰ 139 of the 164 respondents.

³¹ 90 of the 164 respondents. The most common theme was being generally interested in law or having enjoyed it at A-Level.

³² Department for Education “Reviewing Post-18 Education and Funding: Terms of Reference (Department for Education: 2018)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682348/Post_18_review_-_ToR.pdf accessed 21/07/20

³³ Alex Nicholson, The value of a law degree (2020) 54(2) *The Law Teacher* 194.

³⁴ Sam Friedman and Daniel Laurison, *The Class Ceiling: Why it Pays to be Privileged* (Policy Press 2019).

fewer enter, the profession ages,³⁵ and low salaries in the sector combined with high debt levels have been highlighted by the Young Legal Aid Lawyers Group as posing a ‘significant barrier’ to pursuing a career in legal aided areas of work.³⁶ In recent years, issues of wellbeing for practitioners have also come to the fore.³⁷ Many areas of concern focus on workload, underfunding, and the implications for work/life balance of inflexible court listings, which are likely to disproportionately affect criminal practitioners. Whilst students may well be attracted to criminal practice, does what we know of the economic prospects of such practice, the issues of wellbeing, and the social status of criminal practitioners within the profession have implications for how and what we teach? We will explore this predicament in the following section.

The ethics of teaching criminal law and criminal procedure

We recognise our relative privilege as legal academics. We are in secure employment within a sector that has undoubtedly some level of freedom. We recognise that this freedom is somewhat stifled by, inter alia, metrics such as the Research Excellence Framework and the Teaching Excellence Framework and – within law – changes to the degree in light of the Solicitor’s Qualifying Exam. Those of us working in higher education also face chronic problems such as precarity, pay gaps, pension poverty, and – as with criminal practice – increasingly unmanageable and unsustainable workloads.³⁸ Bearing in mind the factors surrounding our own employment and what we know of the criminal justice system, we find ourselves in an uncomfortable ethical position in respect of our students. During the module, ‘Crime, Law and Society’ (initially devised by Newman and Harris, and on which we have all taught at various points over the past 3 years), we teach students about the problems with

³⁵ Law Society, “Criminal justice system in crisis: Parliamentary Briefing” <https://tlsprdsitecore.azureedge.net/-/media/files/topics/criminal-justice/criminal-justice-system-in-crisis-briefing.pdf?rev=29f372a6c9a3448598f432807338e032&hash=D935AECA67833A38188D9DD8176D9D89> accessed 20/07/20.

³⁶ Young Legal Aid Lawyers (n14) 7.

³⁷ Richard Collier, Anxiety and Junior Lawyers in Alex Davies, (ed) ‘*Lawyer Health and wellbeing: How the legal profession is tackling stress and creating resiliency*’ (Ark Publishing 2020); Junior Lawyers Division, *Resilience and Wellbeing Survey 2019: Survey Report*. (Law Society 2019).

³⁸ University and College Union, *Our Four Fights* https://www.ucu.org.uk/media/10715/Our-four-fights/pdf/ucu_four-fights-explainer.pdf accessed 28/07/20.

the criminal justice system and, in particular, the challenges faced by the criminal defence profession.

A number of these students express an interest in working within the criminal justice system, typically (although not exclusively) within criminal defence. Whilst the first half of the module engages students in debates regarding the demise of the criminal justice system and, in particular, the problems with – and faced by – the criminal defence profession, the second half exposes students to the practical realities – both positive and negative – of criminal practice. This part of the module introduces our students to many of the skills and experiences of criminal lawyers through a series of practice-facing sessions built around a fictional set of case papers. The two perspectives on the subject area are presented by staff who bring different areas of academic and professional expertise; term one is taught by staff (Newman and Dehaghani) currently active in socio-legal research (with a focus on the criminal justice system) whilst term two is taught by a former criminal law practitioner (Harris). Through their reflective journals and through discussion with both module leaders, students are encouraged to reflect upon and communicate their developing and nuanced understanding of the problems facing the criminal defence profession and the criminal justice system more generally. This often results in an inherent conflict for our students: they have learned about the problems with criminal defence practice whilst also seeing how criminal defence can effectively contribute to enhancing the lives of others. Indeed, the module is in part designed to spark such reactions, having been initially born out of Harris' personal reflections upon the early days of training for the Bar and a pupillage in specialist criminal chambers in London after a horizon-widening year spent studying a Master degree in Criminology.

For us, the challenges facing criminal defence (and the criminal justice system more broadly) raise an ethical dilemma in relation to those students who wish to pursue a career in criminal defence: without encouraging our students to enter the profession, we are in effect contributing to the demise of the profession; without “new blood”, the profession is most certainly going to perish in 10-15 years' time, if not less. On the other hand, we feel reluctant to encourage our students to enter the criminal defence profession when we understand – through previous practice, through discussion with our colleagues and peers in the

profession, and through our academic research and scholarship – that the profession offers few opportunities for social mobility and progression.

Part of the answer to how we address this question lies within the design of the module itself. The module is constructed, taught, and assessed in such a way that it surfaces these tensions and synergies for students and asks that they reflect upon them. This provides students with the space in which to recognise and acknowledge the conflicts they may feel. In recognition of our role as educators, we feel it important to critically reflect on our encouragement – or otherwise – of students entering the criminal defence profession. We cannot discourage our students from pursuing their passions but, equally, should we encourage our students to enter into a criminal defence profession when this profession – and the wider system within which it operates – is so evidently imperilled? We are still, then, left in a predicament about how to approach this tension. We thus challenge ourselves to work out what we can do to ensure that the profession has a future. It is to this matter that we turn in the following section.

Academia and institutional obligations

In seeking to understand these dynamics and impacts, Fineman's vulnerability theory is particularly illuminating. For Fineman, 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'.³⁹ Not only can this be interpreted as a responsibility on the state to ensure that individuals can access justice through state-provided support, it can also be interpreted to include a state responsibility to ensure that graduates can access – so far as possible – career opportunities. In order to do so, however, there must be a viable career to enter into. Whilst essential to understanding human – or individual – vulnerability, Fineman's theory also urges us to consider the vulnerability of institutions:

³⁹ Martha A. Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 10, 273-274.

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 now invisible in a haze of lost history.⁴⁰

Thus, institutions – such as a publicly funded criminal defence profession – can be vulnerable and compromised: in England and Wales, the criminal defence profession has been eroded and undermined by years of funding cuts and fee stagnations. However, these issues do not simply affect the profession itself and by extension those working within it. The problems cannot be severed from the ways in which they impact upon those who are studying law (particularly criminal law and procedure) and those who are teaching it. The exposed vulnerabilities may not stem simply from the demise of the criminal defence profession but certainly cannot be disconnected from it either. Vulnerability theory alerts us to the inescapable fact that ‘we are not atomised, separate beings; we are inter-connected’.⁴¹

The demise of the institutions – and the dwindling numbers of jobs – mean that our students, when they graduate, will have fewer options available to them, or at least options that are feasible. Students who are saddled with large debts, particularly those from low income households and/or with little to no support system, may abandon their ambitions to earn money. The rightful reluctance on the part of our students to enter into the profession may call into question our role as educators. Whilst the value of a degree cannot be shaped or determined by career prospects, such considerations are nevertheless important. A vulnerability analysis highlights the interconnectedness of such problems: without encouraging our students to enter practice we may indirectly contribute to the (further) demise of the profession, and the absence of a profession may render our roles as criminal law and justice educators redundant. A vulnerability analysis highlights that we are not rational, liberal, autonomous beings as we think we may be, but we depend on institutions, relationships and networks, and these things, too, are dependent on us.

⁴⁰ Martha A. Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1), *Yale Journal of Law and Feminism* 1, 18.

⁴¹ Dehaghani and Newman, op. cit. n1, 1207.

As such, students and their teachers cannot detach themselves from what is happening to the criminal defence profession: the crumbling of criminal defence has impacts upon teaching and learning, and whilst there is a place for teaching criminal law and procedure without a view to our students entering the profession, it may be more difficult to near impossible to sustain our teaching without drawing upon practice (whether in the form of input from practitioners and/or research with practitioners).⁴² But there is a more fundamental issue at hand here: within a vulnerability analysis, do we as teachers and our institutions as educational (and public service) providers have a role to play in pushing back against further cuts and, by extension, limits to our students' prospects?

It is therefore important that we, as academics and educators (and indeed as citizens), use our positions to expose the problems with the criminal justice process and the problems facing the criminal defence profession, whilst at the same time taking steps to support the profession.⁴³ However, with increasing workloads and increased precarity, this is not entirely possible, at least for us as individuals to achieve. As such, we believe that it is the duty of universities to engage with these questions and to, in pursuance of their civic mission, provide the time, space and resource to counter the problems faced by the criminal defence profession. Following Fineman, whilst institutions are themselves vulnerable (and such was exposed during COVID-19 with some universities facing financial hardship and, in some cases, bankruptcy),⁴⁴ they can also be a source of resilience. Universities, rather than being concerned with research and teaching metrics, could realise their value in supporting local communities in a real and meaningful manner; they could place their institutional gravitas behind their teaching and research staff (many of whom are working hard in the pursuance of social and criminal justice); they could cease competition with one another (recognising

⁴² Of course, it could indeed be argued that criminal defence would still exist as a profession, albeit one that is not publicly funded. However, that line of reasoning falls short on at least two bases: firstly, that legal practice (and therefore criminal defence practice) is a public service and secondly, that without public funding, vast numbers of people would go unrepresented perhaps making the profession (if privately funded) obsolete.

⁴³ Fabrizia Serafim has called for the use of the concept of 'extensão' – see Serafim, F. [article].

⁴⁴ Camilla Turner, Thirteen universities face bankruptcy without Government bailout, IFS analysis finds. The Telegraph: 6 July 2020. <https://www.telegraph.co.uk/news/2020/07/05/thirteen-universities-face-bankruptcy-without-government-bailout/> accessed 28/07/20.

their mutual reliance) and instead put such energies into improving society for those who rely on social welfare (such as criminal legal aid).

Fineman's vulnerability theory alerts us to the interconnectedness of our existence: the problems facing the criminal defence profession are not simply problems for criminal defence practitioners to shoulder. They are problems that will inevitably affect many of our students and, by extension, are problems that we encounter in our teaching practices and need to bring into our classrooms. Recognising the position we occupy as academics – and some of us were formerly, both, law students and practitioners – gives us a sense of responsibility and a desire to help fight for something we believe to be important. We can see the role to be played by legal academics in working to preserve access to justice in the criminal sphere (and beyond). Yet, the institutions within which we work – i.e. the university or universities – must also commit to their civic mission agenda; the burden should not be for the individual to bear.

Conclusion

The module on which we teach together arose as a result of reflective conversations about our different experiences of and perspectives upon the criminal justice system and a shared desire to help students recognise the complex relationships between a theoretical examination of that system and practical participation within it. As educators and as reflective practitioners, especially in times of such rapid change both within the academe and beyond it, we find it is increasingly necessary to continue this process of reflection upon our position, being honest with students whilst also supporting them. The constant and iterative process of interrogating what we teach and why becomes more important to all of us.

Within this process, we are aware of problems in the criminal justice system and, in particular, the challenges faced by criminal practitioners. We feel a duty to play a role in fighting to protect an institution that we see great importance in. That said, the task of providing resilience to the criminal defence profession is not ours alone; universities should also take a greater role in supporting the legal profession. Doing so will not only illustrate that they take seriously their students' futures but that they also recognise – and place value on – contributing to wider society. This should not be borne out of a concern for metrics, league

tables, and neo-liberal performance monitoring initiatives, but must emerge from a recognition of the university's role in wider society. The university has the ability and capacity for promoting social justice.

A vulnerability analysis allows – indeed, demands – for a recognition of the interconnectedness. It allows us to critically interrogate not only the dire state of criminal defence but also the ways in which individuals and institutions can undermine and support change. Doing so requires a reflexivity and a recognition of this interconnectedness. Vulnerability theory also allows us to mount a successful challenge to neoliberal ideology: it draws our attention to the ways in which neoliberal discourses present individuals and institutions as self-sufficient and autonomous, failing to expose the reliance on – and reliance of – individuals and institutions. This paper has aimed to highlight some of the many challenges in teaching criminal law and procedure in the face of a crumbling criminal justice system. It is not intended to provide all the answers to the crisis facing criminal justice or, indeed, the crisis facing universities. What we have sought to do is express some of the questions that we have asked ourselves as academics and, in so doing, we have explored some of the problems and possibilities in the hope of prompting further discussion and debate.

Vulnerability theory is central to this; it may have the potential to radically transform society and to radically transform the higher education landscape. We hope that ongoing dialogue into the role that legal academics could play, with regards to our students and the wider legal profession, will progress with an understanding of the insight that can be provided by taking vulnerability seriously.