

# **Exploring the UK innocence movement: tension, reconfiguration and theorisation**

This thesis is submitted in fulfilment of the requirements for the Degree of Doctor of  
Philosophy

**Holly Greenwood**

Cardiff School of Law and Politics

ESRC

April 2017

## **DECLARATION**

This work has not been submitted in substance for any other degree or award at this or any other university or place of learning, nor is being submitted concurrently in candidature for any degree or other award.

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## **Summary**

This is the first in-depth empirical research into the UK “innocence movement,” which refers to the establishment of innocence projects (IPs) across the UK. IPs are university clinics in which students investigate cases of alleged miscarriages of justice. The Innocence Network UK (INUK) was founded in 2004 and assisted in the development of thirty-six IPs across the UK. This thesis utilised empirical methods undertaking semi-structured interviews with past and present leaders of IPs and other criminal appeal units. It provides three original insights into the UK innocence movement. First, it explored the distinctive model of IPs offered in the core literature and identified several underlying tensions within it. However, the research found the majority of sampled IPs did not conform to this model. Thus for heuristic purposes, and to examine the contrasting aims and objectives of criminal appeal clinics, the thesis sets out two ideal types and uses the evidence from interviews to place the sampled projects along a continuum between these. This section illustrated that the tensions within the literature model of IPs resulted in the sampled projects either evolving away from this approach, or not adopting it in the first place. Secondly, the thesis asks whether the innocence movement can be seen to follow a “rise and fall” trajectory, as the initial expansion of INUK was followed by its closure and the demise of several IPs. Instead, it is argued that the movement is better understood as having undergone a reconfiguration, and that the future landscape for miscarriage of justice work looks likely to be very different from that portrayed in the literature. Finally, the thesis adapts Luhmann’s Social Systems theory as a theoretical framework for examining the evolution of the UK innocence movement. The analysis concludes that this can provide theoretical insights into why the original aims and objectives of IPs were not realised. Insight is also drawn from Nobles and Schiff and their account of systems theory, which is used to further explore the tensions within the IP concept. The thesis conclusion reflects on the findings and offers suggestions for future research opportunities in these areas of legal education and analysis.

## **Acknowledgements**

Completion of this PhD thesis would not have been possible without the input and support of several individuals.

I would firstly like to express huge gratitude to my supervisor Professor Stewart Field, who has supported me throughout my time as a postgraduate. His contribution has been invaluable, and without his feedback and engagement in this thesis it certainly would not have been possible.

I would also like to thank Professor Daniel Wincott, who has acted as my second supervisor and whose insight has been a significant contribution to this thesis.

I also extend sincere appreciation to Dr Russell Sandberg, who has dedicated a vast amount of time to helping develop my theoretical analysis, but has also supported me throughout the progression of my PhD.

Extreme gratitude and appreciation is also extended to Professor Julie Price and Dr Dennis Eady who have provided unwavering support to me throughout my PhD, my MSc and my undergraduate degree. These two individuals have been an extremely important part of my time at Cardiff University, and without their help this thesis would also not have been possible.

I would also like to acknowledge the wonderful postgraduate community within the Cardiff School of Law and Politics. Firstly, thank you to Sharron Alldred, Sarah Kennedy and Helen Calvert for their support and help throughout the PhD experience. Furthermore, I thank Dr Rachel Cahill-O'Callaghan for her help with this thesis, and also for her work in cultivating a collaborative research culture within the postgraduate community. Furthermore, thanks and appreciation go towards all my colleagues and fellow PhD students who have always been an immense support and have been extremely important to my time at Cardiff University.

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## **Introduction**

The topic of this thesis is the “innocence movement” in the UK. It is necessary by way of introduction to discuss, what is the “innocence movement”? And why does it merit academic attention?

The “innocence movement” is a term borrowed from American scholarship about the creation and spread of “innocence projects” (IPs) in the United States (US).<sup>1</sup> There are a number of variations of IPs; but the type concentrated on within this thesis are university based projects, where students investigate alleged cases of miscarriages of justice.<sup>2</sup>

The first IP was established in the US, at the Benjamin Cardozo Law School in Yeshiva University in New York in 1992. The Innocence Project<sup>3</sup> was co-founded by Peter Neufeld and Barry Scheck and describes itself as a “national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice.”<sup>4</sup> In 2004 the Innocence Network (IN) was established in the US, which describes itself as an “affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted,” alongside “working to redress the causes of wrongful convictions, and supporting the exonerated after they are freed.”<sup>5</sup> In the US, the innocence movement has been so significant that it has been referred to as “the civil rights movement of the twenty-first century”<sup>6</sup> or as an “innocence revolution.”<sup>7</sup> IN now has sixty-eight member projects, and whilst the majority are American, international members are growing in number.<sup>8</sup> Following the success in America, IPs have spread to other countries such as Canada, Australia, New Zealand, Italy, the Netherlands, Ireland and the UK.

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<sup>1</sup> See for example: D Medwed, ‘Innocentrism.’ [2008] University of Illinois Law Review 1549; G Brown, ‘Deconstructing Innocence: Reflections from a public defender: Can student attorneys accept the paradigm of guilt and continue zealous representation?’ (2008) 13 International Journal of Clinical Legal Education 33 p.34

<sup>2</sup> In the US there are other types of “innocence projects,” such as private organisations, which may or may not be affiliated with law schools (see J Stiglitz, J Brooks, and T Shulman, ‘The Hurricane Meets the Paper Chase: Innocence Projects new emerging role in clinical legal education.’ (2001-2002) 38 California Western Law Review 413 p.415); the UK has also had an innocence project based in a law firm at White & Case LLP

<sup>3</sup> The Innocence Project is a trademarked name: other projects have different variations of this name

<sup>4</sup> <http://www.innocenceproject.org/about/> (accessed 22/05/16)

<sup>5</sup> <http://innocencenetwork.org/about/> (accessed 22/05/16)

<sup>6</sup> D Medwed (n.1) p.1550

<sup>7</sup> K Findley, ‘Innocence Found: The New Revolution in American Criminal Justice.’ in S Cooper (eds.) Controversies in Innocence Cases in America (Ashgate Publishing Ltd. 2014) p.3

<sup>8</sup> <http://innocencenetwork.org/members/#alpha> (accessed 22/05/16)

The first IP in the UK was set up in January 2005 at the University of Bristol by Michael Naughton.<sup>9</sup> This followed on from Naughton's launch of the Innocence Network UK (INUK) in September 2004: this was established as a membership network for the development of IPs across the UK.<sup>10</sup> In 2006 Naughton described the threefold aims of INUK as to: encourage and assist the development of IPs across the UK; to undertake research which identifies the causes of wrongful conviction and to effect legal reform; and to raise public awareness of the wrongful conviction of individuals.<sup>11</sup> During its operational period from September 2004 until September 2014, INUK assisted in the establishment of 36 IPs (35 at universities and 1 in a law firm).<sup>12</sup> There were also two IPs in the UK which bypassed joining INUK and joined the IN in their own right, at the University of Leeds and the University of Westminster.

Based on the number of IPs and the breadth of universities involved, the UK innocence movement appeared to have a strong foundation. However, there appear to have been several underlying problems within the UK innocence movement. Firstly, despite operating for over a decade, IPs in the UK have only overturned one conviction, which was in December 2014.<sup>13</sup> Furthermore, only three cases worked on by IPs have ever reached the Court of Appeal, and these were from just two universities.<sup>14</sup> This is in sharp contrast to the US where for example, The Innocence Project website documents that it has been involved in 192 DNA exonerations.<sup>15</sup> Secondly, the UK movement has been fraught with relationship breakdowns with IPs having been described as "in a state of civil war," and "notoriously clawing each other's eyes out" and "squabbling over cases."<sup>16</sup> Additionally, in July 2014, Naughton announced that from September 2014, INUK would cease to operate as a member organisation for IPs across the UK. At this time the INUK website still listed 25 member IPs across the UK. This decision marked a turning point for the UK innocence movement. INUK had appeared to offer a promising basis for a nationwide, collaborative effort to help those claiming wrongful

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<sup>9</sup> T Varnava, H Brayne, M Naughton and C McCartney 'Government and Education News.' (2006) 40(1) The Law Teacher 71 p.76

<sup>10</sup> Ibid. p.78

<sup>11</sup> T Varnava, H Brayne, M Naughton and C McCartney (n.9) p.78

<sup>12</sup> <http://www.innocencenetwork.org.uk/history> (accessed 22/05/16)

<sup>13</sup> This was the case of Dwaine George: it was an INUK case worked on and referred to the CCRC by Cardiff Law School innocence project

<sup>14</sup> Two cases worked on by the University of Bristol innocence project (ran by Michael Naughton), both of which were refused appeal; and the one case from Cardiff University Law School innocence project which was subsequently overturned.

<sup>15</sup> <http://www.innocenceproject.org/all-cases/#involved-yes> (accessed 04/08/16). There are also numerous other projects in the US which have also achieved exonerations.

<sup>16</sup> D Jessel 'If Andrew Mitchell can see the light, it could happen to everybody...' (3<sup>rd</sup> June 2014) The Justice Gap <http://thejusticegap.com/2014/06/andrew-mitchell-can-see-light-happen-anybody/> (accessed 19/06/14)

conviction. Its collapse marked a period of uncertainty, sparking questions such as, “Is innocence work over in the UK?”<sup>17</sup> Whilst another asserted: “UK Innocence Projects: a bright future.”<sup>18</sup> Questions also arose over how university projects working on miscarriages of justice should evolve in INUK’s wake, with one hoping: “The end of innocence, and the chance of a new beginning?”<sup>19</sup>

One consequence of INUK disbanding is that there are very few “innocence projects” by name left in the UK. Some IPs closed following the INUK fold, such as the University of Gloucester, the University of Southampton and Cambridge University.<sup>20</sup> When Naughton initially announced INUK’s end as a membership organisation for IPs, he still intended for it to continue with casework and research; he folded the University of Bristol IP as a separate entity and incorporated it within INUK. However, in May 2016, INUK announced that it was no longer operational and was officially closed. Although Naughton does suggest on the website that he is collaborating on cases with a small group of people, there is no longer an IP at the University of Bristol. A number of former IPs are still in operation, but they have changed their name from “innocence project” to various alternatives, such as Justice Project,<sup>21</sup> Miscarriages of Justice Review Centre<sup>22</sup> and Criminal Appeals Project.<sup>23</sup> As the “innocence project” name is trademarked to IN, following INUK’s fold former member IPs would have had to join the international network to continue using the name: many former IPs either were ineligible to join, or chose not to.<sup>24</sup>

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<sup>17</sup> C McCartney, ‘Is ‘Innocence’ work over in the UK?’ (July 24<sup>th</sup> 2014) Wrongful Convictions Blog <https://wrongfulconvictionsblog.org/2014/07/24/is-innocence-work-over-in-the-uk/> (accessed 04/08/16): Carole McCartney was the founder of Leeds innocence project in 2005. Followed by, J Price, ‘Is innocence work really over in the UK?’ (September 25<sup>th</sup> 2014) The Justice Gap <http://thejusticegap.com/2014/09/innocence-work-uk/> (accessed 04/08/16): Julie Price is the founder and director of Cardiff University Law School innocence project

<sup>18</sup> A Green, ‘UK Innocence Projects: a bright future.’ (21<sup>st</sup> August 2014) The Justice Gap (<http://thejusticegap.com/2014/08/uk-innocence-projects-bright-future/>) (accessed 31/08/16)

<sup>19</sup> H Quirk, ‘The end of innocence, and the chance of a new beginning?’ (8<sup>th</sup> September 2014) The Justice Gap (<http://thejusticegap.com/2014/09/end-innocence-new-beginning/>) (accessed 31/08/16)

<sup>20</sup> This is likely not an inclusive list: however, it is difficult to know how many IPs are operating in the UK now there is no central network.

<sup>21</sup> Leeds University

<sup>22</sup> Sheffield University

<sup>23</sup> BPP (Leeds and Holborn)

<sup>24</sup> For example, one of the requirements for membership is that the host institution sets aside at least twenty hours per week of at least one staff member’s time to supervise students and oversee the program (<http://www.innocencenetwork.org/resources/membership-materials/membership-guidelines> (accessed 21/02/15)).

Therefore, this provokes the question, what is in a name? And what was the UK “innocence movement?” Does such a movement still exist in the UK? And furthermore, why should this merit research?

There has been very little research on IPs internationally, and in the UK there has been no in-depth research about IPs<sup>25</sup> despite their former prevalence. This thesis aims to explore the UK innocence movement and its potential academic significance.

This thesis will proceed as follows.

Firstly, Chapter 1 will contain the literature review. This will explore what has been written about the innocence movement in the UK and how this compares internationally. Thus far there has been limited academic literature on IPs in the UK. This review will firstly ascertain what is known about such projects, before discussing why they are thought to merit academic consideration. The literature demonstrates that the UK innocence movement was based on a distinct philosophy about miscarriages of justice with a strong reform agenda, which makes the development of IPs of interest. Furthermore, the literature points to several potential underlying tensions within the model of IPs that also warrant consideration. This chapter will conclude by posing research questions to explore these points.

Secondly, Chapter 2 will explain why Luhmann’s Social Systems theory<sup>26</sup> has been selected as a theoretical framework for examining the development and operation of IPs and the UK innocence movement. As will be revealed in the literature review, a central focus of the UK innocence movement was the discord between legal and lay conceptions of a miscarriage of justice: its discrimination between “legal” and “factual” innocence pointed towards Luhmann’s theory as a basis for exploring this. This chapter will provide a brief literature review of the theory and then set out its potential implications for our understanding of IPs and the innocence movement: it will conclude by setting out further research questions which emerge from engaging with this theoretical approach.

Chapter 3 will outline the research design and methodological approach taken in this thesis. This research utilised empirical methods, and semi-structured interviews were carried out with

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<sup>25</sup> A recent empirical study was carried out to try and determine what IPs were still operating in the UK. (M Alexander, ‘Innocence Projects – Green Shoots.’ (10<sup>th</sup> June 2016) Criminal Law & Justice Weekly <http://www.criminallawandjustice.co.uk/features/Innocence-Projects-%E2%80%93-Green-Shoots> (accessed 31/08/16))

<sup>26</sup> Niklas Luhmann was a German sociologist based at Bielefeld University; he is the founder of autopoietic social systems theory. See for example: Luhmann N, Social Systems (Stanford University Press 1995)

sixteen leaders of IPs; additionally four further interviews were conducted with leaders of alternative criminal appeal clinics as a comparative point. Due to the exploratory nature of the research, it proceeded on an inductive basis with constant revision of the themes and research questions arising.

Chapter 4 will discuss Section 1 of the results, and will seek to examine to what extent it was possible to construct a “typical” IP model. This will illustrate that, whilst the literature suggested there was a distinctive philosophy and approach of IPs, this was markedly less clear from the sample. This section will aim to explore the variations that emerged in the data around the aims, objectives and approaches of the sampled projects. For heuristic purposes, it will propose two normative ideal models based on the literature and empirical data: it will then situate the sampled IPs and criminal appeal units on a continuum between these two ideal-types.

Chapter 5 discusses Section 2 of the results. This explores whether it is appropriate to analyse the innocence movement in terms of a “rise and fall” narrative. The sharp rise of projects in the early stages of the movement contrasted with their gradual decline in the last few years suggested such an analysis. This chapter will demonstrate that there were a significant number of underlying problems and tensions within the UK innocence movement which became apparent in the data; it will be suggested these likely contributed to the INUK fold and declining number of IPs. However, this chapter will argue that, rather than understanding the innocence movement as undergoing a “rise and fall,” we are witnessing a “rise and reconfiguration” of projects in the UK. Former IPs that are still operational have developed new approaches and sought new collaborations. Therefore, it will conclude that the future landscape of miscarriage of justice work at UK universities appears to look significantly different to the innocence movement as portrayed in the literature.

Finally, Chapter 6 will apply Luhmann’s Social Systems theory to examining IPs and the UK innocence movement. This chapter will firstly address how Luhmann’s theory is being applied to examining the interview data, which will involve a consideration of the role of people within the theory and their relationship with social systems. Secondly, it will proceed to its main discussion, which will question how we should conceptualise IPs within Luhmann’s theory: in doing so, it will look at the model of IPs as portrayed in the literature, alongside the sampled IPs and the empirical data. . Thirdly, it will be considered why the reform agenda of IPs potentially poses unique problems for the legal system according to a systems analysis. Finally,

the chapter will conclude with a discussion around how this theoretical approach reveals important tensions within the literature model of IPs and the aims and objectives of the UK innocence movement; and thus, how it can offer some potential insights into why the movement evolved as it did. This is the first in-depth analysis of IPs through social systems theory; although the theory has been hinted at in the innocence movement literature, application of this theoretical perspective to understanding IPs has not yet been fully explored.

The conclusion will firstly draw together and summarise the results. It will then discuss the place of the research findings within the comparative context of the global innocence movement, before discussing how the contributions made by this thesis can be situated within broader academic literature. It will conclude by reflecting on future developments within this area, and any insights which the results of this research can provide.

# **Chapter 1**

## **Literature Review**

### **Introduction**

The central topic of this thesis is the development and operation of “innocence projects” (hereafter IPs) in the UK. Despite their prevalence over the last decade, there has been limited academic literature on this subject; therefore, they merit deeper academic consideration. This literature review will take the following approach. Firstly, the existing literature on IPs will be explored with a view to establishing their fundamental characteristics. This will demonstrate how the limited academic literature leaves open some important questions about how we should conceptualise IPs. Secondly, it will suggest the interlocking aims of IPs potentially give rise to a number of tensions, which raise important questions about IPs and merit exploration through research. Furthermore, it will demonstrate that these tensions feed into a debate over whether IPs serve a valuable purpose within the criminal justice system. Thirdly, the UK innocence movement will be compared with the international movement, with central focus on the US. This will explore some potential reasons for the comparative lack of success of IPs in the UK, and will reflect on the difficulties and challenges which IPs face drawing on American research. This will conclude by drawing together the key findings of the literature review, and will pose the research questions that have been identified as important for exploration.

### **1. Context: the American “innocence movement”**

To provide essential context, this section will briefly engage with the international literature on IPs, particularly in relation to the US. It will then concentrate on the UK innocence movement, discussing the context to its development; the creation and role of Innocence Network UK (INUK); and the aims and objectives of UK IPs. It will conclude by defining and conceptualising UK IPs and their fundamental characteristics as portrayed in the literature.

The development of IPs internationally has been referred to as an “innocence movement” which began in America. As outlined in the introduction, the first IP in America was established in 1992 at Benjamin Cardozo Law School in Yeshiva University, New York:<sup>1</sup> this is known as The Innocence Project (hereafter IPNY) and was co-founded by Barry Scheck and Peter

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<sup>1</sup> Predating this was Centurion Ministries which was established in 1983 by McCloskey to examine cases of wrongful conviction.



Neufeld.<sup>2</sup> Scheck and Neufeld recognised the potential in new DNA technology to absolve potentially innocent victims of wrongful conviction.<sup>3</sup> The IPNY website describes its role as: “a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice.”<sup>4</sup> The aims of IPNY are: to exonerate the innocent; to improve the law; to reform through strategic litigation in the courts; and to support exonerees as they try to rebuild their life post-release.<sup>5</sup> It has established its own policy department to enhance and develop its role in reform.

Following the IPNY’s success, which has been involved in 190 exonerations in the US,<sup>6</sup> IPs began to be established in other states.<sup>7</sup> The introduction explained how the Innocence Network (IN) was established in the US in 2004.<sup>8</sup> Since then the American movement has continued to grow in strength. As of 2016, the Innocence Network (IN) has 68 member IP organisations worldwide.<sup>9</sup> The introduction detailed that IN describes itself as “an affiliation of organizations,” which are “dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted, and working to redress the causes of wrongful convictions.”<sup>10</sup> This suggests IN member projects will be committed to both providing casework services to alleged victims of miscarriages of justice, and seeking to improve the current systemic approach to miscarriages of justice.

There are different models of IPs in the US: some exist as private organisations whilst others are based in universities; this thesis is primarily concerned with the latter. IPs are predominantly based in law departments, but may also be in others, such as journalism or criminology. This review will concentrate on those based in law schools because they are most commonly discussed in the literature. Medwed said that whilst there are differences between IPs across the US, they generally share a “common emphasis” on: (1) “seeking the release of prisoners whom members of the project believe to be innocent of the crimes for which they

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<sup>2</sup> The Innocence Project is protected by copyright and trademarked, and therefore reference to other innocence projects should not be capitalised.

<sup>3</sup> J McMurtrie, ‘The Innocence Network: From Beginning to Branding.’ in Cooper, S (eds.) *Controversies in Innocence Cases in America* (Ashgate Publishing Ltd. 2014) p.23

<sup>4</sup> <http://www.innocenceproject.org/about-innocence-project> (accessed 14/01/2016)

<sup>5</sup> <http://www.innocenceproject.org/free-innocent> (accessed 14/01/2016)

<sup>6</sup> <http://www.innocenceproject.org/all-cases/#involved-yes> (accessed 08/08/16)

<sup>7</sup> The first followers being IP Northwest at the University of Washington School of Law; Center on Wrongful Convictions; Wisconsin IP; California IP and Medill Justice Project (J McMurtrie, (n.3) p.24)

<sup>8</sup> <http://innocencenetwork.org/about/> (accessed 20/07/15)

<sup>9</sup> <http://innocencenetwork.org/> (accessed 20/07/16)

<sup>10</sup> Ibid.

have been convicted and for whom there are few other alternatives for legal representation, while (2) providing a first-rate educational experience for students.”<sup>11</sup>

This first point is particularly important: IPs often focus on cases of “factual innocence,” where the prisoner is claiming complete, actual innocence of the crime. This likely originated from the IPNY which restricted its remit to reviewing claims of innocence where there was scope for DNA testing to either confirm or exclude their clients’ involvement.<sup>12</sup> However, in 2001, Neufeld and Scheck urged IPs to take on cases where the “magic bullet” of DNA testing was not available, because the DNA era was approaching its end.<sup>13</sup> Thus several IPs in the US do not operate with this restriction. Brooks, Stiglitz and Shulman said when setting up the California IP they decided not to limit it to DNA cases, because this only helped a small minority of people claiming wrongful conviction: they said the IPNY would turn down 70% of applicants because necessary samples had been destroyed.<sup>14</sup> However, California IP does restrict their focus to factual innocence claims.<sup>15</sup> In 2002, Brooks, Stiglitz and Shulman said that out of thirty-three IPs across America, there were nine which handle DNA cases only; one which handled everything but DNA cases; and twenty-three which more generally handled claims of factual innocence.<sup>16</sup> Medwed, who runs the Second Look Program at Brooklyn Law School,<sup>17</sup> explained they restricted their focus to factual innocence claims because they wanted to deploy their limited resources to help what they perceived to be the “most deserving cases,” whilst also making their project more attractive to potential funding.<sup>18</sup> More recent research by Krieger in 2011 suggested that the “vast majority” of IPs in the US still only accepted cases of factual innocence.<sup>19</sup>

As indicated above, IPs based in universities are also committed to performing an important educational role. Findley, writing in 2006, explained that in the US, IPs “have become

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<sup>11</sup> D Medwed, ‘Actual Innocents: Considerations in Selecting Cases for a New Innocence Project.’ (2002-2003) 81 Nebraska Law Review 1097 p.1101

<sup>12</sup> The IPNY website states that, to date, 342 convicted people have been exonerated following DNA testing, although the IPNY was involved in 190 of these as quoted above (<http://www.innocenceproject.org/all-cases/#exonerated-by-dna>)

<sup>13</sup> See B Scheck, P Neufeld and J Dwyer ‘Actual Innocence: When Justice Goes Wrong and How to Make it Right.’ (New American Library 2003) p.323 cited in J McMurtrie, (n.3) p.21

<sup>14</sup> J Stiglitz, J Brooks and T Shulman, ‘The Hurricane Meets the Paper Chase: Innocence Projects new emerging role in clinical legal education.’ (2001-2002) 38 California Western Law Review 413 p.424

<sup>15</sup> <https://californiainnocenceproject.org/submit-a-case/submit-a-case/> (accessed 05/08/16)

<sup>16</sup> J Stiglitz, J Brooks and T Shulman, (n.14) footnote.5, p.415

<sup>17</sup> D Medwed, (n.11) p.1104

<sup>18</sup> Ibid p.1104

<sup>19</sup> S Krieger, ‘Why Our Justice System Convicts Innocent People and the Challenges Faced By Innocence Projects Trying to Exonerate Them.’ (2011) 14(3) New Criminal Law Review 333 p.367

increasingly significant players in clinical legal education.”<sup>20</sup> Clinical legal education can mean “different things to different people” and can incorporate many different types of activities within and outside of a law degree.<sup>21</sup> Milstein suggests three broad categories of clinical education in the US: in-house, live-client clinics within law schools; external placements for students in a professional setting; and simulations which put students in simulated lawyer roles in a controlled setting.<sup>22</sup> This thesis will concentrate on IPs as in-house live-client clinics within universities: these may be for credit or extra-curricular initiatives.

IPs are considered to have important educational value for law students. Brooks, Stiglitz and Shulman said IPs helped students in writing case memos; handling problems on the run, requiring them to identify and research legal issues as the clients divulge them; teaching them the importance of finding and proving facts (rather than just finding and establishing law); and in developing organisational, time management skills and prioritisation and self-directing of work.<sup>23</sup> Furthermore, students are required to interact with those who will be part of their practising lives, such as clients; relatives; adversaries; clerks and judges. Findley said, whilst there may be inconsistency in student experience on an IP depending on the issues in the case, they are still of significant educational experience and value.<sup>24</sup> They offer “particularly good opportunities” for “learning about the importance of facts; about the importance of being sceptical, vigilant, and thorough; and about ethics, values, and judgment.”<sup>25</sup> Additionally, he thought students could develop a “critical perspective on legal doctrine” and “a critical understanding of “the law in action,” and how the criminal justice system works in practice, and how it might work “more effectively and fairly.”<sup>26</sup> Thus, IPs help students develop professional legal skills and develop critically and ethically through exposure to problems within the criminal justice system.

A third potential aim also emerges from the US literature. As indicated in the thesis introduction, the US innocence movement has been referred to as “the civil rights movement of the twenty-first century”<sup>27</sup> or as an “innocence revolution.”<sup>28</sup> This has connotations of social

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<sup>20</sup> K Findley, ‘The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education.’ (2006) 13 Clinical Law Review 231 p.231

<sup>21</sup> R Gorman, ‘Clinical Legal Education: A Prospectus.’ (1970-71) 44 Southern California Law Review 537 p.537

<sup>22</sup> E Milstein, ‘Clinical legal education in the United States.’ (2005) 51 Journal of Legal Education 375, p.376

<sup>23</sup> J Stiglitz, J Brooks, T Shulman, (n.14) p.430-431

<sup>24</sup> K Findley, (n.20) p.240

<sup>25</sup> Ibid. p.241

<sup>26</sup> K Findley, (n.20) p.241

<sup>27</sup> D Medwed, ‘Innocentrism.’ [2008] University of Illinois Law Review 1549 p.1550

<sup>28</sup> K Findley, ‘Innocence Found: The New Revolution in American Criminal Justice.’ in S Cooper, (eds.) *Controversies in Innocence Cases in America* (Ashgate Publishing Ltd. 2014) p.3

activism, and reform aims appear central to the movement. Findley argued there had been an emergence of “innocence consciousness” in the US, which has replaced the former belief in the system’s infallibility.<sup>29</sup> Following the large number of DNA exonerations and increasing numbers of non-DNA exonerations, the movement has reframed the debate in American criminal justice.<sup>30</sup> Rather than focusing debate on the opposing crime control and due process models, a shared emphasis has emerged to improve reliability and efficacy in identifying the innocent from the guilty.<sup>31</sup> This has provided an increasingly receptive environment for legal reform in the US, with some describing the innocence movement as having a “profound impact” on the operation and reform of the criminal justice system in America.<sup>32</sup> Often cited to illustrate this is that in 2003, Governor Ryan of Illinois changed all death penalty sentences to life imprisonment, through recognition that the potential risk of executing an innocent person was too high.<sup>33</sup>

Therefore, the US innocence movement suggests IPs may have three distinct aims: firstly to provide casework assistance to those claiming factual innocence; secondly, where based in universities to provide an educational experience for students; and lastly, to effect reform within the criminal justice system.

As explained, following success in the US, IPs spread internationally to other countries such as, Canada, Australia, New Zealand, Singapore, Italy and the UK for example.<sup>34</sup> The literature on the innocence movement in other countries is limited, although IPs appear to share similar aims. For example, Weathered explains that the Griffith University IP in Queensland “is a combination of lawyers, students and academics working together to investigate the claims of wrongful conviction and, where possible, to secure the release of innocent persons:” it thus also focuses on factual innocence claims.<sup>35</sup> In 2003, Weathered said if Australian IPs could reflect the work of US IPs in effecting law reform even to “some degree,” then they will develop as a real resource.<sup>36</sup> The National University of Singapore IP was established in 2010 and states that its “main objective” is to “act as a safety net of last resort within the Singapore

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<sup>29</sup> Ibid. p.4

<sup>30</sup> K Findley, (n.28) p.20

<sup>31</sup> K Findley, (n.28) p.20

<sup>32</sup> L Weathered, ‘Investigating Innocence – The emerging role of Innocence Projects in the correction of wrongful conviction in Australia.’ (2003) 12(1) Griffith Law Review 64 p.77

<sup>33</sup> S Roberts and L Weathered, ‘Assisting the factually innocent: the contradictions and compatibility of innocence projects and the Criminal Cases Review Commission.’ (2009) 29(1) Oxford Journal of Legal Studies 43 p.46

<sup>34</sup> This is not an inclusive list.

<sup>35</sup> L Weathered, (n.32) p.79

<sup>36</sup> Ibid. p.86

criminal justice system” and to “raise awareness of the issue of wrongful convictions and educate the public on the risk factors that could result in factually wrong convictions.”<sup>37</sup> Similarly, the Irish IP, which was established in 2009, aimed to achieve two “salutary and interlocking ends” which are to: “(1) help free innocence (sic) people that are either current prisoners or have been released from prison, and (2) inculcate in students clinical skills in a way which made learning law interesting and personally rewarding.”<sup>38</sup> Langwallner also adds a third aim which is to create “a human rights consciousness and a passion for justice.”<sup>39</sup> Therefore, as IPs have spread internationally they appear to have been modelled upon the US movement, sharing similar aims and objectives. Similarly, the UK innocence movement was also developed and modelled upon the American one: the literature on IPs in the UK will now be considered.

## **2. The UK “innocence movement”**

The UK innocence movement was largely formed by Michael Naughton, an academic sociologist based in the law school at the University of Bristol. Naughton established the Innocence Network UK (INUK) in 2004 and the University of Bristol IP (UoBIP), which started work in 2005. Naughton is a key figure in this movement and could be seen as its driving force. The academic literature which does discuss IPs is largely outdated. As explained in the introduction, INUK and UoBIP are now officially closed, but Naughton’s literature provides a significant historical insight into the aspirations of the UK movement. Thus far, as virtually no empirical research has been published on IPs in the UK,<sup>40</sup> this review will firstly aim to establish what is known about IPs in the UK from the existing literature and will identify their key aims and objectives. This will demonstrate that IPs appear to have a distinct philosophy and approach to investigating miscarriages of justice, which suggests they represent more than a student clinic focused on criminal appeals. Before embarking on this, some necessary context to the UK innocence movement will be provided.

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<sup>37</sup> N Rajoo, “...Than that One Innocent Suffer”: The Innocence Project in Singapore.” (2012) 30 Singapore Law Review 23 p.32

<sup>38</sup> D Langwallner ‘The Irish Innocence Project.’ (2011-2012) 80 University of Cincinnati Law Review 1293, p.1294

<sup>39</sup> Ibid. p.1294

<sup>40</sup> Mark Alexander has recently published an article in Criminal Law and Justice Weekly which details a survey he has done of innocence projects in the UK, which does provide some insight into the current state of the UK movement, but was a small scale research project (see M Alexander, ‘Innocence Projects – Green Shoots.’ (10<sup>th</sup> June 2016) Criminal Law & Justice Weekly <http://www.criminallawandjustice.co.uk/features/Innocence-Projects-%E2%80%93-Green-Shoots> )

## **2.1 Background and Context**

Naughton was concerned that the current legal framework for criminal appeals in England and Wales did not adequately address wrongful conviction of the innocent.<sup>41</sup> Naughton thought IPs were needed in the UK due to “significant gaps” in “the legal provisions available to innocent victims who require help and hope in overturning their wrongful convictions.”<sup>42</sup> Naughton described criminal appeals as “highly technical affairs governed by strict rules and procedures,” where there is a perception of offenders as ““getting off on technicalities.””<sup>43</sup> The Court of Appeal (Criminal Division) (hereafter CACD) deals with the legal safety of convictions: s.2 (1)(a) of the Criminal Appeal Act 1995 (CAA 1995) states: the court shall allow an appeal against conviction where they think the conviction is “unsafe.” This means the CACD may quash a conviction where there has been a breach of law or procedure, such as a misdirection to the jury, for example. The CACD may also quash a conviction where fresh evidence has emerged which renders the conviction “unsafe”: s.23 of the Criminal Appeal Act 1968<sup>44</sup> states: the court can receive evidence that it considers necessary or expedient “in the interests of justice,” but which was not adduced in the proceedings from which the appeal lies. The CACD generally do not hear evidence that was available at trial (even if not used) unless there is a reasonable explanation for not so adducing it.<sup>45</sup> Naughton was critical of the legal framework for presenting “insurmountable barriers” to overturning wrongful convictions, where evidence supporting innocence exists but cannot be reheard.<sup>46</sup>

Furthermore, Naughton was particularly critical of how the Criminal Cases Review Commission (CCRC) operated. This was established following recommendations from the Royal Commission on Criminal Justice (RCCJ) which examined the UK criminal justice system following high profile miscarriages of justice.<sup>47</sup> The RCCJ suggested the establishment

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<sup>41</sup> Naughton also called for the development of projects in Scotland where he also considered there was a problem (see M Naughton, ‘Innocence Projects.’ (2006) Inside Time [http://www.insidetime.org/resources/Publications/Naughton\\_InnocenceProjects\\_2006.pdf\\_p.6-7](http://www.insidetime.org/resources/Publications/Naughton_InnocenceProjects_2006.pdf_p.6-7)) Two projects were established there at the University of Strathclyde and at Glasgow Caledonian University. Thus, it seems fair to term this the UK innocence movement, but the majority of the focus in the thesis is on England and Wales.

<sup>42</sup> M Naughton, ‘Wrongful Convictions and IPs in the UK: Help, Hope and Education.’ [2006] 3 Web JCLI p.1 <http://www.innocencenetwork.org.uk/wp-content/uploads/2014/09/wrongful-convictions-innocence-project.pdf> (accessed 21/01/16)

<sup>43</sup> Ibid.

<sup>44</sup> As amended by s.4 CAA 1995.

<sup>45</sup> S.23(2)(d) Criminal Appeal Act 1968

<sup>46</sup> M Naughton, ‘The Criminal Cases Review Commission – Innocence versus safety and the integrity of the criminal justice system.’ (2012) 58 Criminal Law Quarterly 207 p.214

<sup>47</sup> The Royal Commission on Criminal Justice Report Cm 2263 1993 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/271971/2263.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271971/2263.pdf) (accessed 13/05/15)

of an independent body to investigate claims of wrongful conviction and refer cases to the CACD for consideration. The CCRC began operation in 1997 but was established by the CAA 1995. s.13 (1) states that a reference must not be made unless (a) the CCRC consider there is a “real possibility” that the conviction, verdict, finding or sentence would not be upheld by the CACD if referred. Naughton described the “real possibility” test as a “statutory straitjacket,” which “fatally compromises their [the CCRC] independence” requiring them to second-guess the CACD.<sup>48</sup> He criticised how the CCRC could refer cases for appeal based on a procedural error, even where there was significant supporting evidence of guilt, but were “helpless” to refer cases of factually innocent victims of wrongful conviction if the case did not meet the real possibility test and satisfy the CACD’s requirements.<sup>49</sup> He suggested this meant that even where the CCRC had evidence of factual innocence, they may not refer it due to the hurdles in place.<sup>50</sup> He criticised the CCRC for reviewing applications: “in pursuit of legal grounds of appeal” as opposed to conducting investigations which seek: “to get to the truth, or otherwise, of claims of innocence.”<sup>51</sup> Naughton described the CCRC as a “legal watchdog” concerned with upholding the “integrity” of the criminal justice system.<sup>52</sup> He criticised it for examining miscarriages of justice entirely within the parameters of the legal system, rather than focusing on the guilt or innocence of applicants.<sup>53</sup> Naughton suggested it had become “increasingly apparent” that the CCRC was not the solution to wrongful conviction of the factually innocent that it was originally thought to be. This is important context to why Naughton established INUK.

## **2.2 Innocence Network UK (INUK)**

INUK was intended to be a UK equivalent of the Innocence Network in the US. Its overall aim was “to improve the criminal justice system by overturning convictions given to factually innocent people” and to effect reforms of the system to prevent such wrongful convictions from occurring in the future.”<sup>54</sup> This is similar to IN’s aims discussed above. Naughton also provided three more specific aims of INUK as: to encourage and assist the establishment of IPs in the

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<sup>48</sup> M Naughton and G Tan, ‘The right to access DNA testing by alleged innocent victim of wrongful convictions in the United Kingdom.’ (2010) 14(4) *International Journal of Evidence and Proof* 326 p.342

<sup>49</sup> M Naughton and C McCartney, ‘Innocence projects in the UK – the story so far.’ (2006) 40(1) *The Law Teacher* 74 p.74

<sup>50</sup> *Ibid.*

<sup>51</sup> M Naughton and G Tan, (n.48) p.342

<sup>52</sup> M Naughton, (n.46) p.222

<sup>53</sup> M Naughton, ‘The Importance of Innocence for the Criminal Justice System.’ in Naughton, M. (ed.) *The Criminal Cases Review Commission – Hope for the Innocent?* (Palgrave Macmillan 2009) p.22

<sup>54</sup> Innocence Network UK Website <http://www.innocencenetwork.org.uk/about-us> (accessed 31/10/2012)



UK; to undertake research that identifies the causes of wrongful conviction and to effect legal reform; and to raise public awareness of wrongful conviction of the innocent.<sup>55</sup> Therefore, it represented a network to assist UK IPs, but also to educate the wider public about miscarriages of justice and to encourage reform.

Naughton was concerned that previous attention over miscarriages of justice had ebbed because the CCRC was believed to be the solution to the problem.<sup>56</sup> He referred to the closure of JUSTICE,<sup>57</sup> which had previously been active in assisting individuals claiming factual innocence for offences, whilst also seeking to reform the criminal justice process. He thought JUSTICE's "withdrawal from the plight of the factually innocent" seemed "at the very least, premature."<sup>58</sup> Naughton thought the CCRC ought to be concerned with factual innocence according to the RCCJ's recommendations.<sup>59</sup> He suggested, when the CCRC was established, the term miscarriage of justice was subjected to a "*legalification*"<sup>60</sup> process," shifting it from a concern with the possible wrongful conviction of an innocent to "an entirely legal notion," that sees miscarriages of justice in terms of a need for convictions to be "safe in law."<sup>61</sup> Conversely, he said INUK and its network of IPs had "resuscitated innocence as a lens through which to judge the legitimacy of the criminal justice process."<sup>62</sup> Therefore, Naughton said INUK was established "precisely because the existing appeal and post-appeal provisions are failing potentially innocent victims of wrongful conviction and are in urgent need of reform."<sup>63</sup> INUK would challenge the extent to which the system "acts to silence the discourse on factual innocence"<sup>64</sup> and would operate in a "synergy of casework, research and communications to release the discourse of innocence from its shackles."<sup>65</sup> It aimed to "re-establish the bridge between the public and the legitimate operations of the criminal justice system."<sup>66</sup> Therefore, Naughton distinguished between a lay understanding of a miscarriage of justice, as wrongful conviction of the innocent, and how they were understood within law in terms of legal safety:

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<sup>55</sup> M Naughton and C McCartney, (n.49) p.78

<sup>56</sup> M Naughton, (n.42) p.7

<sup>57</sup> This was an organisation which carried out casework and campaigned on behalf of alleged victims of miscarriages of justice. JUSTICE is now active again, and focuses on promoting adherence to the rule of law and protection of human rights (see <https://justice.org.uk/>)

<sup>58</sup> M Naughton, (n.42) p.7

<sup>59</sup> M Naughton, (n.53) p.22

<sup>60</sup> Emphasis in original

<sup>61</sup> M Naughton, (n.53) p.17-18

<sup>62</sup> Ibid

<sup>63</sup> M Naughton, 'Can lawyers put people before the law?' (July 2010) *Socialist Lawyer* 31 p.31

<sup>64</sup> M Naughton, (n.53) p.30

<sup>65</sup> Ibid. p.30

<sup>66</sup> M Naughton, (n.53) p.30



the latter involved a determination of conviction safety according to the admissibility of evidence and appeal grounds applied by the CACD, as discussed above.<sup>67</sup> Naughton saw INUK's focus on factual innocence as better reflecting society's expectations of the criminal justice system.

This is important for understanding how INUK dealt with selecting cases for IPs. As a membership organisation for IPs, INUK logged prisoners' requests for assistance on a database and screened them for eligibility for IP casework. It would refer cases to member projects when required. In focusing on claims of "factual innocence," INUK would not consider claims related to: sentencing issues; claims of partial defence, such as diminished responsibility for example; or claims of partial innocence (where the individual claims innocence of the offence for which they were convicted, but admits culpability of a lesser offence) such as manslaughter, instead of murder.<sup>68</sup> Naughton also suggested INUK would assess prisoners' claims of innocence through application of a "typology of prisoners maintaining innocence."<sup>69</sup> Naughton described this as an "objective screening process" which sought to help provide member IPs with reliable case referrals.<sup>70</sup> He constructed this "typology of innocence" based on an analysis of prisoners' responses to the INUK questionnaires about their case.<sup>71</sup> He described this mechanism as "work-in-progress" but said INUK applied it to separate those who are clearly not innocent, from those who may be.<sup>72</sup> This looked at the potential reasons and motivations for individuals maintaining a false claim of innocence which included:<sup>73</sup>

- a) Those hoping to overturn their conviction for abuse of process, such as claims there were procedural irregularities in the criminal justice process (in arrest, interrogation, investigation or at trial).
- b) Those ignorant of criminal law who do not know their behaviour is criminal (i.e. claims of innocence of joint enterprise because they do not understand the law).
- c) Those who disagree that their actions should be considered a criminal offence.

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<sup>67</sup> M Naughton, (n.53) p.20

<sup>68</sup> M Naughton and G Tan, *Claims of Innocence: An introduction to wrongful convictions and how they might be challenged*, (Bristol: University of Bristol 2010) p.61-62

<sup>69</sup> Appendix A "Typology of prisoners maintaining innocence," Innocence Project Protocols, [www.innocencenetwork.org.uk](http://www.innocencenetwork.org.uk) (accessed 31/10/2013 - no longer available)

<sup>70</sup> Appendix A "Typology of prisoners maintaining innocence," Innocence Project Protocols, [www.innocencenetwork.org.uk](http://www.innocencenetwork.org.uk) (accessed 31/10/2013 - no longer available)

<sup>71</sup> M Naughton, 'Confronting an uncomfortable truth: Not all victims of alleged false accusations will be innocent!' (November 2007) FACTion 8 p.8

<sup>72</sup> Ibid.p.9

<sup>73</sup> Contrary to popular belief it is not in a prisoner's best interests to maintain innocence of an offence as it may take them longer to progress through the prison system because they will often be determined as being in denial, and they will not take part in offending courses in prison.

- d) Those maintaining innocence to protect loved ones from knowing their culpability in the offence.<sup>74</sup>

These categories would be contrasted with the category of prisoners who may actually be innocent of the offence.

Naughton encouraged other organisations to adopt this assessment, such as F.A.C.T.,<sup>75</sup> to better help ensure they were not representing the factually guilty, rather than accepting members based on trust.<sup>76</sup> Naughton also aimed for the prison service and parole board to apply this typology, rather than simply treating all prisoners maintaining innocence as “deniers” of the offence.<sup>77</sup> Therefore, Naughton’s eligibility screening process went beyond simply distinguishing between claims of factual innocence and those related to defences, or sentencing matters; he also attempted to identify false claims of innocence by considering applicants’ potential motivations. This looks markedly different to how we would expect lawyers to assess cases, and reflects INUK’s distinctive approach to investigating miscarriages of justice.

### **2.3 Aims and Objectives of UK innocence projects**

Naughton said there were no definitive criteria for IPs apart from being concerned with claims of factual innocence as opposed to technical miscarriages of justice.<sup>78</sup> However, the literature suggests that typically there were three main aims of UK IPs, similarly to the US: investigating cases involving a factual innocence claim; working towards systemic reform and providing an educational experience for university students. These three aims were articulated by Naughton in relation to UoBIP to: educate students about wrongful conviction of the innocent; work on individual cases of prisoners maintaining innocence; and to conduct research on the causes of wrongful conviction of the innocent to effect legal reform.<sup>79</sup> Similarly, Roberts<sup>80</sup> and Weathered,<sup>81</sup> also writing about IPs in the UK, suggested IPs aimed to: educate law students; investigate cases; publicly campaign for the wrongly convicted; propose reforms; and send

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<sup>74</sup> M Naughton, (n.71) p.9

<sup>75</sup> FACT stands for Falsely Accused Carers and Teachers, and refers to a UK based, voluntary, not for profit organisation, which provides support to those who maintain innocence of accusations of abuse. For more information, see: <http://www.factuk.org/>

<sup>76</sup> M Naughton, (n.71) p.8

<sup>77</sup> M Naughton, ‘Students for justice: the Innocence Network.’ (8<sup>th</sup> May 2009) The Guardian, <http://www.theguardian.com/uk/2009/may/08/innocence-network> (accessed 10/12/15)

<sup>78</sup> M Naughton, ‘Innocence Projects.’ [2006] SCOLag (Scottish Legal Action Group) 348, pp. 202-203 (see <http://www.innocencenetwork.org.uk/publications> for access) (accessed 02/08/16)

<sup>79</sup> M Naughton, (n.42) p.11

<sup>80</sup> Stephanie Roberts used to run the University of Westminster innocence project: this was never a member of INUK, but was part of the Innocence Network internationally.

<sup>81</sup> Lynne Weathered was mentioned above; she runs the Griffith University innocence project in Australia.

applications to the CCRC with the aim of securing a referral to the CACD.<sup>82</sup> These different aims will now be considered in more detail.

### 2.3.1 Casework

This section will discuss how IP leaders in the literature described their casework aims and their approach.

Important to Naughton's casework aims for IPs is why he thought IPs were necessary in the UK. IPs in the US were developed to help serve those unable to afford post-conviction representation. Conversely, Naughton explained in the UK, criminal matters were neglected in pro bono because of a perception of adequate funding.<sup>83</sup> He thought IPs were necessary to serve "unmet legal needs" of a different kind; whilst most pro bono efforts worked entirely within the legal framework in serving the unrepresented, IPs would serve those individuals who were victims of the existing legal framework.<sup>84</sup> He said IPs were developed as an outgrowth of the sustained critical analysis of the inability of the criminal appeal system to rectify all wrongful convictions, and thus IPs would operate outside of the parameters of the legal system.<sup>85</sup> He explained, due to "the limitations of the current criminal justice process," the factually innocent "can exhaust all existing legal remedies and still remain unable to overturn their convictions."<sup>86</sup> This context is key to examining the distinctive approach of IPs to casework according to Naughton.

Naughton stated that UoBIP aimed to "reinstate concern with factual innocence" as opposed to technical miscarriages of justice.<sup>87</sup> He said, "in sharp contrast to the CCRC," UoBIP was "orientated entirely towards getting to the truth of innocence claims."<sup>88</sup> Naughton said: "akin to public inquiries," UoBIP would aim to get to the bottom of innocence claims one way or another (whether that resulted in a conclusion of likely guilt or innocence).<sup>89</sup> Naughton was critical of the presumption of innocence for rendering trial defence lawyers passive, thus he suggested UoBIP would proceed from "no strong presumptions" about the individuals' guilt or innocence.<sup>90</sup> The only "burden" on the project would be to "interrogate the evidence" to

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<sup>82</sup> S Roberts and L Weathered, (n.33) p.52

<sup>83</sup> M Naughton, (n.42) p.10

<sup>84</sup> M Naughton, (n.78)

<sup>85</sup> M Naughton, (n.78)

<sup>86</sup> M Naughton, (n.78)

<sup>87</sup> M Naughton, (n.42)

<sup>88</sup> M Naughton and G Tan, (n.48) p.342

<sup>89</sup> M Naughton, 'How the Presumption of Innocence Renders the Innocent Vulnerable to Wrongful Convictions.' (2011) 2(1) Irish Journal of Legal Studies 40 p.52

<sup>90</sup> Ibid. p.50

determine its reliability.”<sup>91</sup> Alongside this, the other strategy of the project was to actively seek new evidence that may prove the individual’s factual innocence, including new forensic techniques that may not have been available at trial.<sup>92</sup>

Naughton suggested INUK member projects would operate in a similar way. INUK projects would work on factual innocence cases referred to them by the network. They would also operate “akin to public inquiries” into alleged wrongful conviction of the innocent; seeking to uncover the truth behind the conviction, and to identify what went wrong in the system when a wrongful conviction has occurred.<sup>93</sup> Naughton was particularly concerned that IPs should be independent. He emphasised how they were not subordinate to a financial relationship with their clients; to governmental interference; or to the courts and the structural limitations of the criminal justice process.<sup>94</sup> Furthermore, IPs were not subject to a traditional lawyer-client relationship, and thus would not have the “best outcome” responsibility to their clients.<sup>95</sup> Naughton’s model for IPs to be independent reflects his criticisms of the CCRC for lacking independence and being bound to the CACD: he thought the independence of IPs made them better able to carry out objective, truth-finding investigations.

Naughton’s account of IPs as not subordinate to the “structural limitations” of the criminal justice process becomes clearer in the context of other literature. Naughton said IPs would not be “restricted to the search for fresh evidence that seeks to show that criminal convictions may not be ‘safe in law’.”<sup>96</sup> He criticised lawyers working with INUK IPs for resigning themselves to the legal framework and being unable “to step outside the very processes INUK seeks to challenge.”<sup>97</sup> He explained: they “fail to understand our [INUK’s] aims” and “subordinate IP investigations to the criteria of the CACD and CCRC.”<sup>98</sup> He criticised lawyers for encouraging students “to ignore the question of factual innocence or guilt and seek out legal grounds for appeal,” and for advising IPs to close cases where no obvious grounds of appeal can be found.<sup>99</sup> Conversely, Naughton explained he asked his law student caseworkers to “suspend the pursuit

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<sup>91</sup> M Naughton, (n.89) p.52

<sup>92</sup> M Naughton, (n.89) p.51

<sup>93</sup> M Naughton, (n.53) p.34

<sup>94</sup> M Naughton, (n.53) p.34

<sup>95</sup> M Naughton, (n.53) p.34

<sup>96</sup> M Naughton, (n.53) p.32

<sup>97</sup> M Naughton, (n.63) p.32

<sup>98</sup> M Naughton, (n.63) p.32

<sup>99</sup> M Naughton, (n.63) p.32

of legal grounds and focus their investigations on finding out if the alleged innocent victim of wrongful conviction is telling the truth.”<sup>100</sup>

Naughton thought a broader, truth-finding orientation could yield greater dividends in a case than focusing on appeal grounds. He suggested IPs should “undertake full investigations of all of the evidence that led to the conviction to determine its reliability and/or applicability to the conviction.”<sup>101</sup> IPs should “investigate all of the available unused material for evidence of innocence, carry out fieldwork investigations, such as interviewing potential witnesses, finding possible alibis, and researching new scientific technologies that could establish innocence or guilt.”<sup>102</sup> He discussed two cases worked on by UoBIP where information in the unused schedule unearthed important evidence supporting potential factual innocence that could assist in an appeal.<sup>103</sup> He said lawyers would advise students not to look at unused evidence from trial because it would be unlikely to contain any fresh evidence which would satisfy the tests of the CCRC/CACD (evidence which is available is not deemed ‘fresh’).<sup>104</sup> However, Naughton suggested by broadening out the strict focus on appeal grounds or fresh evidence, IPs may identify important evidence that would be overlooked by a strict legal approach.

Naughton criticised lawyers for concentrating IP students’ efforts on looking at legal issues, such as judicial misdirection in the summing up, or breaches of legal procedure. He considered this “desktop review approach” was unhelpful to clients who have often already failed at the CACD/CCRC,<sup>105</sup> which was also one of Naughton’s criticisms of the CCRC.<sup>106</sup> Crucially, Naughton states: “Worse, such activities take place entirely within the legal framework INUK exists to challenge. They assume the very point at issue, namely the justness of the rules of criminal appeal.”<sup>107</sup> Thus, Naughton suggested INUK and its member projects were intended to challenge the legal approach, and therefore should not confine themselves to this legalistic approach to investigation. He said: if lawyers working with INUK are “passionate about people, truth, innocence and justice then the time has come” for them to “help to truly challenge the criminal appeal system” to encourage the necessary reforms to produce results that “we are

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<sup>100</sup> M Naughton, (n.63) p.32

<sup>101</sup> M Naughton, (n.63) p.32

<sup>102</sup> M Naughton, (n.63) p.32

<sup>103</sup> M Naughton, (n.63) p.32

<sup>104</sup> M Naughton, (n.63) p.32

<sup>105</sup> M Naughton, (n.63) p.32

<sup>106</sup> <http://www.innocencenetwork.org.uk/wp-content/uploads/2013/01/CCRC-Symposium-Report.pdf> p.17

<sup>107</sup> M Naughton, (n.63) p.32

together supposed to be working towards.”<sup>108</sup> Therefore, Naughton’s approach to casework reflected his broader aims to reform the criminal appeal system.

Although Naughton criticised a strict focus on legal grounds in case investigations, he did recognise there was a “pragmatic need” to find grounds of appeal to apply to the CCRC.<sup>109</sup> He suggested where a legal challenge was not possible, IPs may seek a Royal Prerogative of Mercy.<sup>110</sup> This is a petition to the Secretary of State to pardon a convicted individual where they are considered likely to be innocent, but there is no legal ground for quashing the conviction.<sup>111</sup> Naughton criticised the CCRC for not using this power, quoting in 2012 (after 15 years of casework and reviewing 13,681 convictions) the CCRC had not referred a single case for consideration, which he thought further demonstrated their lack of concern with factual innocence.<sup>112</sup> It is not known whether an IP has ever applied for one.

Therefore, Naughton’s model for UoBIP and INUK IPs was aimed towards helping the factually innocent by not confining investigation to the legal approach he perceived as inadequate. His model of casework investigation suggested IPs would be: independent, rather than working in a typical lawyer-client relationship; focused on factual innocence; carrying out active, neutral, truth-finding investigations or “inquiries”; and should be examining all available evidence, rather than concentrating on strictly applying legal grounds.

Price and Eady run the Cardiff Law School innocence project (CLSIP): they wrote one article in 2010 about their work. CLSIP was a member of INUK at this point but left shortly afterwards to operate independently. Price and Eady explain: “Innocence in the sense used by our innocence project suggests that the key question is whether the accused actually committed the offence, rather than whether he/she has a legally arguable case for appeal;”<sup>113</sup> whilst it has been argued the CACD and CCRC reverse this emphasis.<sup>114</sup> They clarify, this does not claim the IP can be certain about innocence, but rather means looking “holistically at a case to try and establish a view about the likelihood of innocence, regardless of the likelihood of a successful appeal.”<sup>115</sup> Thus, Price and Eady adopt a similar approach to Naughton in examining all

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<sup>108</sup> M Naughton, (n.63) p.32

<sup>109</sup> M Naughton, (n.53) p.34

<sup>110</sup> M Naughton, (n.53) p.34

<sup>111</sup> M Naughton, (n.46) p.220

<sup>112</sup> M Naughton, (n.46) p.220

<sup>113</sup> J Price and D Eady ‘IPs, the CCRC and the Court of Appeal: breaching the barriers?’ (2010) 9 Archbold Review 6 p.6

<sup>114</sup> Ibid. p.6

<sup>115</sup> Price and Eady (n.113) p.6

available evidence to examine innocence claim. They too acknowledged the need to address the statutory restrictions governing appeals otherwise they would be “peripheral” to their clients.<sup>116</sup>

Roberts (Westminster University IP (WUIP)<sup>117</sup>) and Weathered (Griffith University IP) wrote about UK IPs: notably WUIP never joined INUK. They discussed how UK IPs had captured attention because the CCRC is a “more empowered and substantially better funded body to address wrongful conviction...”<sup>118</sup> Roberts and Weathered explained IPs had a different focus to the CCRC: concentration on factual innocence claims was the “essence” of IP work<sup>119</sup> and their “overriding consideration.”<sup>120</sup> They defined factual innocence as representing a “lay” understanding of a miscarriage of justice, representing the wrongful conviction of an innocent person. Conversely, they describe how the broader legal definition applied by the CCRC includes legal and procedural issues pertaining to safety,<sup>121</sup> which would not be understood as equating to innocence outside the legal arena.<sup>122</sup> Thus, adopt the same model as Naughton and Price and Eady in this regard. However, Roberts and Weathered explain that IPs engage with the lay and legal understanding of wrongful conviction in different roles: when talking to the media, public or politicians they use the lay factual innocence interpretation, but when educating law students about the appeal system, or when making an application to the CCRC/CACD they adopt the legal construction, “in order to comply with the statutory tests of the CCRC and CA.”<sup>123</sup> This potentially represents an important difference, which will be discussed further below.

Roberts and Weathered were focused on how the factual innocence focus of IPs could be compatible with the CCRC/CACD. They suggested “fresh evidence” cases were where IPs could make the most impact.<sup>124</sup> IPs could be “compatible with the CCRC,” where they could locate new evidence “which either expressly or impliedly suggests innocence” that would enable the CCRC to refer on the basis of unsafety.<sup>125</sup> They thought with “factual innocence being irrelevant at the CCRC,” IPs could fill a gap because factual innocence and the plight of

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<sup>116</sup> Price and Eady (n.113) p.6

<sup>117</sup> It is thought this IP has closed down

<sup>118</sup> S Roberts and L Weathered, (n.33) p.44

<sup>119</sup> S Roberts and L Weathered, (n.33) p.45

<sup>120</sup> S Roberts and L Weathered, (n.33) P.51

<sup>121</sup> S Roberts and L Weathered, (n.33) P.45

<sup>122</sup> S Roberts and L Weathered, (n.33) p.49

<sup>123</sup> S Roberts and L Weathered, (n.33) p.52

<sup>124</sup> S Roberts and L Weathered, (n.33) p.57

<sup>125</sup> S Roberts and L Weathered, (n.33) P.59

innocent is their primary concern.<sup>126</sup> Roberts and Weathered were thus generally similar in their casework approach to the other authors. However, their engagement with the legal construction of a miscarriage of justice and aim to find compatibility with the CCRC is potentially distinguishable from Naughton's aim to challenge the existing legal framework.<sup>127</sup>

### 2.3.2 Reform

Naughton also identified research and reform as aims of INUK and UoBIP.<sup>128</sup> As explained, Naughton saw IPs as necessary because of perceived problems with the criminal appeal system. Naughton aimed to target reform through academic research and publication. McCartney<sup>129</sup> and Naughton thought INUK could be a forum to attract research funding and to collate research efforts and identify knowledge gaps.<sup>130</sup> They suggested academic research on causes of wrongful conviction could be an essential part of realising corrective reforms of the criminal justice system.<sup>131</sup>

Naughton has pursued this goal in several academic articles discussing perceived problems within the criminal appeal system and the role of IPs in overcoming systemic limitations.<sup>132</sup> As discussed above, he criticised how the burden of proof and presumption of innocence rendered the defence passive and left the innocent vulnerable to wrongful conviction.<sup>133</sup> A joint article by Naughton and Tan<sup>134</sup> argued for alleged victims of wrongful conviction to have the right to access DNA testing.<sup>135</sup> They utilise examples from two cases at UoBIP where they suggest the CCRC failed to identify potential avenues for DNA testing that could prove or disprove the claim of innocence.<sup>136</sup> The authors make a "moral and political argument" for the criminal appeal system to prioritise investigating the potential truth of claims of innocence above legal

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<sup>126</sup> S Roberts and L Weathered, (n.33) p.70

<sup>127</sup> This potential distinction is considered important for conceptualising IPs within social systems theory

<sup>128</sup> M Naughton, (n.42) p.11

<sup>129</sup> Carole McCartney was the founder of Leeds innocence project; but she no longer works as its director.

<sup>130</sup> M Naughton and C McCartney, 'The Innocence Network UK.' 7(2) Legal Ethics 150 p.152

<sup>131</sup> Ibid.

<sup>132</sup> McCartney has published on issues surrounding forensics and DNA but her publications are not directly linked to her work on the Leeds innocence project, unlike for Naughton. (See for example: C McCartney, 'The DNA Expansion Programme and Criminal Investigation.' (2006) 46 British Journal of Criminology 175)

<sup>133</sup> M Naughton, (n.89)

<sup>134</sup> Gabe Tan was the Executive Director of INUK and worked alongside Michael Naughton in running the UoBIP for several years.

<sup>135</sup> They suggest that this is protected under Article 27(1) of the Universal Declaration of Human Rights (UDHR) which states that: "Everyone has the right ... to share in scientific advancement and its benefits." They also suggest it is reinforced by Article 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which recognises the right of everyone: "To enjoy the benefits of scientific progress and its applications (see M Naughton and G Tan, (n.48) p.328)

<sup>136</sup> M Naughton and G Tan, (n.48) p.335



and procedural safety of guilty verdicts.<sup>137</sup> Additionally, in March 2012, INUK held a Symposium on the Reform of the CCRC funded by the Joseph Rowntree Reform Trust: it was attended by lawyers, academics, campaigners and victims of miscarriages of justice. This resulted in the publication of a report calling for reform of the CCRC.<sup>138</sup> This made a number of recommendations for change, such as increasing the CCRC's independence from the CACD and reform of the real possibility test; broadening the interpretation of fresh evidence so that it does not exclude evidence available at trial; and for the CCRC to undertake more fieldwork investigations rather than desktop reviews.<sup>139</sup> In 2014 Naughton was also invited to give evidence to a Justice Select Committee Review of the CCRC, which examined its operation and remit.<sup>140</sup> Thus, Naughton has been committed to pursuing reform of the criminal appeal system through academic research and publication, and aimed to draw on the experience of UoBIP to provide evidence for these academic arguments.

Price and Eady of CLSIP identified with reform as an important aim. They suggested the appeal system was unfair and premised on “doublethink”<sup>141</sup> in presenting fundamental rules as fair, whilst logically knowing they are unfair.<sup>142</sup> They criticised the CACD for: holding out the jury as infallible, despite its fallibility being self-evident; refusing the admission of evidence which was available at trial and thereby penalising the appellant for tactical decisions made by their counsel; refusing to admit significant new evidence at appeal; and failing to holistically consider all the evidence on appeal.<sup>143</sup> CLSIP suggested their broad, holistic approach to case investigation (discussed above) may generate findings, which although untenable as grounds for appeal, could inform “wider academic and policy discussions.”<sup>144</sup>

However, CLSIP also appeared to challenge the CCRC directly through their casework.<sup>145</sup> They explained how in one case their CCRC application was premised on challenging the

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<sup>137</sup> M Naughton and G Tan, (n.48) p.345

<sup>138</sup> M Naughton and G Tan ‘Innocence Network UK (INUK) Symposium on the Reform of the Criminal Cases Review Commission (CCRC): Report’ (August 2012) <http://www.innocencenetwork.org.uk/wp-content/uploads/2013/01/CCRC-Symposium-Report.pdf> (accessed 31/08/2016)

<sup>139</sup> Ibid. p.17

<sup>140</sup> For information on the Inquiry by the Justice Select Committee or Naughton's contributions see <https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/criminal-cases-review-commission/>

<sup>141</sup> This is taken from George Orwell's “1984” and was used by Eady in his PhD thesis on miscarriages of justice to explain the unfairness of the criminal justice system (see D Eady, ‘Miscarriages of justice: the uncertainty principle.’ (2009) PhD Thesis, Cardiff University.)

<sup>142</sup> J Price and D Eady, (n.113) p.6

<sup>143</sup> J Price and D Eady, (n.113) p.6

<sup>144</sup> J Price and D Eady, (n.113) p.6

<sup>145</sup> J Price and D Eady, (n.113) p.7

CACD over their previous judgment.<sup>146</sup> In this case they said there was substantial new evidence obtained over several years and it was difficult to see how the project or the CCRC could uncover anything new.<sup>147</sup> However, they concluded (along with a number of individuals from the legal and media professions) that the CACD's judgment was factually inaccurate, and thus: "we submit with understandable hesitancy, unfair in its treatment of the evidence, its disregard of crucial matters and its selectivity of argument."<sup>148</sup> They conclude: "We urge that this application provides an opportunity for the CCRC to demonstrate its commitment to the cause of factual innocence and to counter the assertion that it is overly subservient to the CA."<sup>149</sup> Thus, CLSIP directly appealed to the CCRC to broaden their approach to considering cases and to refer a case on grounds of potential factual innocence.

Price and Eady concluded their article suggesting there was "a desperate and urgent need" for practitioners, campaigners, IPs and the CCRC "to work together to minimise the harmful effects of the overly restrictive appeal process and ultimately to bring about legislative and attitudinal change to overcome it."<sup>150</sup> They explained: those "engaged in the struggle for justice need to work alongside a proactive and challenging CCRC to overcome the myth that legal and institutional precedents and processes can always be equated with wisdom."<sup>151</sup> They thought any review of the CCRC's remit needed "to be matched by a more open, less restrictive, approach from the CACD."<sup>152</sup> Therefore, Price and Eady directly appealed to the CCRC to take a broader approach in academic articles and through casework.

Roberts and Weathered said IPs should publicly campaign for those wrongly convicted and propose reforms.<sup>153</sup> They thought IPs being based in universities were well placed to contribute to reform, and could use their casework to inform research into why people get wrongly convicted.<sup>154</sup> They consider that the CCRC is potentially reluctant to get involved in campaigning due to "political sensitivities" and think IPs would contribute differently to reform because of their factual innocence focus.<sup>155</sup> They refer to the "significant role" of IPs in the US in campaigning for law reform and suggest that IPs in the UK are similarly placed to do this.

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<sup>146</sup> J Price and D Eady, (n.113) p.8

<sup>147</sup> J Price and D Eady, (n.113) p.8

<sup>148</sup> J Price and D Eady, (n.113) p.8

<sup>149</sup> J Price and D Eady, (n.113) p.8

<sup>150</sup> J Price and D Eady, (n.113) p.8-9

<sup>151</sup> J Price and D Eady, (n.113) p.9

<sup>152</sup> J Price and D Eady, (n.113) p.9

<sup>153</sup> S Roberts and L Weathered, (n.33)

<sup>154</sup> S Roberts and L Weathered, (n.33) p.69

<sup>155</sup> S Roberts and L Weathered, (n.33) p.52

Thus, Roberts and Weathered see IPs as having a role in reform that could be achieved through academic research, but also through campaigning about issues related to wrongful conviction. Their approach is potentially distinguishable from Naughton's and Price and Eady's in being less focused on criticising and effecting reform of the CCRC and the CACD, but rather aiming for IPs to effect preventative reforms by identifying causes of wrongful conviction. Furthermore, their description of IPs as campaigning is potentially distinguishable from how Naughton envisioned INUK's role which he emphasised was not a campaigning organisation.<sup>156</sup> This could simply be a labelling distinction, or it could reflect his model of IPs as neutral public inquiries, which would be negated were they to engage in campaigning.

### 2.3.3 Education

IPs in the UK have also played an important role in clinical legal education at UK universities, enabling students to work on live, real-client cases. The introduction of IPs in the UK in 2004-2005 coincided with an increasing interest in pro bono initiatives within law schools, as documented by Sylvester in 2003: this will be discussed further below.<sup>157</sup>

McCartney started the Leeds IP in 2005 (this was set up independently of INUK and never joined). She wrote about the potential value of IPs to legal education: "if law educationalists are to respond to the many demands being made of them, and take seriously the responsibility of producing proficient and ethical lawyers with a lifelong commitment to pro bono work, and the pursuit of justice, then such innovation must be embraced."<sup>158</sup> Naughton and McCartney also wrote a collaborative article about the pedagogical benefits of IPs, suggesting they could provide students with "unparalleled insight into the workings of the criminal law, criminal procedure and the law of evidence," and require teamwork and innovative thought and idea generation. They thought the study of wrongful convictions "exposes all aspects of the criminal justice process to critical scrutiny, encompassing socio-legal and criminological concepts." They emphasised the importance of IPs in nurturing students to develop as ethical lawyers.<sup>159</sup> They also listed general skills that students would gain, such as: critical thinking and analysis; problem-solving, argument construction; creative thinking; record keeping and time management; organisation and prioritisation; and developing professionalism skills and

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<sup>156</sup> <http://www.innocencenetwork.org.uk/about-us> (accessed 19/10/2012) - this is no longer on the current website; see also M Naughton and G Tan, (n.68) p.60

<sup>157</sup> C Sylvester, 'Bridging the Gap? The Effect of Pro Bono Initiatives on Clinical Legal Education in the UK.' (2003) 3 International Journal of Legal Education 29. This is discussed when looking at the tensions underlying the innocence movement: this will look at the reluctance of law schools in the UK to incorporate clinical methods.

<sup>158</sup> M McCartney, 'Liberating Legal Education? Innocence Projects in the US and Australia.' (2006) 3 Web JCLI

<sup>159</sup> M Naughton and C McCartney, (n.49) p.75

learning to deal with people.<sup>160</sup> Thus, they thought IPs could help students develop skills for legal practice but also encourage them to think more broadly and critically about the criminal justice process, and beyond the academic study of law.

Roberts and Weathered discussed how IPs could contribute to legal education in the current climate, where the development of “new and innovative ways of law teaching” was required. They explained, with increasing numbers of students attending university, there were also increasing demands on law departments to provide different educational opportunities.<sup>161</sup> IPs would be part of a “long tradition” of clinical legal education in the UK, but could offer an alternative to the traditional civil focus of clinics. Furthermore, IPs would not just cultivate “lawyering skills,” but could encourage students to “think critically and ethically” about wrongful conviction.<sup>162</sup> Thus they could also benefit students who were not intending to enter practice.<sup>163</sup>

#### **2.4 Constructing an IP Model from the UK literature**

The literature suggests that IPs in the UK have a distinctive approach to examining miscarriages of justice. It suggested UK IPs had three central aims: investigating claims of factual innocence; effecting reform within the criminal justice system; and providing an educational experience for students. Within this, there are a number of distinguishing features of IPs as university clinics.

Firstly, IPs have a strong reform role, which emerges from why they were established. According to Naughton and Price and Eady, IPs were intended to challenge the restrictive operation of the current appeal system. Roberts and Weathered suggested IPs would have a role in campaigning for the wrongly convicted and would research causes of wrongful conviction to feed back into the system. Although it was suggested there may be a slight difference between these two agendas, it was clear from the literature that IPs would have a reform aim.

Secondly, IPs were distinguishable in focusing on “factual innocence” cases, which adopted the lay construction of a miscarriage of justice as wrongful conviction of the innocent. This was distinguished from a “legal” construction of a miscarriage of justice which looked at

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<sup>160</sup> M Naughton and C McCartney, (n.49) p.75

<sup>161</sup> S Roberts and L Weathered, (n.33) p.65

<sup>162</sup> S Roberts and L Weathered, (n.33) p.67

<sup>163</sup> S Roberts and L Weathered, (n.33) p.67

whether the accused had a “legally arguable”<sup>164</sup> case for appeal, or would include consideration of legal and procedural issues pertaining to safety.<sup>165</sup> This distinction is particularly important in distinguishing IPs from a traditional approach to post-conviction appeals within the legal system. Furthermore, Naughton thought this distinguished IPs from other clinics working on criminal appeals. He discussed the Student Law Office at Northumbria University where students successfully overturned the conviction of Alex Allan in 2001 and explained: this was “not an Innocence Project” because “they do not require clients to make a declaration of factual innocence, and they will even represent guilty offenders if the case is held to have educational merit.”<sup>166</sup> Thus, Naughton clearly sets IPs apart for their factual innocence focus, which was also identified as distinctive by Price and Eady and Roberts and Weathered.

Thirdly, particularly with Naughton’s model of IPs, there appeared to be a distinctive approach to casework. Naughton likened IPs to “public inquiries,” which should undertake objective, truth-finding investigations, akin to which would examine all available evidence. He said IPs should not concentrate their investigatory efforts only on finding grounds of appeal, but should interrogate the claim of innocence. He said IPs would not be subject to the lawyer-client relationship which required advancing a client’s best interests but would be independent. This clearly distinguished IPs from a traditional legal practice approach. Similarly, Price and Eady said IPs would focus on exploring the potential innocence of the client through holistically examining all available evidence, rather than simply concentrating on appeal grounds. Roberts and Weathered suggested IPs should focus on finding fresh evidence that could support factual innocence, which could enable them to be compatible with the CCRC’s remit. Although there were some differences, all authors suggested IPs would focus on examining the client’s potential factual innocence in casework.

The educational aims of IPs were typical of clinical legal education, in focusing on professional skills development; teaching students about the limitations of the law; and encouraging them to develop ethically as lawyers. However, there was also a specific focus on teaching students about miscarriages of justice. There is potentially an important distinction between the educational approach of Naughton and Roberts and Weathered, which relates to their casework model. Whilst Roberts and Weathered said they would use a legal construction of a miscarriage

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<sup>164</sup> J Price and D Eady (n.113) p.6

<sup>165</sup> M Naughton, (n.89) p.45

<sup>166</sup> <http://www.innocencenetwork.org.uk/wp-content/uploads/2014/09/wrongful-convictions-innocence-project.pdf>

of justice<sup>167</sup> when teaching the students how to approach casework,<sup>168</sup> Naughton said he asked students to suspend pursuit of legal grounds and to focus on whether the client could be telling the truth.<sup>169</sup> Thus, Roberts and Weathered's approach to using the legal construction reflects a traditional approach to vocational education and preparing students for practice; whilst Naughton's approach encourages students to examine the cases outside of the legal framework. This suggests he saw IPs as going beyond simulating legal practice and encouraging students to develop a moral or ethical agenda.

Overall, despite some potential differences between authors, the UK literature was clear that IPs had distinguishing features. The UK innocence movement appears to have been underpinned by a unique philosophy towards investigating miscarriages of justice, in their focus on factual innocence, their approach to casework, and reform agenda. However, literature on IPs in the UK is lacking; the contributing authors came from four IPs, with many writing over five years ago. With around 38 IPs having been established over the last decade, this raises the following question: how far did these distinct objectives and approaches translate to other projects? This will be a central question in this research.

### **3. Potential Tensions for IPs**

The distinct aims and objectives of IPs potentially raise a number of tensions: these are not only central to analysing the UK innocence movement, but are also of general academic importance. This section will firstly explore these potential tensions, before discussing how they feed into debate concerning whether IPs play a valuable role in the criminal justice process.

#### **3.1 Interaction of IPs reform agenda and casework role:**

In relation to INUK, there is the potential for tension between its reform agenda and its casework aim to seek a legal remedy for clients. As discussed, Naughton saw IPs as serving unmet legal needs through operating outside of the existing legal framework, which he perceived as inadequate for helping factually innocent victims of wrongful conviction.<sup>170</sup> This fed into how INUK screened cases for eligibility; his typology of innocence sought to distinguish different applicant motivations for making an innocence claim, rather than focusing

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<sup>167</sup> The authors actually discuss using 'legal communications' as they discuss this in context of social systems theory; but this essentially means they adopt the legal construction of a miscarriage of justice. Their discussion of social systems theory is dealt with in the chapter on systems theory and IPs.

<sup>168</sup> S Roberts and L Weathered, (n.33) p.52

<sup>169</sup> M Naughton M, (n.63) p.32

<sup>170</sup> M Naughton, (n.78)

on identifying the potential for pursuing grounds of appeal. This also fed into his casework model for investigation: he asked his law student caseworkers to suspend their focus on legal grounds and to concentrate on establishing whether the client may be telling the truth.<sup>171</sup> He criticised lawyers working with INUK for reversing this emphasis and working within the legal framework, rather than challenging it.<sup>172</sup> Thus, although Naughton recognised the necessity of identifying grounds of appeal, his approach to screening and investigating cases was potentially a source of tension with progressing cases through the criminal appeal system. Roberts and Weathered explicitly acknowledged this tension and identified areas of compatibility between IPs and the legal framework of the CCRC and CACD; whilst contrastingly Naughton aimed to challenge it. This tension is thus most acute in Naughton's aims for INUK and its member projects: thus for those IPs working on cases from INUK and following its model in casework, we might expect them to experience tensions within their role.

The concentration of IPs on "factual innocence" also raises questions over how they assess this. Naughton suggested that through focusing on factual innocence INUK aimed to fulfil "both the popular belief and the public aspiration that the criminal justice system should convict the guilty and acquit the innocent."<sup>173</sup> However, there are obvious difficulties with ascertaining guilt or innocence and establishing truth in the context of criminal justice. Jackson considered the difficulty of ascertaining truth results in "differing epistemological conceptions" about the meaning of truth in criminal justice and ways of reaching it.<sup>174</sup> How do IPs construct "factual innocence?" And how do they attempt to assess this in casework? The factual innocence focus originated from IPNY, which sought to prove innocence through DNA testing. McMurtie explained that in *People v. Wesley*<sup>175</sup> DNA testing was lauded as "the single greatest advance in the 'search for the truth,' and the goal of convicting the guilty and acquitting the innocent."<sup>176</sup> The absence or presence of DNA can provide a reasonably solid basis for determining innocence or guilt;<sup>177</sup> but it becomes much more complicated without this possibility. No IPs in the UK are known to restrict their focus to cases where there is scope for DNA testing, and thus likely rely on less certain means for examining potential factual innocence.

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<sup>171</sup> M Naughton (n.63) p.32

<sup>172</sup> M Naughton (n.63) p.32

<sup>173</sup> M Naughton (n.63) p.32

<sup>174</sup> J Jackson, 'Theories of Truth-finding in Criminal Procedure: An Evolutionary Approach,' (1988) 10 Cardozo Law Review 475 p.484

<sup>175</sup> 533 N.Y.S.2d 643, 644 (Albany County Court 1988)

<sup>176</sup> Cited in J McMurtie, (n.3) p.21

<sup>177</sup> This obviously depends on the circumstances in the case and other factors such as potentially innocent contamination.

Furthermore, it is debatable whether by promoting “factual innocence” IPs are undermining other important aims of the criminal justice process. The Criminal Procedural Rules make it clear that the “acquitting the innocent and convicting the guilty” is just one of the objectives of criminal procedure.<sup>178</sup> The criminal process in England and Wales is based upon an adversarial procedural model. Although it might be accepted that both adversarial and non-adversarial systems regard truth-finding as an “important value,”<sup>179</sup> Damaska has argued that whilst inquisitorial procedure was geared more towards truth-finding,<sup>180</sup> adversarial procedure is geared towards the protection of other values, such as protecting the individual from state abuse.<sup>181</sup> Goodpaster discusses “rights theory” as a possible basis for rationalising the adversarial procedure which prioritises protecting the defendants’ rights to protect citizens from the possible abuse of the government’s power and resources.<sup>182</sup> In doing this, the process ensures it is difficult for a government to bring or win any prosecution and this incorporates a policy decision to favour acquittals over convictions;<sup>183</sup> this also protects defendants from the weaknesses of the adversary trial in terms of truth-finding.<sup>184</sup> The defendants’ rights are put before truth-finding and operate as a strong constraint on investigation and sometimes even achieving a fair decision.<sup>185</sup> This is the central argument forwarded by Laudan who argues the criminal justice system needs to be rebalanced towards truth-finding instead of excessively protecting the rights of criminal suspects.<sup>186</sup> Therefore, there is an argument that the emphasis on truth-finding risks undermining important due process protections for defendants.

This concern has been discussed by academic commentators. Quirk argued that “the proposition that the appeal courts and CCRC should address issues of innocence is ill-founded, out-dated and potentially counter-productive.”<sup>187</sup> She explained there was already a political trend towards favouring truth-finding processes and undercutting due process protections to ensure the guilty are not going unpunished.<sup>188</sup> Quirk emphasised the importance of ensuring

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<sup>178</sup> The Criminal Procedure Rules (October 2015)

<sup>179</sup> J Jackson (n.174) p.484

<sup>180</sup> M Damaska, ‘Evidentiary barriers to conviction and two models of criminal procedure: A comparative study.’ [1973] 121(3) University of Pennsylvania Law Review 506 p.580

<sup>181</sup> Ibid. p.583

<sup>182</sup> G Goodpaster, ‘On the Theory of American Adversary Trial.’ 78(1) Journal of Criminal Law and Criminology 118 p.125 p.134

<sup>183</sup> Ibid. p.134

<sup>184</sup> G Goodpaster (n.182) p.137

<sup>185</sup> G Goodpaster (n.182) p.138

<sup>186</sup> R Goldman and R Goldman, ‘Review of Truth, Error, and Criminal Law: An Essay in Legal Epistemology by Larry Laudan.’ [2009] 15 Legal Theory 55 p.55

<sup>187</sup> H Quirk, ‘Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer.’ (2005) 70(5) Modern Law Review 759 p.762

<sup>188</sup> Ibid. p.760-761



that suspects' rights are protected along with the integrity of the process.<sup>189</sup> She thought there was a danger that "two tiers of successful appellant are created; the innocent and those who 'escaped on technicalities'."<sup>190</sup> Following INUK's closure, Quirk encouraged universities to reflect on the last decade and "the chance of a new beginning." She urged for IPs to apply the legal test of "unsafety," which would be "infinitely more protective of both suspects and the integrity of the criminal justice system." She thought teaching the significance of that test was important for students, who may become "defence lawyers, prosecutors, police officers, journalists or politicians."<sup>191</sup> Similarly, an American author Smith says the narrative of innocence smacks of "one-upmanship" and "arrogance."<sup>192</sup> She refers to the Midwestern IP in the US which states that it does not help guilty offenders "get off on technicalities" and laments that this undermines the devastating effects of false confessions, mistaken eyewitness identification, and police and prosecutorial misconduct, which lie at the root of many wrongful convictions.<sup>193</sup> Like Quirk, Smith is concerned the emphasis on factual innocence threatens fundamental legal principles underlying the adversarial criminal justice system in the US, in particular the presumption of innocence. She suggests the more we focus on proving innocence, the more we undercut due process protections in place to provide a check on the state's power.

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Linked to this issue is how we identify the role of a lawyer within the adversarial process. Iain Morley QC, writing as a practicing barrister, emphasises that "rightly or wrongly, adversarial advocacy is not really an enquiry into the truth;" rather "advocates try to win their cases within the rules irrespective of the truth."<sup>195</sup> In doing this, advocates are expected to advance the best interests of the party they are representing. Brants and Field explain that underlying the adversarial process is a view that "party rights to collect the evidence that suits their case" can "provide a basis for strong defence narrative building."<sup>196</sup> Therefore, IPs, in suggesting that the emphasis should be on impartial truth-finding rather than on promoting their clients' best

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<sup>189</sup> H Quirk, (n.187) p.769

<sup>190</sup> H Quirk, (n.187) p.768

<sup>191</sup> H Quirk, 'The end of innocence, and the chance of a new beginning?' (8<sup>th</sup> September 2014) The Justice Gap <http://thejusticegap.com/2014/09/end-innocence-new-beginning/> (accessed 31/08/16)

<sup>192</sup> A Smith, 'In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About IPs.' (2010) 13 University of Pennsylvania Journal of Law and Social Change 315 p. 317-318

<sup>193</sup> Ibid. p.319-320

<sup>194</sup> A Smith (n.192) p.324

<sup>195</sup> I Morley, *The Devil's Advocate: A short polemic on how to be seriously good in court* (Thomas Reuters (Legal) Ltd. 2009) p.12-13

<sup>196</sup> C Brants and S Field, 'Truth-finding, procedural traditions and cultural trust in the Netherlands and England and Wales: when strengths become weaknesses.' [2016] *International Journal of Evidence and Proof* DOI: 10.1177/1365712716658893

interests are potentially undermining the core values at the heart of adversarial lawyering, and thus undermining the ethics of defence representation. This is considered further when discussing the role of IPs in legal education in the next section.

Roberts and Weathered acknowledged that concentrating on “factual innocence” was problematic because of difficulties with proving it.<sup>197</sup> They explain that IPs are not suggesting the CACD and CCRC restrict their ambit to focusing on factual innocence, which would be “inappropriate and unworkable”<sup>198</sup> and would require appellants to work towards an inappropriately high level of proof.<sup>199</sup> Furthermore, they clarify that IPs are not intended to undercut due process protections which are vital in the criminal justice system. However, Roberts and Weathered explain, because the legal institutions downplay actual innocence as a consideration, some actual innocence cases may not receive the attention they deserve<sup>200</sup> and could be overlooked when an appellant does not have a legal or procedural error to base an appeal on.<sup>201</sup> They suggest the different focus of IPs aims “to persuade the CCRC to refer more fresh evidence cases” to the CACD.<sup>202</sup> They conclude that the US movement has “demonstrated that a dedication to factual innocence,” alongside extensive investigations which uncover significant evidence can lead to a volume of exonerations.<sup>203</sup>

It is debatable what Naughton meant when stating that IPs would focus on “claims of factual innocence as opposed to technical miscarriages of justice.”<sup>204</sup> He explained that IPs would not accept cases based on “technicalities,” such as partial defences, or cases where there is a dispute over the severity of the crime. This would not exclude claims of innocence based on legal procedural violations. However, Naughton’s typology of innocence that he applied to case screening did identify reliance on “abuse of process” points as a potential indication of a person making a false innocence claim.<sup>205</sup> Simply based on the literature, it is unclear how INUK approached case screening on claims related to procedural errors or violations. However, in relation to the Irish IP (which is an IN member), Langwallner said the IP’s investigation “might involve technical legal issues as long as the prisoner assures us and we accept that he or she is

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<sup>197</sup> S Roberts and L Weathered, (n.33) p.57-58

<sup>198</sup> S Roberts and L Weathered, (n.33) p.59

<sup>199</sup> S Roberts and L Weathered, (n.33) p.57

<sup>200</sup> S Roberts and L Weathered, (n.33) p.59

<sup>201</sup> S Roberts and L Weathered, (n.33) p.58

<sup>202</sup> S Roberts and L Weathered, (n.33) p.59

<sup>203</sup> S Roberts and L Weathered, (n.33) p.70

<sup>204</sup> M Naughton, (n.78)

<sup>205</sup> M Naughton, (n.71)

factually innocent.”<sup>206</sup> This suggests that rather than such claims being disregarded, it is the belief in factual innocence which is required; but this still raises the important question over how this belief is arrived at.

The literature on IPs thus suggests the potential for a tension to exist between IPs broader reform agenda and their approach to casework. The existing academic literature also points to another tension between IPs focus on “factual innocence” and competing values within the criminal justice system. However, the lack of empirical research on IPs thus far means we do not know how IPs perceive this tension, or how they seek to resolve it.

The discussion in this section raises another set of tensions around what we want to teach law students, and what we think a lawyer’s role is.

### **3.2 IPs role in Legal Education**

The reform agenda and casework approach of IPs is also potentially in tension with their role in legal education. To what extent does the factual innocence focus of IPs risk undermining important professional values within legal practice? Smith, a defence attorney in the US, expressed concern that students were “being trained to be judges and juries, not advocates,” by asking for the clients declaration of innocence before agreeing to represent them.<sup>207</sup> She criticised this for teaching students that some cases are more worthy than others, and was concerned the emphasis on innocence could lead to ambivalence, which underlies “the bad lawyering at the root of so many wrongful convictions.”<sup>208</sup> She laments that students are not being taught the importance of adversarial ethics, such as due process protections and the presumption of innocence; instead these notions are actually being undermined in some way.<sup>209</sup> Similarly, Brown was concerned the innocence movement was having unintended consequences. Reflecting on her experiences running a juvenile justice clinic, she observed that students provided more “zealous” representation to a client they fervently believed was innocent, than for one they had greater doubts about: she argues “zealous representation should never be married to the importance of innocence.”<sup>210</sup> Thus, there are concerns that IPs, intentionally or not, undermine important values in legal practice.

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<sup>206</sup> D Langwallner, (n.38) p. 1305

<sup>207</sup> A Smith, (n.192) p.327

<sup>208</sup> A Smith, (n.192) p.327

<sup>209</sup> A Smith, (n.192) p.327

<sup>210</sup> G Brown, ‘Deconstructing Innocence: Reflections from a public defender: Can student attorneys accept the paradigm of guilt and continue zealous representation?’ (2008) 13 International Journal of Clinical Legal Education 33 p.43

This relates to a broader question over the role of a law school. Clinical legal education in the US is often underpinned by a social justice or reform angle. Tarr suggested this role meant it was “not simply a pedagogical method, it is a philosophy about the role of lawyers in our society.”<sup>211</sup> Wizner posed the question, “What are law schools for?” He discussed how traditional legal education taught students to be value-neutral and to see the system as the “ultimate saviour of justice.”<sup>212</sup> Wizner thought clinical legal education should teach students to deal with clients as human beings, rather than as hypothetical fact situations; and to become sensitive to ethical considerations and the limits of legal intervention in resolving human issues.<sup>213</sup> Furthermore, he thought students should be taught to utilise the legal system as a means for social change, and to identify with a duty of public service, and an obligation to aid the poor and underrepresented.<sup>214</sup> Wizner thought clinical legal education helped students to develop beyond the typical ‘hired-gun’ value neutral lawyering approach, but instead encourage them to be more concerned with social justice and the limits and potential of law.<sup>215</sup>

The extent to which lawyers should remain value-neutral or work for a cause has been explored through literature on cause-lawyering.<sup>216</sup> Cause-lawyering involves using legal skills to pursue ends and ideals which transcend client service, be those ideals of a social, cultural, political, economic or legal status.<sup>217</sup> This approach has been viewed as detrimental in destabilising the dominant understanding of legal practice by challenging the idea of lawyers’ “partisanship” and “non-accountability:” traditionally lawyers should advocate a client’s case regardless of their personal beliefs.<sup>218</sup> What Sarat and Scheingold term “conventional lawyers” would view cause-lawyering as ethically suspect as it contradicts the requirement of lawyers to provide services regardless of whether they approve of the client’s cause.<sup>219</sup> Thus there is a tension underlying the use of IPs in legal education related to whether they ought to uphold the traditional lawyering approach, in teaching students to be value-neutral practitioners; or whether students should be encouraged to fight the cause of the innocent.

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<sup>211</sup> N Tarr, ‘Current Issues in Clinical Legal Education.’ (1993-1994) 37 *Howard Law Journal* 31 p.33

<sup>212</sup> S Wizner, ‘What Is a Law School?’ (1989) 38 *Emory Law Journal* 701 p.704-705

<sup>213</sup> *Ibid.* p.714

<sup>214</sup> S Wizner, (n.212) p.714

<sup>215</sup> S Wizner, (n.212) p.704

<sup>216</sup> Cause-lawyering literature was examined for the purposes of this thesis: this was not selected as the basis for examining IPs, partly because the research results did not particularly support UK IPs as in this role; but this area certainly could provide a sound basis for thinking about the innocence movement more broadly.

<sup>217</sup> A Sarat and S Scheingold, *Something to believe in: politics, professionalism and cause lawyering* (Stanford University Press 2004) p.3

<sup>218</sup> *Ibid.* p.3

<sup>219</sup> A Sarat and S Scheingold, (n.217) p.7

Risinger and Risinger<sup>220</sup> suggested there was an important distinction between being an “innocence lawyer” and a criminal defence lawyer, which involve very different values.<sup>221</sup> They described the traditional criminal defence lawyer role as based on two principles. Firstly, a “cab-rank” approach, which obliges them to take on clients as they are approached;<sup>222</sup> and the “I don’t care if you are innocent” principle, which upholds the notion that everyone is entitled to put the government to proof.<sup>223</sup> Conversely, an “innocence lawyer” is committed to factually innocent clients.<sup>224</sup> Two claims “lie at the heart” of being an innocence-lawyer: firstly, that the factually innocent are more worth saving from punishment than other classes of convicted persons; and secondly, that to properly review a factual innocence claim requires a rational evaluation of all available information, properly investigated and marshalled, whether it is formally admissible in a trial or not.<sup>225</sup> Risinger and Risinger also suggest that innocence lawyers may become intimately involved with law reform to pursue their aims of creating a more “innocentric”<sup>226</sup> approach to criminal justice.<sup>227</sup> This means focusing on effecting reform to help the factually innocent, rather than encouraging criminal justice reform more generally.

When writing, Risinger and Risinger said their project had not joined IN<sup>228</sup> because they did not think IN’s ethical best practices sufficiently separated the innocence function from the criminal defence function.<sup>229</sup> They explain, whilst criminal defence lawyers should not care whether their clients are factually innocent, which is the “essence of their role”; innocence lawyers “must and do care deeply about whether their client is factually innocent,” because that is the “essence of their role.”<sup>230</sup> They suggest innocence lawyers have an “ethical obligation” to critically investigate and examine all the available information and to only pursue a case where innocence appears clear or highly likely.<sup>231</sup> This means substantial investigatory resources are expended on a case before taking it on, and no obligation arises to

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<sup>220</sup> M Risinger and L Risinger are Associate Directors of the Last Resort Exoneration Project at Seton Hall Law School

<sup>221</sup> M Risinger and L Risinger, ‘The Emerging Role of Innocence Lawyer and the Need for Role- Differentiated Standards of Professional Conduct.’ in Cooper, S (eds.) *Controversies in Innocence Cases in America* (Ashgate Publishing Ltd. 2014)

<sup>222</sup> Provided they have the capacity and the person has the means to pay them.

<sup>223</sup> M Risinger and L Risinger, (n.221) p.123

<sup>224</sup> M Risinger and L Risinger, (n.221) p.123

<sup>225</sup> M Risinger and L Risinger, (n.221) p.125

<sup>226</sup> Risinger and Risinger describe this term as coined by Medwed, D. to connote an approach to criminal procedure that explicitly foregrounds exoneration of the factually innocent as a criminal justice value and seeks to privilege the exoneration of the factually innocent over other values (Ibid. p.126 (footnote 9)).

<sup>227</sup> M Risinger and L Risinger, (n.221) p.126

<sup>228</sup> Although they are now members.

<sup>229</sup> They suggest this is due to the fact many innocence project leaders came from a criminal defence background.

<sup>230</sup> M Risinger and L Risinger, (n.221) p.133 (footnote 9)

<sup>231</sup> M Risinger and L Risinger, (n.221) p.125

the prisoner until certain conditions are met.<sup>232</sup> Risinger and Risinger said they would only accept cases where they conclude the individual is very likely factually innocent and that further investigation could establish that; it will be dropped immediately if any evidence emerges suggesting guilt.<sup>233</sup> The authors explain in the first year of running their project they had 225 inquiries: from those, 175 applications were distributed; out of 125 returned, only three or four cases were deemed appropriate for their involvement.<sup>234</sup> The authors said they hoped the reader had been convinced that “innocence is different” and thus, so should being an innocence lawyer.<sup>235</sup>

Their view of the “innocence lawyer” role is clearly not shared by all IPs in the US. However, their account raises some potential tensions between conflicting views of a lawyer’s role. The relationship between IPs and cause-lawyering has not been discussed in the academic literature. In the absence of empirical research, we do not know how far IPs emphasise their focus on factual innocence, or whether they seek to challenge the value-neutral lawyering approach. However, the two principles identified by Risinger and Risinger as at the “heart” of being an innocence lawyer, do echo some of the UK literature about the IP approach. In particular, their emphasis on examining all the potential evidence (formally admissible or not) looks similar to Naughton and Price and Eady’s emphasis on reviewing all available evidence to investigate the innocence claim. Similarly, the emphasis on encouraging systemic reform for an “innocentric” approach echoes Naughton’s account of INUK’s role in the literature. Risinger and Risinger’s account of being an “innocence lawyer,” although potentially at the extreme end of the scale, may also emerge in the operations of IPs in the UK. Thus, questions arise over the extent to which IPs in the UK share this vision of being an “innocence lawyer”?

Other potential tensions of a different nature arise with regard to the IPs place in clinical legal education. Firstly, the American literature discussed difficulties with reconciling the educational aims of IPs with their other roles. Findley said the pedagogical benefits of IPs had been overlooked in the US literature, and discussed how the educational role of projects can become swamped by the client service, research, and public policy missions of the projects.<sup>236</sup> Furthermore, Medwed explained that in innocence cases it can be difficult to foresee a case strategy and thus predict what students may gain from it: he explained IP cases can be

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<sup>232</sup> Such as waiving their attorney client privilege, M Risinger and L Risinger, (n.221) p.125

<sup>233</sup> M Risinger and L Risinger, (n.221) p.134

<sup>234</sup> M Risinger and L Risinger, (n.221) p.134

<sup>235</sup> M Risinger and L Risinger, (n.221) p.138

<sup>236</sup> K Findley (n.20) p.234

extremely time consuming and cumbersome cases; difficult to navigate politically; and inherently unpredictable.<sup>237</sup> Furthermore, Medwed said case selection at an IP “differs significantly” from other in-house clinics, which typically put the perceived educational attributes at the top of the screening chart. For IPs, he said, educational value is a secondary consideration as there are not enough meritorious claims to provide the luxury of picking on educational value.<sup>238</sup> The potential difficulties around the variability of the educational benefit of IPs could make it difficult for universities seeking to utilise it as a pedagogical tool, especially where it may run for student credit.

Another tension raised in the US literature was the difficult place of clinical legal education within an academic university. Boswell explained the tension between theories of legal education and whether law is better understood through logic or experience manifested itself “in the birth of the modern “clinical movement.””<sup>239</sup> Holland described the US legal profession as “divided into two camps” of practitioners and scholars “and nowhere is the divide clearer than in America's law schools.”<sup>240</sup> Tarr said in 1993 that there were still issues with marginalization of the clinic and its students’ work within the faculty at a number of universities, where clinicians may be on uncertain, one year contracts, or a lower salary with more limited employment benefits.<sup>241</sup> Furthermore, Colbert said clinicians can struggle to advance in an academic career due to the “publish or perish” policy of universities, which values faculty members who publish in respectable law journals.<sup>242</sup> This issue is undoubtedly also of importance in the UK where universities are assessed according to the Research Excellence Framework (REF) which ranks universities according to where their work is published. Whilst Naughton appears to have published a number of academic articles, as a whole there was little academic literature on IPs, despite research being an aim of UK IPs discussed above.

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<sup>237</sup> D Medwed, (n.11) p.1128. Maurer has written about the benefits of working on “big cases” in a clinical legal education setting and has argued that it provides the students with significant opportunities in collaboration N Maurer, ‘Handling Big Cases in Law School or Lessons from my Clinical Sabbatical.’ (2003) 9 Clinical Law Review 879

<sup>238</sup> D Medwed, (n.11) p.1135-1136

<sup>239</sup> R Boswell, ‘Keeping the Practice in Clinical Education and Scholarship.’ (1992) 43 Hastings Law Journal 1187 p.1187

<sup>240</sup> L Holland, ‘Invading the Ivory Tower: The History of Clinical Legal Education at Yale Law School.’ (1999) 49 Journal of Legal Education 504 p.504

<sup>241</sup> N Tarr, (n.211) P.41

<sup>242</sup> D Colbert, ‘Broadening Scholarship: Embracing Law Reform and Justice.’ (2002) 52(4) Journal of Legal Education 540 p.542

These two further tensions raised in relation to clinical legal education could be important for examining the extent which IPs have been integrated within the university: there could be difficulties if IPs other aims conflict with their educational benefit, which would be a priority for a university.

### **3.3 Evaluating the role of IPs within the criminal justice system**

Some of the tensions discussed above feed into a debate over whether IPs play a valuable role in the criminal justice process. Quirk thought the UK innocence movement was misguided and the need for IPs was “assumed rather than evaluated or explained.”<sup>243</sup> She equated IPs in America to “emergency relief” operating in desperate circumstances, where there is the prospect of the death penalty and no legal aid. She described them as “a pragmatic, albeit inadequate, response to a pressing need” which fill a void where “almost anything is better than nothing.”<sup>244</sup> Whereas she thought IPs in the UK were a “retrogressive step”<sup>245</sup> because we have the CCRC which is both substantially better funded and better placed to carry out investigations.<sup>246</sup> Quirk was concerned that IP work had never been checked for quality, and that whilst mechanisms exist to hold the CCRC to account, there are none for IPs. She thought the overlap between IPs and the CCRC was improperly considered, and IPs risked “contaminating evidence, and delaying or compromising the appeal process.”<sup>247</sup> The latter point may be particularly important given the lack of success of UK IPs in overturning convictions.

However, there is potentially an argument that IPs could play an important role in the UK. Since Quirk was writing, there have been significant cuts to legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 making it difficult for appellants to get funding for post-conviction representation. If IPs could work to a standard that was close to replicating legal representation, they may be considered beneficial. Hodgson and Horne estimated that between 1<sup>st</sup> October 2005 and 30<sup>th</sup> September 2006 only around 34% of applicants to the CCRC were legally represented;<sup>248</sup> the figure had been similar the year before at around 33% between 1 October 2006 and 30 September 2007.<sup>249</sup> Their research suggested

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<sup>243</sup> H Quirk, (n. 187) p.772

<sup>244</sup> H Quirk, (n. 187) p.772

<sup>245</sup> H Quirk, (n. 187) p.776

<sup>246</sup> H Quirk, (n. 187) p.772

<sup>247</sup> H Quirk, (n. 187) p.772

<sup>248</sup> Their figures include solicitors or counsel

<sup>249</sup> J Hodgson and J Horne, ‘The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC)’ (2008) (October 6, 2009) SSRN:<http://ssrn.com/abstract=1483721> or <http://dx.doi.org/10.2139/ssrn.1483721> (para.4.1) p.11



that legal representation greatly benefitted applicants to the CCRC. They estimated there was a 2.1% chance of unrepresented applicants having their case referred to the CACD, which compared to a 7.6% chance for represented applicants.<sup>250</sup> Furthermore, unrepresented applicants had a 50.8% chance of having their case closed at the earliest stage because of ineligibility, lack of previous appeal or no reviewable grounds: this compared to a figure of 18.4% for represented applicants.<sup>251</sup> Hodgson and Horne concluded the research clearly demonstrated that applicants with legal representation had “a significantly better chance” of the CCRC accepting their case for a detailed review or investigation, and also of having their case referred to the CACD.<sup>252</sup> Whilst they recognised that some of the differences were explicable because lawyers would screen out weaker cases, they also developed a scale for analysing the quality of applications. They found that “applications involving lawyers were almost twice as likely to contain successful submissions and more than twice as likely to contain reasonable submissions.”<sup>253</sup> These were the categories developed to reflect the two highest quality types of submissions to the CCRC. Therefore, IPs could potentially improve the situation for unrepresented applicants if they were able to emulate a legal practitioners’ quality of application.

Furthermore, it is worth acknowledging that, despite the difficulties discussed with IPs focusing on “factual innocence,” the courts do place high significance on potential innocence when determining compensation for appellants successful in challenging their conviction. s.133 of the Criminal Justice Act 2003 states that a person may be entitled to compensation where they are pardoned or have their conviction quashed because “a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice,” which does reflect a legal construction of the concept of innocence. However, in interpreting this test, the courts have suggested that, whilst this does not require an “applicant to prove his innocence *generally*”<sup>254</sup> the question is whether the Secretary of State considers that the applicant’s innocence has “been proved *by the new or newly discovered fact.*”<sup>255</sup> Importantly however, when considering questions surrounding compensation in the case of *R (on the application of*

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<sup>250</sup> Ibid. p.12. They used the CCRC Management information system to analyse CCRC applications between 1 January 2001 and 31 December 2007 to examine the influence of legal representation on success. Given the CCRC’s admission to the potential inaccuracy of the system, Hodgson and Horne adjusted it for accuracy by estimating the margin of error: the figures used here are the adjusted figures.(see p.8-9)

<sup>251</sup> J Hodgson and J Horne, (n.249) p.12

<sup>252</sup> J Hodgson and J Horne, (n.249) p.42

<sup>253</sup> J Hodgson and J Horne, (n.249) p.42. Their research details how this was analysed, see p.14-15

<sup>254</sup> *R (on the application of Hallam and Nealon) v Secretary of State for Justice*. [2016] EWCA Civ 355

<sup>255</sup> Paragraph 50

*Ali*) *v Secretary of State for Justice*,<sup>256</sup>, the court said the extent to which the Secretary of State considers the judgment of the CACD will depend on the individual judgment, and they were clear to state that “the Court of Appeal is only concerned with the safety of a conviction and not with the more specific question of whether the defendant is truly innocent or not.”<sup>257</sup> Therefore, in relation to obtaining compensation, victims of miscarriages of justice are very rarely eligible because of the difficulties in proving innocence, alongside the reluctance of the CACD to make any pronouncements on an applicant’s potential factual culpability. Thus, in this context, the aim of IPs to focus on establishing likely “factual innocence,” if successful in achieving this standard of proof, would serve an important role for their clients.

There are ethical issues with using clinical legal education to fill gaps in legal services. Tarr, writing about the US, questioned whether law schools are using poor people as “guinea pigs,” where the under privileged are expected to be grateful for the provision of such services. She questions: “Whose interests do they really serve: the clients, the students, the supervisors, or the law schools?”<sup>258</sup> Thus, there is justifiable concern over the quality of university clinic work. In the UK, INUK did monitor the work of member IPs to a certain extent; it had a complaints procedure for prisoners; it provided protocols for case-working standards; and member projects were required to provide an annual report detailing their activities that year. Naughton indicated that a contributing factor to INUK’s fold was problems with member IPs not following protocols.<sup>259</sup> Clearly, with INUK now closed, monitoring quality and activity of IPs is a bigger problem than before. There is no way of knowing which projects are still operating; what cases they have; how far they are progressing; or the quality of their work. Given the lack of success in casework of UK IPs, there is a need to think about how IPs are operating.

This leads on to the next section, which will consider the UK innocence movement in the international context and reflect on its comparative lack of success to the movement in America.

#### **4. The UK innocence movement in the international context**

The thesis introduction discussed how the UK movement was thus far significantly less successful than its American counterpart. This section will primarily focus on the US

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<sup>256</sup> [2013] WLR (D) 35

<sup>257</sup> N Monaghan, ‘Judicial guidance on the award of compensation for miscarriages of justice: issues of accountability and compatibility with the presumption of innocence.’ [2013] Coventry Law Journal 1 p.5

<sup>258</sup> N Tarr, (n.211) p.35

<sup>259</sup> <http://www.innocencenetwork.org.uk/inuk-new-beginnings>

movement; partly because there is little literature on the movement in other countries, but also because the US movement is by far the most advanced.

#### **4.1 Casework and exonerations**

In 2011 Krieger published “unprecedented empirical research” on American IPs.<sup>260</sup> There were 60 IPs in the US at this time. Krieger carried out twenty-two interviews with geographically diverse IPs, with the average being established in 2001.<sup>261</sup> Krieger said that combined, the sampled projects had overturned 108 convictions (with individual projects ranging from 0-14 exonerations). As Krieger excluded the two eldest projects because of their substantially greater experience, this illustrates the general success of IPs in America across the board. This is markedly different to the UK where only one conviction has been overturned in around 11 years (2005-2016). If we take Krieger’s average sampled age of IPs as established in 2001 and the year his article was published in 2011, we might expect IPs in the UK to have overturned more convictions than they have thus far. Krieger’s research sought to explore what factors contributed to IPs’ success in achieving exonerations. This will be discussed before reflecting on the implications for the UK movement.

Krieger used the number of exonerations achieved as the benchmark of IP success, but acknowledged this was “not necessarily the most accurate measure of project success but it is the cleanest and simplest.”<sup>262</sup> Krieger found that finances had the most significant correlation with exoneration success at IPs; no project with a budget of two hundred thousand dollars or less secured more than five exonerations.<sup>263</sup> Other factors included, limiting the number of volunteers; no project with an excess of fifty volunteers achieved more than five exonerations, and the project with the most volunteers (200) was one of the least successful.<sup>264</sup> Unsurprisingly, he found that projects which dedicated more time to case investigation were more successful; with the top three projects spending 45% of their time investigating, and the bottom five spending only 29% of their time investigating.<sup>265</sup> Krieger also found the more successful projects would review fewer cases at a time.<sup>266</sup> States with a bigger population, and thus correspondingly a greater prison population, had achieved more exonerations; he

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<sup>260</sup> S Krieger, (n.19) p.337

<sup>261</sup> Krieger excluded the two oldest projects because of their national scope and substantially greater experience, as well as the difficulty of keeping their responses confidential (S Krieger, (n.19) p.365)

<sup>262</sup> S Krieger. (n.19) p.371

<sup>263</sup> S Krieger. (n.19) p.372

<sup>264</sup> S Krieger. (n.19) p.375

<sup>265</sup> S Krieger. (n.19) p.376

<sup>266</sup> S Krieger. (n.19) p.378

suggested this could be because those IPs receive more applications and thus are better at identifying more promising cases.<sup>267</sup> Crucially, Krieger found that project age did not correlate with success, with six projects at the age of eight years having exonerations ranging from 0-14.<sup>268</sup>

Therefore, Krieger's findings raise questions for consideration about the UK. Krieger found that on average the IPs would review 1750 requests for assistance for every exoneration.<sup>269</sup> The INUK website documents that it assessed "over 1,500 applications for members, of which over 100 cases were referred to member IPs for further investigation."<sup>270</sup> Therefore, comparing this to the American figure, and correlating it with the one conviction overturned by UK IPs (which was an INUK case), this is a slightly better return than the average presented by Krieger. Furthermore, crucially, Krieger found that funding was a significant contributor to the success of IPs and no project with less than 200,000 dollars had secured more than five exonerations. Comparably, UK IPs do not appear to receive anywhere near as much funding as projects in the US, which fundraise but also receive state grants. This is likely significant and will be discussed further below.

Although little is known about the success rate of IPs in other countries so far, Weathered reported that IPs in Australia (which were established in 2001) had not replicated the success of American IPs in attaining exonerations.<sup>271</sup> She thought this was perhaps explicable through differences in prison populations, with 1,574,700 individuals incarcerated in America, versus 33,791 in Australia.<sup>272</sup> Another factor she suggested was that Australian prisoners have significantly lower detention periods than in America, which means that clients may approach their parole hearing before IP investigations are concluded, and thus have a higher temptation to admit guilt to obtain release. Both factors are potentially relevant to the UK. The UK also has lower prison tariffs than the US, and although the UK has a higher prison population than Australia (85,134 in August 2016<sup>273</sup>), this is still much lower than the US. Weathered did not specify how many convictions IPs had overturned in Australia, but an article on the Sydney

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<sup>267</sup> S Krieger. (n.19) p.381

<sup>268</sup> S Krieger. (n.19) p.377

<sup>269</sup> S Krieger. (n.19) p.369

<sup>270</sup> <http://www.innocencenetwork.org.uk/history>

<sup>271</sup> At the Griffith University in Queensland and the University of Technology, Sydney (UTS) in New South Wales. (L Weathered, (n.32) p.79).

<sup>272</sup> L Weathered, 'Reflections on the Role of Innocence Organisations in Australia.' (2015) 17 Flinders Law Journal 515 p.518

<sup>273</sup> Official Statistics: Prison population figures: 2016

<https://www.gov.uk/government/statistics/prison-population-figures-2016> (accessed 08/08/16)

Criminal Lawyers website said that (as of January 2016) only one conviction in Australia was overturned by an IP.<sup>274</sup> This would put the innocence movement in Australia on an equal footing with the UK in terms of exonerations. However, the UK's lack of success is potentially more concerning as Australia only has four IPs,<sup>275</sup> whereas the UK has had up to thirty-eight.

Another factor which may contribute to IPs limited success in the UK is the extra hurdle posed by the CCRC, whilst IPs in the US apply directly to the court. UK IPs firstly have to get their case application accepted for a full investigation at the CCRC's initial review stage; the CCRC has to then undertake their own investigations and decide to refer the case to the CACD, at which point the CACD can still uphold the conviction. This can take a long time; the successful case from CLSIP was with the CCRC for three years before referral, and then had a year's wait before the CACD hearing. Thus, potentially there is a time-lag for IPs in the UK where cases are awaiting decisions at the CCRC. Another potential consideration is that prisoners can apply directly to the CCRC without any legal assistance; thus IPs are the ultimate last resort for prisoners when they have exhausted all legal remedies and have no legal representation. Thus, when IPs get a case, it may already have undergone full investigation at the CCRC and been rejected for referral. Comparably in the US where no such body exists, the wrongly convicted are potentially more dependent on IPs to get their case to court: therefore, they may get more cases where there are avenues for investigation. Therefore the role played by the CCRC in the UK is an important consideration.

## **4.2 Reform**

The US movement has also been more successful than the UK in achieving reform. Marion and Zalman cited three key reforms which have been implemented in the US resulting from IPs. In April 2002, the Illinois Governor's Commission on Capital Punishment detailed 85 reforms designed to prevent sending innocent people to death.<sup>276</sup> Secondly, the Innocence Protection Act was enacted in 2004, which requires (among other issues) post-conviction DNA testing in federal cases to test innocence claims, and requires the government to preserve biological evidence.<sup>277</sup> Thirdly, in 2010, Ohio's governor Strickland introduced several

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<sup>274</sup> Sydney Criminal Lawyers <http://www.sydneycriminallawyers.com.au/blog/wrongful-convictions-in-australia-less-likely-to-be-overturned-than-other-countries/> (accessed 25/07/2016).

<sup>275</sup> L Weathered (n.272)

<sup>276</sup> N Marion and M Zalman, 'Towards a Theory of Innocence Policy Reform.' in S Cooper (eds.), *Controversies in Innocence Cases in America* (Ashgate Publishing Ltd. 2014) p.178

<sup>277</sup> Ibid. p. 178 It also encouraged states to pass similar laws to obtain federal grants to help defray the costs of DNA testing.

reforms designed to prevent wrongful conviction, including DNA preservation and rules on police interrogation, for example.<sup>278</sup>

In the UK, IPs have not yet made a significant contribution to effecting reform. Notably, in 2014-2015 there was a Justice Select Committee (JSC) Review of the CCRC which sought to examine: whether the CCRC fulfilled its expectations and remit from the RCCJ; whether it has appropriate and sufficient statutory powers and resources to carry out its function; and whether the real possibility test under s.13 Criminal Appeal Act 1995 was the appropriate test. As explained above Naughton was invited to give evidence, and other IPs provided written evidence, including Cardiff Law School IP, which also prepared another joint petition for signatories, and Nick Johnson who runs Nottingham Trent's former IP. Naughton and Eady were also called to give oral evidence. The JSC recommended that the CACD's approach to analysing miscarriages of justice ought to be reviewed to "encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument."<sup>279</sup> This marked some success for the innocence movement agenda as this issue was raised in their written and oral evidence.<sup>280</sup> However, in September 2015, it was confirmed that these recommendations would not be acted upon.<sup>281</sup> Another reform attempt was INUK's intervention in the Supreme Court case of Nunn<sup>282</sup> to argue for a continuing duty of disclosure post-conviction: this aimed to give appellants the right to access material which may undermine the prosecution case, or assist the defence for the purpose of correcting miscarriages of justice.<sup>283</sup> The Supreme Court rejected that a continuing duty of post-conviction disclosure arises,<sup>284</sup> but set out certain circumstances when disclosure would be appropriate.<sup>285</sup> However, INUK's aim for post-conviction disclosure to become an ingrained right was not

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<sup>278</sup> N Marion and M Zalman, (n.276) p.179

<sup>279</sup> <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/850.pdf> see paragraph 28, p.15-16

<sup>280</sup> See particularly, J Price and D Eady, Written evidence from Cardiff University Law School Innocence Project (CCR 29):

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Criminal%20Cases%20Review%20Commission/written/16120.html> (accessed 22/09/2016)

<sup>281</sup> <http://www.parliament.uk/documents/commons-committees/Justice/correspondence/15-09-30-Michael-Gove-to-Chair-on-FOI-Court-of-Appeal-Joint-Enterprise%20.pdf>

<sup>282</sup> R (on the application of Nunn) v. Chief Constable of Suffolk Constabulary [2014] UKSC 37

<sup>283</sup> C McCartney and N Speechless, 'The Supreme Court, post-conviction disclosure and 'fishing expeditions': R (Nunn) v Chief Constable of Suffolk Constabulary & Anor [2014] UKSC 37' (2015) 19(2) International Journal of Evidence & Proof 120 p.122

<sup>284</sup> R (on the application of Nunn) v. Chief Constable of Suffolk Constabulary [2014] UKSC 37 para 30

<sup>285</sup> The duty which does exist is found in paragraph 72 of the Attorney General's guidelines: "where, after the conclusion of proceedings, material comes to light that might cast doubt upon the safety of the conviction, the prosecutor must consider disclosure of such material." The Court also extended this to include: "if there exists a real prospect that further enquiry may reveal something affecting the safety of the conviction, that enquiry ought to be made." (see R (on the application of Nunn) v. Chief Constable of Suffolk Constabulary [2014] UKSC 37 para 42).

realized. This is in sharp contrast to the US enactment of the Innocence Protection Act in 2004 which was discussed above.

The UK's lack of success in reform may also be resource related. In the US, Marion and Zalman said reform efforts were hampered by finances, because only two projects appeared well funded enough to have a specific focus on policy (IPNY and the Center on Wrongful Conviction; both employ policy staff to work on reform).<sup>286</sup> Krieger also found that the sampled projects estimated spending only 5% of their time on policy reform and lobbying because of limited resources.<sup>287</sup> This is likely also an issue for UK IPs which are thought to receive less funding than those in the US. Findley also suggested that the numerous exonerations in the US raised public sympathy and publicity for the wrongly convicted, which meant the movement provided a "rare opportunity" for policy reform.<sup>288</sup> Thus the comparably less successful UK movement may be faced with an environment less receptive to reform.

#### **4.3 Education**

There is also thought to be a potential discrepancy between the US and UK in relation to clinical legal education. This form of pedagogy is more advanced in the US, which means IPs may be better accommodated in the US law schools than in the UK. The introduction of clinical education was hard fought in the US. Wizner explained its "intellectual roots" dated back to the 1930's and the legal realist movement<sup>289</sup> but it did not become a practical reality until the 1960's.<sup>290</sup> This was possible due to the provision of funding from the Council on Legal Education for Professional Responsibility,<sup>291</sup> for the development of clinical legal educational schemes<sup>292</sup> to help serve the poor.<sup>293</sup> Writing in 2002, Wizner said that virtually all of the law schools in the US now had clinical schemes. He described clinical education as the most

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<sup>286</sup> N Marion and M Zalman, (n.276) p.177

<sup>287</sup> S Krieger, (n.19) p.387

<sup>288</sup> K Findley, (n.20) p.234

<sup>289</sup> Legal realist scholars criticised the formal nature of legal scholarship and thought students should be exposed to the interaction between theory and practice (S Wizner 'The Law School Clinic: Legal Education in the Interests of Justice.' (2002) 70 Fordham Law Review 1929 p.1932; see also L Holland, 'Invading the Ivory Tower: The History of Clinical Legal Education at Yale Law School.' (1999) 49 Journal of Legal Education 504 p.507). For an example of such scholarship see J Frank, 'Why not a Clinical Lawyer School?' (1933) 81 University of Pennsylvania Law Review 907; see also J Frank, 'What Constitutes a Good Legal Education?' (1933) 19 A.B.A. 723

<sup>290</sup> S Wizner. 'The Law School Clinic: Legal Education in the Interests of Justice.' (2002) 70 Fordham Law Review 1929

<sup>291</sup> Holland explained that the Council was set up by Pincus whose interest in clinical legal education was instigated by his own experience during his law degree which he perceived as inadequate (see L Holland, (n.240) p.516)

<sup>292</sup> L Holland, (n.240) p.516

<sup>293</sup> S Wizner. (n.290) p.1933

significant reform of American legal education since Langdell's invention in 1870 of the case study method at Harvard;<sup>294</sup> this was the previously predominant approach to law teaching.<sup>295</sup> Milstein explained that clinical legal education had evolved into a distinctive academic field which includes "sophisticated models of pedagogy," and "experience based scholarship about teaching, lawyering, law, and legal institutions."<sup>296</sup> Furthermore, every state in the US has a "student practice rule" permitting students supervised by a law school faculty member to practice law.<sup>297</sup> Therefore, it is evident that clinical legal education has become integrated into law schools in the US.

However, the situation in the UK is different where clinical legal education has been slower to develop and is less integrated in law school curriculums. Sylvester said in 1973 there were clinical programs at 125 out of 147 accredited law schools in America.<sup>298</sup> Contrastingly, it was in the 1970's that the first real client clinic was established in the UK at the University of Kent, which was followed by the University of Warwick in 1975.<sup>299</sup> She said by the 1980's there were still only four clinics in universities in the UK.<sup>300</sup> There is a view that the UK has been resistant to developing clinical methods of teaching. In 1967 the Ormrod Committee recommended that law degrees should be the normal route of entry to the profession, but should be academic in study, and the practical and professional training aspect should be completed afterwards.<sup>301</sup> Boon and Webb suggested the split in England and Wales between the academic undergraduate degree and the postgraduate professional training courses has contributed to a divide, which has led to a climate of "mutual inattention (at best) or suspicion (at worst)."<sup>302</sup> Sylvester said there was a view that clinical schemes would not benefit all students, because not all undergraduate law students wish to become practitioners.<sup>303</sup> Therefore, imposing a clinical element within the degree program was seen as "diluting the academic study of law with skills only relevant to the legal professional."<sup>304</sup> Sylvester said whilst participating

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<sup>294</sup> The Langdell case study method was considered to have revolutionised legal education in America by suggesting instead of just learning about the law, students should analyse court appellate judgments and seek to predict what decision the court might make in the future. See S Wizner. (n.290) p.1930-1931 or Stiglitz J, Brooks J and Shulman T, (n.14) p.416-417

<sup>295</sup> S Wizner. (n.290) p.1933-1934

<sup>296</sup> E Milstein, 'Clinical legal education in the United States.' (2001) 51 *Journal of Legal Education* 375 p.375

<sup>297</sup> *Ibid.* p.376

<sup>298</sup> C Sylvester, (n.157) p.29

<sup>299</sup> *Ibid.* p.29

<sup>300</sup> Birmingham, Warwick, South Bank and Northumbria

<sup>301</sup> W Twining, 'Blackstones Tower: The English Law School.' (Sweet and Maxwell 1994) p.168

<sup>302</sup> A Boon and J Webb, 'Legal Education and Training in England and Wales: Back to the Future?' (2008) 58(1) *Journal of Legal Education* 79 p.117

<sup>303</sup> C Sylvester, (n.157) p.32

<sup>304</sup> C Sylvester, (n.157) p.31



students welcome clinical programmes “almost universally,” it had been difficult to convince academics and, even some practitioners, that clinical legal education provides a valuable contribution. This means “clinical programmes have come and gone and are often first to feel the effect of resource crises.”<sup>305</sup>

Linked to this is the extent to which existing law clinics are incorporated into university curriculums. In 2003, Sylvester said that whilst pro bono initiatives were on the rise in the UK, there remained a resistance to the integration of law clinics into degree programs.<sup>306</sup> This distinguishes extra-curricular initiatives where students are working in their spare time, versus an integrated clinic. Clearly, the latter enables students to dedicate more time to the work, and would likely mean more staff resources are directed to the project than where the initiative is entirely extra-curricular. In 2014, LawWorks carried out a survey which was sent to 99 institutions with 109 identifiable law schools. They received responses from 80 law schools (73% of all law schools surveyed or 81% of institutions). This indicated that 96% of respondent institutions were now involved in pro bono or clinical activity: if this was corrected to assume that non-respondents did not carry out such work, then 70% of all law schools are involved in such schemes.<sup>307</sup> However, in terms of assessed clinics, only 20 institutions or 25% of respondents said their university assessed pro bono/clinical work.<sup>308</sup> Thus in 2014, the majority (75%) of clinics were still non-assessed and remained extra-curricular activities. However, the survey indicated that clinics were “increasingly becoming assessed” and this figure was a significant rise from 2010 where only 10% of clinics were assessed.<sup>309</sup>

In the absence of research, it is unclear how many IPs in the UK are extra-curricular versus credit-bearing. Those IPs discussed in the literature were extra-curricular, although Naughton indicated that UoBIP may be assessed in the future.<sup>310</sup> However, as discussed, the majority of these articles are now several years old. In the US Stiglitz, Brooks and Shulman said they decided to award students’ credit for participation on the California IP; they reasoned that IP work is very time consuming and would likely suffer when students sought to balance their

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<sup>305</sup> C Sylvester, (n.157) p.29

<sup>306</sup> C Sylvester, (n.157)

<sup>307</sup> D Carney, F Dignan, R Grimes, G Kelly and R Parker, ‘The LawWorks Law School Pro Bono and Clinic Report 2014.’ Produced for LawWorks (<https://www.lawworks.org.uk/sites/default/files/LawWorks-student-pro-bono-report%202014.pdf> ). LawWorks is a charity in England and Wales which seeks to connect individuals to free legal advice where required

<sup>308</sup> Ibid. p.33

<sup>309</sup> D Carney, F Dignan, R Grimes, G Kelly and R Parker, (n.307) p.5

<sup>310</sup> <http://www.innocencenetwork.org.uk/wp-content/uploads/2014/09/wrongful-convictions-innocence-project.pdf> p.11

participation against their studies and other activities.<sup>311</sup> They also listed a number of other US projects which award credit.<sup>312</sup> Thus, considering the place of IPs in universities within the UK could be important to reflecting on whether this may contribute or detract from achieving their aims. Although potential limitations to IPs resulting from the UK culture to clinical legal education did not arise in the IP literature, it has been identified as an important consideration.

## **5. Potential challenges for innocence projects**

This final section will discuss the challenges that US IPs in Krieger's research said they experienced. We would expect UK IPs to experience similar difficulties in many respects: it will be important to consider whether some, or any, of these issues are contributing factors to the lack of IP success in the UK. Krieger asked IPs in his sample what they perceived as their biggest challenges. Lack of funding was the most reported issue, with twenty out of twenty-two projects mentioning funding issues. Combined, the sampled projects estimated spending about 5% of their time on fundraising.<sup>313</sup> He explained IPs could struggle to get grants because they would spend a large amount of time reviewing unworthy cases for investigation to identify meritorious cases; and because exonerations may take up to a decade, many funders look for a quicker return and impact from their investment.<sup>314</sup> As mentioned above, Krieger found that no IP with a budget of less than two hundred thousand dollars had secured more than five exonerations.<sup>315</sup> As indicated above, UK IPs likely receive even less money than their US counterparts. In the 2014 LawWorks survey, 80% of clinics said they received no external funding, but law schools meet the "core costs" such as providing premises, equipment and staff.<sup>316</sup> It emphasised that resource limitations for pro bono activities has been a constant theme.<sup>317</sup> A recent survey of IPs in the UK found that the majority identified funding as a "perennial challenge."<sup>318</sup>

Another key challenge identified was accessing evidence; access may be denied or missing.<sup>319</sup> Linked to this were difficulties with prosecutor cooperation; prosecutors have the right to

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<sup>311</sup> J Stiglitz, J Brooks and T Shulman, (n.14) p.425

<sup>312</sup> Such as students at IPNY; Northern California; Texas Innocence Network; Thomas Cooley; the Second Look Program; Wisconsin. (J Stiglitz, J Brooks and T Shulman, (n.14) p.426 footnote 66.\_

<sup>313</sup> S Krieger, (n.19) p.370

<sup>314</sup> S Krieger, (n.19) p.383

<sup>315</sup> S Krieger, (n.19) p.372

<sup>316</sup> D Carney, F Dignan, R Grimes, G Kelly and R Parker, (n.307) p.5

<sup>317</sup> D Carney, F Dignan, R Grimes, G Kelly and R Parker, (n.307) p.17

<sup>318</sup> M Alexander, 'Innocence Projects: Green Shoots.' [10<sup>th</sup> June 2016] Criminal Law and Justice Weekly <http://www.criminallawandjustice.co.uk/features/Innocence-Projects-%E2%80%93-Green-Shoots> (Accessed 03/08/16)

<sup>319</sup> S Krieger, (n.19) p.384

withhold evidence and require for IPs to argue for disclosure in court, which expends resources and causes delays.<sup>320</sup> We would expect gaining disclosure would be potentially problematic in the UK following Nunn, which said disclosure is up to the discretion of the relevant criminal justice agency depending on whether they think there is a “real prospect that further enquiry may reveal something affecting the safety of the conviction.”<sup>321</sup> Linked to this, IPs in Krieger’s study raised general systemic defects as problematic with “procedural hurdles, lack of compliance with existing laws, and ill-equipped public defender service,” being three prominent issues identified,<sup>322</sup> as well as general resistance to reform from legislators.<sup>323</sup> It is likely UK IPs would also identify systemic defects as problematic based on the literature, although these would perhaps be different in nature. Furthermore, the resistance to reform is potentially evident in IP’s lack of success so far.

Other challenges identified in Krieger’s research were psychological and emotional obstacles. Where an IP has expended time and resources fighting to test exhibits for individuals who profess innocence, they can become disillusioned when a client’s DNA is present.<sup>324</sup> He said one project had found their clients’ DNA in eight out of twenty-five cases where DNA testing was done.<sup>325</sup> This may be equally challenging for UK IPs. In 2013 there was a confession from one of UoBIP’s key clients, Simon Hall. UoBIP had publicly challenged Hall’s conviction over several years, and the case was often cited in Naughton’s articles to illustrate how evidence supporting factual innocence had come to light.<sup>326</sup> Hall’s confession was likely a blow to the UoBIP, and potentially could have impacted the UK movement more broadly.<sup>327</sup> Another psychological issue identified was helplessness, where IPs can become convinced of a client’s innocence and be unable to do anything further.<sup>328</sup> It is likely UK IPs would potentially experience feelings of helplessness given the lack of exoneration success.

To conclude, this has explored the potential tensions and problems or challenges which IPs may face through examining the existing academic literature. However, in the UK, there is no systematic empirical evidence of how IPs experience tensions, or problems and challenges, or

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<sup>320</sup> S Krieger, (n.19) p.386

<sup>321</sup> Judgment R (Nunn) v. Chief Constable of Suffolk Constabulary, cit., par. 42.

<sup>322</sup> S Krieger, (n.19) p.385

<sup>323</sup> S Krieger, (n.19) p.387

<sup>324</sup> S Krieger, (n.19) p.387

<sup>325</sup> S Krieger, (n.19) p.388

<sup>326</sup> See for example, M Naughton, (n.63) and M Naughton and G Tan, (n.48)

<sup>327</sup> See for discussion: J Price, ‘Simon Hall confession: a time to take stock.’ (5<sup>th</sup> September 2013) The Justice Gap <http://thejusticegap.com/2013/09/simon-hall-confession-a-time-to-take-stock/>

<sup>328</sup> S Krieger, (n.19) p.388

how they may aim to resolve them. Therefore, this is an area that would benefit from empirical research.

## **Conclusion**

This literature review has demonstrated the limited scholarship so far on the innocence movement internationally, and specifically in the UK. It sought firstly to explore what an “innocence project” is, and suggested the literature implies IPs are distinguishable by their unique aims and objectives and approach to investigating miscarriages of justice. The literature suggests that the UK innocence movement is underpinned by a distinct philosophy which relates to how one should define a miscarriage of justice and how the criminal justice system should operate. This makes IPs of academic interest, particularly in relation to how they negotiate their distinctive casework orientation on “factual innocence.” The literature also suggests that tensions may potentially exist within the different aims of IPs, in relation to their reform agenda, their aim to correct individual wrongful convictions and to provide an educational scheme within universities. However, thus far we do not know how these tensions are experienced by IPs in practice, or how they seek to resolve them. It is suggested that these tensions feed into a debate within the literature as to whether IPs serve a valuable purpose within criminal justice: this debate is centred around contrasting assessments over the value and utility of IPs’ distinctive emphasis on factual innocence. Finally, this review has also discussed how the UK innocence movement fits into the international context, and reflected on its comparatively limited success to the US movement. It considered some potential reasons for this difference, and discussed the potential applicability of challenges experienced by IPs in the US to IPs in the UK. Due to the scale of the UK innocence movement and the number of IPs which have existed over the last decade, their lack of success raises questions for consideration.

## **Research questions**

Due to the lack of empirical research on IPs, this review has suggested several areas for exploration. The following research questions have been identified as those which would potentially benefit from empirical research. These questions have emerged from both the literature review and from developments within the innocence movement.

### **1. Defining and distinguishing an “innocence project”**

- (a) To what extent do sampled IPs identify with the distinctive aims, objectives and functions of innocence projects as portrayed in the literature?
- (b) To what extent is it possible to construct a typical IP model based on the participants' accounts?
- (i) How do IP leaders perceive the aims, objectives and functions of the project?
- (ii) How, if at all, do the accounts of these aims, objectives and functions and their negotiation differ between IPs?
- (iii) To what extent do the IP leaders experience tensions between their aims, objectives and function?
- (iii) How might the accounts of aims, objectives and functions differ between IPs and other criminal appeal clinics?

## **2. Reflections on the development and trajectory of the innocence movement**

- (a) To what extent do leaders of innocence projects consider they have succeeded in their original aims and objectives? How do they characterise their successes and failures?
- (b) Have innocence projects developed and evolved during their operation? In what ways have they evolved and why?
- (c) Is there a new model of pro bono clinic emerging? How is this different?
- (d) Can we conceptualise the innocence project movement in the UK in terms of a “rise and fall” narrative?
- (e) Given the importance of competing constructions around what constitutes a “miscarriage of justice” in the literature, is it possible to analyse the UK innocence movement within a broader conceptual understanding of the relationship between legal and other discourses?

The following chapter will begin to address this final question. In order to explore the potential tensions encumbered with the place of competing discourses in this setting, Luhmann's social systems theory was identified as a potentially important theoretical framework through which to examine the UK innocence movement. The following chapter will explain why this theory was selected and its potential significance to examining IPs and the UK movement.

## **Chapter 2**

### **Theoretical Framework: Social Systems Theory**

#### **1. Social Systems Theory as a theoretical framework**

This chapter will discuss why Luhmann's Social Systems Theory has been selected as the theoretical framework for this thesis. Central to the potential importance of Social Systems theory for examining the UK innocence movement is the distinction which is drawn between "factual innocence" and the legal construction of innocence around safety. The theory has been recognised for its potential relevance to IPs, with both Naughton<sup>1</sup> and Roberts and Weathered<sup>2</sup> engaging briefly with Nobles and Schiff's systems analysis of miscarriages of justice.<sup>3</sup> However, there has been no in-depth attempt to apply the theory to examining the development and operation of IPs. This chapter will firstly engage with some of the literature on Social Systems theory by way of introduction, before explaining how Nobles and Schiff have utilised the theory to examine the phenomenon of miscarriages of justice: in doing this, it will demonstrate its potential significance as a theoretical framework for examining the UK innocence movement. This chapter will conclude by setting out three further research questions which have emerged from consideration of this theoretical approach.

#### **2. An introduction to Social Systems Theory**

Niklas Luhmann is the founder of autopoietic social systems theory. Luhmann considered there were three main types of systems: living systems (cells, brains, and organisms), psychic systems (human minds/systems of consciousness) and social systems (function systems, organisations<sup>4</sup>).<sup>5</sup> Luhmann's theory is constructivist and premised on the basis that there is no access to objective reality: systems construct themselves and their environment.<sup>6</sup> Key to Luhmann's theory is the concept of autopoiesis. Autopoiesis means "self-production:" the biologist Maturana developed this concept to explain how biological systems, such as cells, are

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<sup>1</sup> M Naughton, 'Redefining Miscarriages of Justice: A Revived Human-Rights Approach to Unearth Subjugated Discourses of Wrongful Criminal Conviction.' (2005) 45 British Journal of Criminology 165

<sup>2</sup> S Roberts and L Weathered, 'Assisting the factually innocent: the contradictions and compatibility of innocence projects and the Criminal Cases Review Commission.' (2009) 29(1) Oxford Journal of Legal Studies 43

<sup>3</sup> R Nobles and D Schiff, 'Miscarriages of Justice: A Systems Approach' (1995) 58 Modern Law Review 299

<sup>4</sup> Luhmann's account of organisations is not considered in this chapter but will be discussed in Chapter 6: essentially he sees organisations as autopoietic social systems, which reproduce themselves on the basis of decision-making; they may participate within a particular social system or cross over different social systems (see HG Moeller Luhmann Explained: From Souls to Systems (Open Court Publishing, Carus Publishing company 2006) p.32

<sup>5</sup> HG Moeller, (n.4)

<sup>6</sup> HG Moeller, (n.4) p.16

the product of their own production.<sup>7</sup> Maturana, with another biologist Varela, proposed that we could understand biological systems as autopoietic units, which repeatedly reproduced their own elements and consequently became independent of their environment.<sup>8</sup> Maturana explained: as a cell reproduces and develops itself, it produces components, which produce components which then produce further components: “the boundary of the cell is its membrane” and the membrane is “a process that limits diffusion and thus preserves the internal network of production that produces the membrane.”<sup>9</sup> This explanation is crucial to understanding the application of the theory to other systems.

Luhmann adopted the concept of autopoiesis and applied it to understanding modern society. He saw society as a first-order autopoietic system, which was comprised of second-order, autopoietic, social subsystems, such as law, science, and the economy.<sup>10</sup> Luhmann’s unit of analysis for society was the system, rather than individuals, social groups, ideologies and cultures.<sup>11</sup> King explained: Luhmann sought “to understand how meaning and knowledge come into existence” and how it was able to “take on a consensus and air of authority which enables society to exist,” and rejected the possibility that any individual or man could be capable of this.<sup>12</sup> Luhmann understood society as a system of communication, and thus identified this as the basic unit of analysis for social systems:<sup>13</sup> it is through the production and reproduction of communication that social systems develop and ultimately maintain themselves.<sup>14</sup> Luhmann thought that, whilst autopoiesis explained how social systems produce and reproduce themselves, it was of low explanatory value beyond that:<sup>15</sup> it cannot explain the specific structures which develop within a system, or the historical states of the system from which further autopoiesis proceeds.<sup>16</sup> It cannot account for which society is produced.<sup>17</sup> Luhmann sought to examine further the development of social systems within society.

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<sup>7</sup> HG Moeller, (n.4) p.12

<sup>8</sup> M King ‘The Truth about Autopoiesis.’ (1993) 20(2) *Journal of Law and Society* 218 p.219

<sup>9</sup> HG Moeller, (n.4) citing Varela, F. [1997] “Autopoiesis, strukturelle Kopplung und Therapie Fragen an Francisco Varela.” In *Lebende Systeme*, edited by F.B. Simon p.148-149 Frankfurt/Main: Suhrkamp

<sup>10</sup> HG Moeller, (n.4) p.24

<sup>11</sup> M King and A Schutz, ‘The Ambitious Modesty of Niklas Luhmann.’ (1994) 21(3) *Journal of Law and Society* 261

<sup>12</sup> M King, ‘The Construction and Demolition of the Luhmann Heresy.’ (2001) 12 *Law and Critique* 1 p.25

<sup>13</sup> HG Moeller, (n.4) p.9

<sup>14</sup> M King, (n.8) p.219

<sup>15</sup> N Luhmann, *Theory of Society – Volume 1* (English translation, Stanford University Press 2013) p.32

<sup>16</sup> *Ibid.*

<sup>17</sup> N Luhmann, (n.15) p.132

Luhmann identified the main social systems in society as developing through functional differentiation. Each can be identified by the function they perform.<sup>18</sup> Social systems relate to themselves and their environment through observation.<sup>19</sup> The function systems observe society through their own internal structures and interpret it according to their own function (i.e. economic system examines society economically; science looks at society scientifically).<sup>20</sup> King and Thornhill explain that society's function systems became functional when other systems (and thus society as a whole) began to rely upon their communications.<sup>21</sup> The operation of social function systems is the production of communication, and they produce communications for society in accordance with their function. The function systems, "organize communications and disseminate them in ways that they and other communicative systems may make use of them."<sup>22</sup> They produce communications which reduce society's complexity to meaningful and manageable proportions.<sup>23</sup> Essentially, the function systems create order out of chaos.<sup>24</sup>

The social function systems have thus evolved to exist as large communicational systems of meaning.<sup>25</sup> The nature of communication is important to thinking about how these systems evolved. Luhmann understood social communication as a "synthesis of information, utterance and understanding," which can be verbal or non-verbal communications such as acts and gestures.<sup>26</sup> Mingers explained: at each stage between information, utterance and understanding, there is "a selection from a range of possibilities," and "it is the operation of the autopoietic system which defines and makes the selections."<sup>27</sup> King and Thornhill described communication as doubly contingent: when A makes a gesture they expect B to respond in a certain way, but B's response will depend on his selection from the range of interpretations that he has internalised, including how B expects that A will interpret that response; within this example there are already numerous possibilities for misunderstanding.<sup>28</sup> Thus, there is no a priori condition for communication: it is contingent and could always have been otherwise.<sup>29</sup>

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<sup>18</sup> For example: science, production and supply of knowledge; politics; making collectively binding decisions possible and practically applying them. HG Moeller, (n.5) p.24 & p.29. Law's function will be discussed later on.

<sup>19</sup> M King and A Schutz, (n.11) p.263

<sup>20</sup> HG Moeller, (n.4) p.24-25

<sup>21</sup> M King and C Thornhill, Niklas Luhmann's Theory of Politics and Law (Palgrave Macmillan 2003) p.9

<sup>22</sup> Ibid. p.9

<sup>23</sup> M King and C Thornhill, (n.21) p.17-18

<sup>24</sup> M King and C Thornhill, (n.21) p.9

<sup>25</sup> HG Moeller, (n.4) p.24

<sup>26</sup> M King (n.8) 218 p.220

<sup>27</sup> J Mingers 'Can social systems be autopoietic?' (2002) 50(2) The Sociological Review 278 p.286

<sup>28</sup> M King and C Thornhill, (n.21) p.16

<sup>29</sup> HG Moeller, (n.4) p.23



However, communication can only continue and grow if it establishes certain patterns to allow it to proceed in that way.<sup>30</sup> The social systems have evolved within society as socially established communication patterns.<sup>31</sup> The function systems have resolved the problem of double contingency, so the understanding of their communications has stabilised on both sides (i.e. Money has evolved as a stable means for carrying out economic transactions.)<sup>32</sup>

The modern social function systems have completed their operational closure so that they differentiate themselves from their environment and other social systems.<sup>33</sup> Systems must construct their own boundaries: to think of a system as completely open to its environment would be to abandon the idea of a system at all.<sup>34</sup> Thus, boundary maintenance is system maintenance.<sup>35</sup> Social systems can be understood as cognitively open, because they are open to events and information from their environment; but they are operationally closed in that information cannot be directly imported into the system.<sup>36</sup> In this sense, social systems, like cells, build up a membrane to protect their internal structures, which controls what can enter and leave. Operational closure does not prevent systems from being open to their environment, but is a necessary condition of it: it enables systems to build their internal structures through which to observe their environment.<sup>37</sup> Luhmann's account of operational closure has been wrongly interpreted as suggesting that social systems are completely closed and autonomous, and therefore unable to interact. Whilst Luhmann understood social systems as autonomous on a structural and operational level, this did not mean they were "without contact, or self-contained."<sup>38</sup> Luhmann did not deny that social systems will influence one another; only that one social system can ever determine the operations of another.<sup>39</sup>

Operationally closed systems do not directly interfere with each other.<sup>40</sup> Luhmann used the concept of "irritation" to explain the relations between systems. Moeller explained the German origins of the word mean "to distract" or "to perturb."<sup>41</sup> What happens in one system does not directly cause a specific reaction in another system, but it triggers certain developments or

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<sup>30</sup> HG Moeller, (n.4) p.23

<sup>31</sup> HG Moeller, (n.4) p.23

<sup>32</sup> HG Moeller, (n.4) p.22

<sup>33</sup> HG Moeller, (n.4) p.33

<sup>34</sup> HG Moeller, (n.4) p.33

<sup>35</sup> N Luhmann, *Social Systems* (Stanford University Press 1995) p.17

<sup>36</sup> M King and A Schutz, (n.11) p.278

<sup>37</sup> HG Moeller, (n.4) p.17

<sup>38</sup> N Luhmann, *Theory of Society – Volume 2* (Stanford University Press 2013) p.33

<sup>39</sup> M King, (n.8) p.227

<sup>40</sup> M King (n.8) p.221

<sup>41</sup> HG Moeller (n.4) p.221

“resonance” within that system.<sup>42</sup> But how a social system responds to irritation from another is entirely determined by the perturbed social system itself.<sup>43</sup> Moeller provides an example: when the media report on a political scandal, this does not directly cause anything to happen in the political system but it perturbs it.<sup>44</sup> The political system may have to respond because the status quo cannot be maintained; however it will respond by reference to its own operations and procedures, which may involve a change in tack/politician stepping down.<sup>45</sup> This is not decided or determined by the social system of the media. Irritation is singular to the social system being “irritated,” but systems can become bound by an event which simultaneously “irritates” and “resonates” within both: this is called a “structural coupling.”<sup>46</sup>

Structural coupling explains how autopoietic, operationally closed social systems can be connected and may even existentially depend on one another.<sup>47</sup> Moeller explained there is a structural coupling between bodies (biological systems) and minds (psychic systems) and social communication (social systems): as clearly there could be no social communication without bodies or minds.<sup>48</sup> However, structural coupling goes beyond co-dependence, and can enable one system to have impact on another.<sup>49</sup> Luhmann explained that structural couplings enhance interactions between systems because they reduce the relevant relations between system and environment: they cut down environmental noise into a narrow area of influence, which provides the conditions for the system to process irritations and causalities.<sup>50</sup> Thus structural coupling enhances interactions and interrelations between systems by establishing specific areas of influence.<sup>51</sup>

Moeller explains: “structural coupling does not violate the operational closure of systems, rather it establishes specific interrelations between different autopoietic processes.”<sup>52</sup> Thus, structural couplings do not directly steer, interfere or determine other systems’ operations, but they can establish stable links of irritation that force other systems to resonate with them.<sup>53</sup> Luhmann identifies property and contract as structural couplings between the economy and

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<sup>42</sup> HG Moeller, (n.4) p.221

<sup>43</sup> HG Moeller, (n.4) p.221.

<sup>44</sup> HG Moeller, (n.4) p.221.

<sup>45</sup> HG Moeller, (n.4) p.221.

<sup>46</sup> HG Moeller, (n.4) p.37

<sup>47</sup> HG Moeller, (n.4) p.226

<sup>48</sup> HG Moeller, (n.4) p.18-19 & p.226

<sup>49</sup> M King Systems, not People, make Society Happen. (Holcombe Publishing 2009) p.55

<sup>50</sup> N Luhmann, Introduction to Systems Theory (Polity Press 2013) p.86

<sup>51</sup> Ibid. p.85

<sup>52</sup> HG Moeller, (n.4) p.37

<sup>53</sup> HG Moeller, (n.4) p.39

law.<sup>54</sup> The economic system depends on the codes of property and money: no transaction is possible without a clear divide establishing having or not having property rights. However, each system applies its own recursive network and the consequences of a transaction involving property and money remain different in law and the economy. Thus, these concepts do not become integrated and de-differentiate the economic and legal system, but as mechanisms of structural coupling they “organise the reciprocal irritation of these systems and influence, in the long run, the natural drift of structural developments in both systems.”<sup>55</sup>

The operationally closed social function systems relate to themselves and their environment through observation, which reconstitutes everything observed into a distinction.<sup>56</sup> King and Thornhill explain: the social function systems develop a binary code, which they apply in order to understand or to produce meaning about their environment, and to establish their own identity within it.<sup>57</sup> Codes always have a positive and negative side and are binary in nature: so law (legal/illegal), politics (government/opposition), and science (true/false.) The code enables systems to determine which communications belong to it and which belong to its environment (i.e. law – all communications relating to legal/illegal belong to the legal system).<sup>58</sup> Social systems also generate meaning through constant communication about the application of these distinctions.<sup>59</sup> Social systems develop programmes to help them process their code. Programmes supply the code with “flesh and bone.”<sup>60</sup> They fill it with content and justify its application; otherwise binary codes would appear only as crude and reductionist, and meaningless distinctions.<sup>61</sup> Whilst system coding is stabilised and must remain the same (because it is how a system constitutes its identity) programmes can be modified and replaced.<sup>62</sup>

For the purposes of this thesis, it is helpful to expand in relation to law. Law’s function is the exploitation of conflict perspectives for the formation and reproduction of congruently (temporally, objectively, socially) generalised behaviour expectations.<sup>63</sup> Thus law resolves

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<sup>54</sup> N Luhmann, ‘Operational Closure and Structural Coupling: The Differentiation of the Legal System.’ (1991-1992) 13 Cardozo L. Rev. 1419 p.1435

<sup>55</sup> Ibid. p.1436

<sup>56</sup> M King and A Schutz, (n.11) p.263

<sup>57</sup> M King and C Thornhill, (n.21) p.23

<sup>58</sup> M King and C Thornhill, (n.21) p.24

<sup>59</sup> R Nobles and D Schiff, *Observing Law Through Systems Theory* (Hart Publishing 2013) p.9

<sup>60</sup> HG Moeller, (n.4) p.25

<sup>61</sup> HG Moeller (n.4)p.23

<sup>62</sup> M King and C Thornhill, (n.21) p.24

<sup>63</sup> M King, ‘Child Welfare within Law: The Emergence of a Hybrid Discourse.’ (1991) 18(3) *Journal of Law and Society* 303 p.307. King said this was Luhmann’s later account of law’s social function, which essentially explains how law determines when to act and to produce normative behavioural standards for society. Thus law uses events in its environment as an opportunity to produce normative behavioural standards for society. In earlier accounts

social conflicts and in the process generates behavioural expectations for society. Law can be described as “normatively closed” but “cognitively open.”<sup>64</sup> Law is normatively closed, because only law can communicate legally<sup>65</sup> and bestow a legally normative quality on its elements.<sup>66</sup> But it is cognitively open to events and information in its environment, and even depends upon it for a constant stream of social dilemmas and conflicts which society expects it to resolve.<sup>67</sup> Thus, law applies the coding distinction legal/illegal to its environment to determine what events are conditions for its operation<sup>68</sup> (i.e. when communication related to legal/illegal arises through social conflict). Simultaneously, only law is capable of determining what is lawful and unlawful<sup>69</sup> and what constitutes as legality for society.<sup>70</sup> Clearly, what is legal/illegal is a matter of dispute.<sup>71</sup> Thus, law has developed encoding programmes (such as substantive law), to allocate the values of right/wrong, lawful/unlawful or illegal/legal to past social events.<sup>72</sup> As one of law’s programmes, substantive law can be modified and updated: but law must continue to apply the code legal/illegal to continue maintaining and reproducing its existence as a system.

The systemic codes represent how modern society gives meaning to its environment, and will apply throughout society: but the meaning is system specific and would not directly transfer into other systems.<sup>73</sup> For example, what science establishes as true/false is not guaranteed to be accepted as truth in other subsystems such as religion, or politics for example.<sup>74</sup> This is because, as stated above, each system constructs its own environment from its operations.<sup>75</sup> There is no common environment for all systems that can somehow be represented within any system: reality is a multitude of system-environment constructions that are in each case

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of Luhmann’s theory, law’s function was understood as stabilising normative behavioural expectations in the face of cognitive disappointment: in this way, law frees us from the demand that we should learn from experience (M King (n.63) p.305) Thus, illegal acts do not become legal because they are committed: law stabilises normative behavioural expectations (M King and A Schutz ‘The Ambitious Modesty of Niklas Luhmann.’ (1994) 21(3) *Journal of Law and Society* 261 p.275).

<sup>64</sup> Ibid. p.305-306

<sup>65</sup> M King and A Schutz, (n.11) p.277

<sup>66</sup> M King and A Schutz, (n.11) p.277 citing N Luhmann ‘The Unity of the Legal System ’ p.20 in G Teubner (eds.) *Autopoietic Law: A New Approach to Law and Society* (1988)

<sup>67</sup> M King and A Schutz, (n.11) p.278

<sup>68</sup> M King and A Schutz, (n.11) p.279

<sup>69</sup> M King and C Thornhill, (n.21) p.24

<sup>70</sup> M King and A Schutz, (n.11) p.279

<sup>71</sup> M King and C Thornhill, (n.21) p.25

<sup>72</sup> M King (n.63) p.307

<sup>73</sup> M King and C Thornhill, (n.21) p.24

<sup>74</sup> M King and C Thornhill, (n.21) p.24

<sup>75</sup> M King and A Schutz (n.11) p.263

unique.<sup>76</sup> Systems also reproduce their own identity in that environment.<sup>77</sup> The codes and programmes have enabled systems to mark themselves out from their environment and develop self-descriptions.<sup>78</sup> Self-descriptions are different from systemic function as allocated by Luhmann because they represent selective choices through which a system conveys a particular impression at a particular time of itself and its activities.<sup>79</sup> For example, law may see itself as producing justice; and science as obtaining objective truth. However, these systemic self-descriptions may conflict with how other systems observe their operations.<sup>80</sup>

A final important introductory point is that Luhmann saw social systems as necessarily paradoxical. Each system represents an entity existing within an environment which it constructs itself from its operations.<sup>81</sup> Therefore, what a system observes and treats as its environment is nothing other than its own creation: it has no access to reality or an external world, yet it must relate and direct its operations to an external environment which does not exist independently of itself.<sup>82</sup> However, the system treats itself as though it exists in an objectively verifiable world: this enables systems to ignore the paradox of their own existence.<sup>83</sup> Social systems operate as though their communications are justified and legitimated by universal notions of what is true, legal, moral, scientific, and apply these self-produced criteria to their own operations.<sup>84</sup> They are unable to recognise that what they observe is only part of reality (the whole of which is inaccessible), and through their operations they continuously reaffirm their view of the external world and their situation within that constructed world: this conceals the paradox of their existence.<sup>85</sup> Only a second-order observer (an observer outside the social system) can observe the paradoxical nature of other social systems through reference to their own constructed world.<sup>86</sup> For example, law sees itself as producing justice and thus nothing lawful can simultaneously be unjust; but observers may disagree with law's construction of justice.

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<sup>76</sup> HG Moeller, (n.4) p.16

<sup>77</sup> M King and A Schutz, (n.11) p.263

<sup>78</sup> M King and C Thornhill, (n.21) p.10

<sup>79</sup> M King and C Thornhill, (n.21) p.10

<sup>80</sup> M King and C Thornhill, (n.21) p.10

<sup>81</sup> M King and A Schutz (n.11) p.263

<sup>82</sup> M King and C Thornhill, (n.21) p.20

<sup>83</sup> M King and C Thornhill, (n.21) p.20

<sup>84</sup> M King and C Thornhill, (n.21) p.20

<sup>85</sup> M King and C Thornhill, (n.21) p.20

<sup>86</sup> M King and C Thornhill, (n.21) p.20

### **3. Consequences of Social Systems Theory for Law**

The operation of law as a social system will be central to examining IPs within social systems theory: thus it is necessary to further explore the consequences for understanding law as an autopoietic social system.

For law to maintain itself and fulfil its function within society, it must continue to apply the distinction legality/illegality to itself and its environment.<sup>87</sup> Essentially, the consequences of autopoiesis mean social systems exist as self-producing “organisms” of communication, which connect system-internal communication to other system-internal communication.<sup>88</sup> Therefore, within the legal system, all its communications necessarily refer back to other legal communications, or to law.<sup>89</sup> Through functional differentiation and the development of their respective codes, social systems have differentiated themselves so they have become incompatible discourses.<sup>90</sup> Where a system resonates with a communication in its environment, it is severed from its originating system and adopted through the attribution of a new meaning from the receiving system’s self-referential communications; thereby, giving it a meaning which is unique to that system.<sup>91</sup> So when law adopts events or communications from its environment, they are inevitably transformed or reconstructed by law into events or communications which are recognisable as legal communications.<sup>92</sup> Law (as with other social systems) does this through reducing the complexity of the environment into manageable proportions through the imposition of simplistic concepts, such as rights, duties and responsibilities; culpable or innocent conduct; victims and villains.<sup>93</sup>

Law maintains its autonomy from other social systems by asserting the validity of its truths independently of the truths produced by other systems.<sup>94</sup> However, it faces a special problem.<sup>95</sup> In fulfilling its function of imposing order and resolving disputes in its environment, it has to confront and deal with other discourses and communicative systems.<sup>96</sup> Additionally, it must produce statements for consumption by society which promote and reinforce its claim to be able to regulate and control these subsystems.<sup>97</sup> Teubner, who was extremely influential in

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<sup>87</sup> M King and C Piper *How the Law Thinks About Children* (2<sup>nd</sup> edition, Ashgate Publishing Limited 1995) p.30

<sup>88</sup> HG Moeller, (n.4) p.15

<sup>89</sup> Nobles, R. Schiff, (n.3) p.300

<sup>90</sup> HG Moeller, (n.4) p.33

<sup>91</sup> R Nobles and D Schiff, (n.59) p.15-16

<sup>92</sup> M King, (n.8) p.225

<sup>93</sup> M King and C Piper, (n.87) p.30

<sup>94</sup> M King and C Piper (n.87) p.30

<sup>95</sup> M King and C Piper (n.87) p.31

<sup>96</sup> M King and C Piper (n.87) p.31

<sup>97</sup> M King and C Piper, (n.87) p.31

applying social systems theory to law, was particularly interested in how law resolved this problem.<sup>98</sup> King and Piper explain that Teubner thought law was faced with an irreconcilable conflict, in simultaneously being required to maintain its own autonomy, yet remaining dependent upon a “multiplicity of competing epistemes.”<sup>99</sup> Teubner suggested to overcome this, law would “enslave cognitive operations according to its normative context and institutional purpose.”<sup>100</sup> This explains why, despite other discourses seemingly being incorporated into law, this does not result in greater connection between law and other discourses, but rather leads to “unanticipated consequences” and the production of “hybrid artefacts with ambiguous epistemic status and unknown social consequences.”<sup>101</sup> He explained, when communications related to social science enter the legal system, they do not bear the label “made in science,” but are reconstructed within the closed operational network of legal communications and acquire quite a different meaning.<sup>102</sup> Thus, other social discourses cannot enter the legal system without being reconstructed or “enslaved” by law according to its own operations.

King explained that Teubner was particularly concerned with the harmful side effects of law’s reconstruction of reality.<sup>103</sup> He applied Teubner’s ideas to the empirical study of child welfare to illustrate the impossibility of creating a hybrid discourse of child welfare and law.<sup>104</sup> He suggested law ‘enslaves’ child welfare, by reconstructing social science perspectives concerning the child’s best interests, into arguments about rights. He provides the example of case where a psychiatrist expressed concern over returning a child to its mother who had recently become pregnant: the psychiatrist felt the responsibility would prove too much and recommended the child’s best interests required termination of contact with the mother and adoption.<sup>105</sup> However King explains, in court the “concern for rights and justice prevailed” and the hearing was treated as a contest between social services and the mother. The court decided

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<sup>98</sup> Teubner was a Professor in Private Law and Legal Sociology at the University of Bremen: he is one of the main scholars who contributed to legal scholarship on social systems theory. He made considerable strides forward in applying Luhmann’s theory and developing his concepts through application to legal phenomena (see G Teubner *Law as an Autopoietic System* (Blackwell Publishers 1993)

<sup>99</sup> M King and C Piper, (n.87) p.31 citing G Teubner ‘How the Law Thinks: Toward a Constructivist Epistemology of Law.’ (1989) 23(5) *Law and Society Review* 727 p.743

<sup>100</sup> G Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law.’ (1989) 23(5) *Law and Society Review* 727 p.745

<sup>101</sup> *Ibid.* p.747

<sup>102</sup> G Teubner, (n.100) p.749

<sup>103</sup> M King (n.63) p.307

<sup>104</sup> M King ‘The Construction and Demolition of the Luhmann Heresy.’ in J Priban and D Nelken (eds.) *Law’s New Boundaries: The consequences of legal Autopoiesis* (Dartmouth Publishing Company, Ashgate Publishing Ltd. 2001) p.143

<sup>105</sup> M King, (n.63) p.317

that because the mother had not forfeited her rights and was at worst incompetent, rather than morally wrong, the child should be rehabilitated with the mother on a trial basis.<sup>106</sup> Therefore, simultaneously, the legal decision rejected the evidence of the psychiatrist and potentially posed a risk to the child's welfare.<sup>107</sup> Thus law "enslaves" the discourse of child welfare and reconstructs this according to its own institutional purpose to generate behavioural expectations according to lawful/unlawful coding.

King also explored how the paradoxical nature of social systems can become problematic when other systems' observations about this become irritants. For law, this may occur when the perceived injustices of the legal system undermine its communications and create uncertainty over the legality/illegality of decisions.<sup>108</sup> Law must engage in 'deparadoxification' to conceal that it is law, through its own operations and reconstructions of the external world, that is deciding the meaning of justice and injustice for society, rather than some supreme authority.<sup>109</sup> For example, when an external observer identifies a wrongful conviction, this creates an irritant for law and a paradox: because nothing lawful can simultaneously be unjust.<sup>110</sup> Thus, law must reconstitute the situation in ways that make it amenable to the lawful/unlawful decision. He explains how the Court of Appeal finds new and inventive ways of rejecting its own past decisions where those decisions now appear unjust.<sup>111</sup> In doing so, it converts a previously lawful decision, which is now considered unjust, into an unlawful decision; whilst still giving the present decision the authority of lawfulness and justice.<sup>112</sup>

King also discussed how law is threatened when the credibility of non-legal communications which it depends upon come under question.<sup>113</sup> Law must then reconstruct the structure of the communication system to restore its authoritative status and usefulness to law.<sup>114</sup> In this way, King thought law could play an important role in concealing the paradox for other social systems. King explained how law did this with social work. Social work has the self-description of promoting child welfare: this is paradoxical, because of the impossibility of doing this in any reliable or scientific way, due to inherent difficulties in harm identification and

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<sup>106</sup> M King, (n.63) p.317

<sup>107</sup> M King, (n.63) p.317

<sup>108</sup> M King, *A Better World for Children: Explorations in Morality and Authority*. (Routledge 1997) p.59

<sup>109</sup> Ibid. p.59

<sup>110</sup> M King, (n.108) p.59

<sup>111</sup> M King, (n.108) p.59

<sup>112</sup> M King, (n.108) p.59

<sup>113</sup> M King, (n.108) p.67

<sup>114</sup> M King, (n.108) p.67



prediction.<sup>115</sup> Social work is unable to admit the impossibility of its task, because it would threaten its social identity and upset social morale.<sup>116</sup> King explains that other social systems avoid the exposure of the paradox by putting procedures in place to test the validity of truth claims, which “has the effect of immunizing the system against criticism that it is failing to perform the impossible task that society expects of it, and which it still claims to be capable of performing.”<sup>117</sup> However, social work is unable to do this, as it depends on other systems for truth validation, such as law, science and medicine. King explained that when medico-scientific opinions in social work lost credibility for their failure of accurate predictions, law responded by reformulating the problem; it judged social work’s effectiveness through its compliance with guidelines, rules and regulations. Thus King says law has the ability to be the great healer.<sup>118</sup> However, simultaneously, law is also the great concealer, in concealing the paradox from society that there remains an insoluble problem in predicting and determining child welfare.<sup>119</sup>

These ideas are important for thinking about how law determines criminal responsibility. Criminal law involves the impossible task of determining truth behind past events; it conceals this paradox through the use of its truth proceduralisation processes, in the form of a criminal trial. In this context, law often draws upon other social systems communications, such as scientific evidence, which may be evolving and unable to provide certain answers. Nobles and Schiff have discussed how law reconstructs scientific evidence at trial into a contest between two experts, who are then assessed on court performance.<sup>120</sup> As mentioned above, King suggests that allegations of wrongful conviction threaten to expose the paradox upon which the criminal justice process rests.<sup>121</sup> Thus, how the Court of Appeal responds is significant to re-concealing the paradox, and ensuring the continued authority of law.<sup>122</sup> These points are important to thinking about miscarriages of justice, and particularly to ideas on this topic from Nobles and Schiff. The next section will now focus in on a systems analysis of miscarriages of justice and the potential implications of this for IPs.

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<sup>115</sup> M King, (n.108) p.65

<sup>116</sup> M King, (n.108) p.65

<sup>117</sup> M King, (n.108) p.66

<sup>118</sup> M King, (n.108) P.67

<sup>119</sup> M King, (n.108) p.69

<sup>120</sup> This is discussed below. (R Nobles and D Schiff, (n.3))

<sup>121</sup> M King, (n.108) p.59

<sup>122</sup> M King, (n.108) p.59

#### **4. Social Systems Theory: Potential implications for IPs**

Social systems theory is of potential significance to the philosophy of the UK innocence movement, and the model of IPs as portrayed in the literature: the distinct aims and objectives of IPs raise a number of further tensions from a systems theory perspective. This will be explored through drawing on insights from Nobles and Schiff, who have applied autopoietic theory to the criminal process.<sup>123</sup>

##### **4.1 Insights from Nobles and Schiff**

Nobles and Schiff's application of social systems theory to miscarriages of justice and the criminal process will be considered in three parts. Firstly, their analysis of the competing constructions of a "miscarriage of justice" between law and other social systems will be discussed: their analysis explains how these conflicting constructions can sometimes pose a threat to law's authority. Secondly, Nobles and Schiff's conclusions on how the Court of Appeal (hereafter CACD) defends the finality and authority of the criminal justice process will be considered: this is relevant for thinking about how the CACD determines post-conviction appeals. Thirdly, Nobles and Schiff's reflections on the consequences of autopoietic theory for understanding law will be discussed insofar as they are relevant for the analysis of the UK innocence movement in this chapter.

##### **4.1.1 Competing constructions of a "miscarriage of justice:"**

Nobles and Schiff used social systems theory to explore the competing constructions of a "miscarriage of justice" within society. They discussed the difficulties which law faces in sustaining a legal construction of wrongful conviction when confronted with alternative constructions in other systems.<sup>124</sup> They initially wrote about this in the mid 1990's following the exposure of miscarriages of justice such as the Guildford Four and Birmingham Six: this led to a crisis of confidence in the criminal justice process and the Royal Commission on Criminal Justice (RCCJ) being established. Leading up to this, the media had become significantly involved in investigating wrongful convictions. Thus, Nobles and Schiff were particularly interested in utilising systems theory to explore the different understandings of a miscarriage of justice between law and the media.

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<sup>123</sup> From here on, the criminal justice system must be referred to as the "criminal process." Nobles and Schiff say it is necessary to use the latter terminology, because systems theory would not recognise criminal justice as a separate system, but a subsystem of law. (R Nobles and D Schiff, (n.3) p.301)

<sup>124</sup> R Nobles and D Schiff, (n.3) p.301

The media is a main function system within systems theory, and codes on the basis of information/not information;<sup>125</sup> or for the news media, news/not news.<sup>126</sup> Nobles and Schiff explain that legal events provide a constant source of news,<sup>127</sup> but the media does not report on every legal event. Rather, it selects events from the legal system according to what it thinks will be ‘information,’ or ‘news’ to its imagined audience.<sup>128</sup> Conviction is often deemed ‘news’ or ‘information’ for the public: but when reporting, the media misreads the criminal justice process’s operations of conviction and acquittal.<sup>129</sup> Media reports do not discuss the internal legal complexities and rules which led to the verdict, but rather treat the conviction as a statement of fact;<sup>130</sup> or an “authoritative narrative of the commission of the crime” by the person in question.<sup>131</sup> Similarly, the media misread legal communications about a miscarriage of justice. Within law, when the CACD quashes a conviction, it communicates that the conviction is “unsafe” according to the statutory requirements in s.2 (1) Criminal Appeal Act 1968.<sup>132</sup> This is not acknowledgment that the individual is factually innocent, but a legal recognition of the unsafety in continuing to rely on that conviction.<sup>133</sup> However, when the media report on the quashing of a conviction because they deem it “news” or “information,” they misread legal communications as suggesting the individual was innocent.<sup>134</sup> Therefore, they read into it something that is very rarely being communicated in legal terms.

Nobles and Schiff explain, the misreading between law and the media over conviction is harmonious, because both systems treat it as an authoritative decision of culpability. Conviction provides a “stable misreading” between the legal system’s processes and other social systems: it facilitates its ability to interrelate with other systems, such as the media and politics, which also rely on legal convictions.<sup>135</sup> However, Nobles and Schiff explain, the media’s search for a legal process which recognises innocence can cause problems for the legal system when it draw’s society’s attention to the fact there is not one.<sup>136</sup> The media’s understanding of a wrongful conviction can thus operate as periodic pressure on the legal

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<sup>125</sup> R Nobles and D Schiff, ‘A Story of Miscarriage: Law in the Media.’ (2004) 31(2) *Journal of Law and Society* 221, p.226

<sup>126</sup> R Nobles and D Schiff, (n.59) p.237

<sup>127</sup> R Nobles and D Schiff, (n.125) p.228

<sup>128</sup> R Nobles and D Schiff, (n.125) p.225

<sup>129</sup> R Nobles and D Schiff, (n.125) p.228

<sup>130</sup> R Nobles and D Schiff, (n.125) p.228-229

<sup>131</sup> R Nobles and D Schiff, (n.3) p.313

<sup>132</sup> Amended by s.1 Criminal Appeal Act 1995

<sup>133</sup> S Roberts and L Weathered, (n.2) p.51

<sup>134</sup> R Nobles and D Schiff, (n.59) p.245

<sup>135</sup> R Nobles and D Schiff, (n.59) p.245

<sup>136</sup> R Nobles and D Schiff, (n.59) p.245

system to be something which it cannot be, or accomplish within a functionally differentiated world: a system for the delivery of truth.<sup>137</sup> As explained above, law cannot be open to all the events in its environment: this would overwhelm law and render it unable to function.<sup>138</sup> The criminal process<sup>139</sup> uses substantive law, rules of evidence and procedure to form its constrained openness to events.<sup>140</sup> Thus, punishment following conviction is not justified through having established the truth behind earlier events, but by reaching a conclusion which represents the legal interpretation of those events.<sup>141</sup>

Nobles and Schiff explained that leading up to the RCCJ, the media had been involved in exposing several high profile miscarriages of justice, which had caused an “increasingly dominant concept of justice” to emerge, which was the notion of “justice based on truth.”<sup>142</sup> They said when truth-finding emerges as the desired justification for practices within the legal system, this can cause problems for law.<sup>143</sup> This is because, what can objectively count as truth lies within the system of science and not within law: science is charged with determining what can count as objective truth, and applies the code truth/untruth, probable or improbable.<sup>144</sup> The conditioning programmes in science bear little resemblance to the conditioning programmes used within law (juries, cross-examination, and rules of evidence) to achieve its operations of conviction/acquittal, or conviction quashed/upheld.<sup>145</sup> Nobles and Schiff ask: what is scientific about the verdict of twelve lay persons/examination-cross-examination/rules of evidence? What can be relied upon in a criminal trial as scientific proof?<sup>146</sup> Miscarriages of justice are

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<sup>137</sup> R Nobles and D Schiff, (n.59) p.230

<sup>138</sup> This is where it is helpful to allude to the biological origins of the theory in terms of cells (as the social system) and the membrane (system’s boundaries) which diffuses what can enter from the environment: the membrane is essential to the cell’s integrity.

<sup>139</sup> Nobles and Schiff’s focus was on the criminal justice process: they explained this was a subsystem of the subsystem of law: its operations feed into the wider operations of the legal system in terms of communicating legal/illegal. Because it is a subsystem we must refer to it as the criminal justice process (rather than system). For an explanation of the criminal justice process’s relationship to the legal system within autopoietic theory, see R Nobles and D Schiff, (n.3)

<sup>140</sup> R Nobles and D Schiff, (n.3) p.303

<sup>141</sup> R Nobles and D Schiff, (n.3) p.303

<sup>142</sup> R Nobles and D Schiff, (n.3) p.304

<sup>143</sup> R Nobles and D Schiff, (n.3)

<sup>144</sup> Although this is still a construction of the system of science and does not actually represent “objective truth”; but the function of science is to provide society with facts that can be treated as objective truth.

<sup>145</sup> Nobles and Schiff explain their focus is on the criminal justice process as a subsystem of the legal system and that therefore conviction/acquittal are the operations of the subsystem of the criminal justice process. These feed into the overall legal system’s closure and application of the code legal/illegal. Thus their interest is with the sub-codes of the criminal justice process and how they are read internally within the legal system, and externally within society and other social systems. This subsystem and sub-code focus will also be necessary for application of autopoietic theory to look at IPs. (R Nobles and D Schiff, (n.3) p.304 & (footnote 22))

<sup>146</sup> R Nobles and D Schiff, (n.3) p.305

thus capable of generating perceptions that law's authority is in crisis when they cause the scientific model of truth-finding to be applied to the legal system.<sup>147</sup>

Questions over law's authority pose a threat to the ability of law and other social systems to rely on convictions.<sup>148</sup> Nobles and Schiff explained how the criminal process was required to defend itself against challenges presented by miscarriages of justice, to minimise its loss of authority and to prevent all convictions coming under question.<sup>149</sup> They explain how the CACD resorts to "assertion" and "deflection" to defend the criminal justice process.<sup>150</sup> The CACD makes assertions that legal procedures are scientific, such as suggesting cross-examination is the best tool for testing truth and the reliability of witnesses: law even tests scientific evidence from experts in this way.<sup>151</sup> They also suggest the CACD uses deflection through justifying legal processes with reference to values not reducible to scientific analysis, such as procedural fairness, or legalism and the rule of law.<sup>152</sup>

Therefore, this analysis has implication for IPs. Firstly, IPs election to focus on "factual" rather than "technical" innocence deliberately misreads wrongful conviction in the same way as Nobles and Schiff suggested the media did. Both Naughton<sup>153</sup> and Roberts and Weathered<sup>154</sup> used Nobles and Schiff's explanation to demonstrate the competing constructions around a miscarriage of justice and to illustrate the difference between "legal" and "factual" innocence. Therefore, we might expect IPs factual innocence focus to cause tensions in their interactions with the legal system. This aspect of IPs will be important to thinking about how we conceptualise IPs within systems theory. Another factor which we might expect to raise issues within systems theory is the emphasis of factual innocence in the innocence movement reform agenda. INUK aimed to "release the discourse of innocence from its shackles"<sup>155</sup> and to reconnect the appeal system to the legitimate, public expectations of its role: to acquit the

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<sup>147</sup> R Nobles and D Schiff, (n.3) p.305

<sup>148</sup> R Nobles and D Schiff, (n.3) p.305

<sup>149</sup> R Nobles and D Schiff, (n.3) p.314

<sup>150</sup> R Nobles and D Schiff, (n.3) p.305

<sup>151</sup> They refer to Bridge J's instructions to the jury in the Birmingham Six: after commenting that understanding scientific evidence can be difficult for a jury of lay people, he suggested that, "the only way you can resolve these differences is by your impression of the witnesses." R Nobles and D Schiff, (n.3) p.305 & (footnote 25)

<sup>152</sup> Nobles and Schiff recognise that these concepts have no fixed value, and express surprise that criminal justice practices continue to be presented as mechanisms of fairness "without undue embarrassment," despite their obvious cultural specificity. R Nobles and D Schiff, (n.3) p.305

<sup>153</sup> M Naughton, (n.1)

<sup>154</sup> S Roberts and L Weathered, (n.2)

<sup>155</sup> M Naughton, 'The Importance of Innocence for the Criminal Justice System.' in Naughton, M. (ed.) *The Criminal Cases Review Commission – Hope for the Innocent?* (Palgrave Macmillan 2009) p.30

innocent and uphold the convictions of the guilty.<sup>156</sup> Thus Naughton sought to resurrect ideas related to “justice as based on truth.” Nobles and Schiff suggested that this climate could pose a threat to law’s authority, and therefore we might expect this agenda to be strongly resisted within the legal system.

#### **4.1.2 Criminal Appeals: protecting law’s finality and authority**

Linked with the above, Nobles and Schiff explored how the criminal justice process seeks to protect its finality and authority when dealing with appeals against conviction: they thought central to law’s authority was the defence of a legal construction of miscarriages of justice. They explained: there is an understanding of a “miscarriage of justice” which is entirely internal to the legal system: where a conviction is quashed because of a mistake of law, a breach in legal procedure or misdirection to the jury.<sup>157</sup> To avoid criticisms from its environment of being too formal or technical,<sup>158</sup> the court will identify a plausible link between the breach and the possibility the verdict is factually incorrect.<sup>159</sup> This ensures the legal process retains some connection with outside understandings of a conviction as representing factual guilt.<sup>160</sup> Appeals based on errors of law or procedure are relatively uncontroversial for law, and can be resolved entirely through its own self-reference. However, Nobles and Schiff thought appeals based on questions of fact were more problematic: appeals suggesting the jury’s verdict is factually incorrect undermine law’s finality and threaten the ability of criminal justice to operate as a workable process.<sup>161</sup> As discussed above, during a criminal trial, the legal system uses substantive law, rules of evidence and procedure to reach a legal interpretation of past events.<sup>162</sup> Therefore, appeals requiring a reappraisal of this first instance decision threaten law’s “partial deafness” to events which enable it to achieve convictions.<sup>163</sup> It threatens law’s ability to “offer finality,” so that it can create relatively stable operations which itself, and other systems, can utilise (such as conviction).<sup>164</sup>

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<sup>156</sup> Ibid. p.30

<sup>157</sup> R Nobles and D Schiff, (n.3) p.302

<sup>158</sup> R Nobles and D Schiff, (n.3) p.302

<sup>159</sup> R Nobles and D Schiff, (n.59) p.241

<sup>160</sup> R Nobles and D Schiff, (n.3) p.302

<sup>161</sup> R Nobles and D Schiff, (n.3) p.303

<sup>162</sup> R Nobles and D Schiff, (n.3) p.303

<sup>163</sup> R Nobles and D Schiff, (n.3) p.303

<sup>164</sup> R Nobles and D Schiff, (n.3) p.303. As was discussed above, conviction provides a “stable misreading” between the legal system’s processes and other social systems and facilitates its ability to interrelate with other systems.

Nobles and Schiff described the CACD as representing a “critical moment” for the legal system’s authority and stability.<sup>165</sup> When the authors were writing, they said the CACD was permitted by statute to exercise a wide discretion in overturning convictions (when unsafe or unsatisfactory). Yet they said the CACD was extremely resistant to this broader discretion when it was introduced, and continued to require grounds of a legal or procedural breach, or grounds which can be accommodated in the law’s cognitive openness (fresh evidence).<sup>166</sup> They suggested the CACD’s resistance was because relying on this broader discretion, would create the “ultimate paradox” for the legal system: an authority for law to decide what counts as legality.<sup>167</sup> The implication of Nobles and Schiff’s suggestion is that law would be unable to conceal its paradox (that law constitutes legality) through reference to external events (i.e. fresh evidence) or internal error (i.e. error in law’s programmes).<sup>168</sup> Nobles and Schiff suggest this posed a threat to law’s finality, and at the extreme, could render conviction according to legal procedure an interim stage, prior to its reappraisal through open-ended investigation.<sup>169</sup> They suggest, openness at this stage could undermine the normative closure necessary to the continuing authority of the criminal justice process.<sup>170</sup> Thus, the legal system must manage the pressures from other systems which threaten its finality and authority.<sup>171</sup>

Nobles and Schiff discuss how the CACD protects law’s finality and authority at appeal stage by exhibiting deference to the jury’s decision: commitment to jury supremacy is the court’s “underlying rationale,” for interpreting their powers and justifying their judgments.<sup>172</sup> Nobles and Schiff refer to *McGrath* [1949]<sup>173</sup> where the CACD affirm: where the jury have been properly directed, the Court cannot “substitute” itself for the jury and re-try the case: this would “strike at the very root of trial by jury.”<sup>174</sup> Therefore, the CACD justifies its interference with the jury’s verdict only when there has been an error in law or procedure, or where fresh evidence has emerged that requires law’s consideration. The CACD have been urged to take a

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<sup>165</sup> R Nobles and D Schiff, (n.3) p.306

<sup>166</sup> R Nobles and D Schiff, (n.3) p.306

<sup>167</sup> R Nobles and D Schiff, (n.3) p.306

<sup>168</sup> As discussed above, social systems conceal their paradox by operating as if their communications are justified and legitimated by universal notions of what is true, legal, moral, and scientific: they apply these self-produced criteria to their own operations. Here, law cannot make reference to any external reasons for its decision making: thus it reveals law constituting legality. (King M and Thornhill C, (n.21) p.20

<sup>169</sup> R Nobles and D Schiff, (n.3) p.306-307

<sup>170</sup> R Nobles and D Schiff, (n.3) p.307

<sup>171</sup> R Nobles and D Schiff, (n.3) p.307

<sup>172</sup> R Nobles and D Schiff, (n.3) p.310

<sup>173</sup> *McGrath* [1949] 2 All ER 495

<sup>174</sup> R Nobles and D Schiff, (n.3) p.310

broader approach and to consider a conviction's safety in light of all available evidence.<sup>175</sup> Nobles and Schiff explained that such critics would sacrifice the finality of criminal trials to enable the CACD to quash convictions following assessment of all available evidence.<sup>176</sup> Particularly threatening to law is that critics justify this through scepticism of the procedures by which convictions are legally constructed (i.e. evidence given under oath, evidence of forensic science, jury verdicts).<sup>177</sup> Nobles and Schiff explain that interference with the jury's verdict risks undermining the normative commitment of the legal system to jury trial.<sup>178</sup> As the CACD has always exhibited deference to the jury, applying a broader discretion would require them to either: undo the finality/legality of the criminal justice process; find a new constitutional/legal way of preserving that process; or continue deferring to the jury, in which case the fresh evidence requirement would resurface.<sup>179</sup> Thus, they suggest the CACD's deference to the jury is part of law's defence of its finality and authority; this explains the CACD's resistance utilise a broader discretion.<sup>180</sup>

Based on this analysis, Nobles and Schiff suggested in 1995 that the new Authority recommended by the RCCJ (now the CCRC) would not overcome previous problems under the C3 division.<sup>181</sup> They suggested there was a difficult relationship between C3 and the CACD, because the latter would "jealously resist" referrals.<sup>182</sup> They said the "new authority" would be "destined to reproduce the same sort of relationship" because it was still dependent on referring cases to the CACD: "so long as the Court continues to deal with the problems of finality by a constitutional deference to the jury, the new Authority will have no prospect of a successful referral unless its investigations and determinations exhibit a similar deference."<sup>183</sup>

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<sup>175</sup> Nobles and Schiff refer to the submissions of JUSTICE (a campaigning organisation); but as was demonstrated in the literature review this is also a concern of others, and was a criticism of the system which arose in the innocence movement.

<sup>176</sup> R Nobles and D Schiff, (n.3) p.306

<sup>177</sup> R Nobles and D Schiff, (n.3) p.306

<sup>178</sup> R Nobles and D Schiff, (n.3) p.235

<sup>179</sup> R Nobles and D Schiff, (n.3) p.310

<sup>180</sup> Nobles and Schiff are not the only scholars to consider that "finality" in the criminal justice process is fiercely defended by the Court of Appeal; Malleon came to a similar conclusion based on an analysis of failed reform attempts of the criminal appeal process (See, K Malleon, 'Appeals against Conviction and the Principle of Finality.' (1994) 21(1) Journal of Law and Society 151). However, they are the first to analyse it in terms of autopoietic systems theory.

<sup>181</sup> Under the previous system, the Home Secretary in the C3 division was responsible for referring cases for consideration by the Court of Appeal

<sup>182</sup> The RCCJ sought to replace C3 with a new independent authority because of controversies over its operation and its ability to correct miscarriages of justice. Nobles and Schiff explained how the C3 division had investigated the Guildford Four and had concluded based on their biographies that they were likely innocent. However, knowing the CACD would not entertain biographical information as evidence it could not justify a referral to the Court. (R Nobles and D Schiff, (n.3) p.309-310)

<sup>183</sup> R Nobles and D Schiff, (n.3) p.315



This prediction is significant to thinking about the criticisms levied at the CCRC in the innocence movement literature.

Nobles and Schiff thus thought social systems theory provided important insights for reformers: it illustrates the need to “take systems seriously” and to think about how they differentiate and maintain themselves.<sup>184</sup> They explained: there is no direct access to truth or objective standards of justice; where a system relies on such concepts, they are particular constructions within those systems. The legal system thus understands its own practices as mechanisms for accessing truth and for achieving justice. Nobles and Schiff also discussed how the different constructions of a miscarriage of justice between law and the media would likely periodically lead to crises periods. They cautioned legal reformers that attempting to stretch the media’s understanding would be unpersuasive and would be considered too formal and technical.<sup>185</sup> Therefore, Nobles and Schiff thought systems theory provided insights for those engaged in reforming the criminal process. Those who urge the CACD to take a broader approach to reconsidering trial verdicts will be met with resistance because of the potential threats to law’s finality and authority. For those advocating reforms to increase legal due process rules, their arguments are likely to be disregarded for their technicality in other social systems (such as, the media and politics).

Therefore, Nobles and Schiff’s analysis again has important implications for the innocence movement reform agenda insofar as it presented a challenge to how law determined post-conviction appeals. This is relevant to Naughton’s criticisms of the criminal appeal system for being “highly technical affairs” where there is a perception of offenders as ““getting off on technicalities.””<sup>186</sup> This reflects Nobles and Schiff’s insights into the likely tension between different reform agendas, and the tension raised in the literature which questioned whether IPs should focus on factual innocence, or whether this undercut important due process protections. Furthermore, the reform agenda of IPs in the literature was critical of the restrictive approach of the CACD’s and CCRC’s determination of appeals in requiring fresh evidence or legal argument.”<sup>187</sup> Nobles and Schiff suggested that were the CACD to apply a discretion to quash a jury verdict because they disagreed with it, this would risk exposing the “ultimate paradox”

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<sup>184</sup> R Nobles and D Schiff, (n.3) P.319

<sup>185</sup> R Nobles and D Schiff, (n.3) P.319-320

<sup>186</sup> M Naughton ‘Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education.’ (2006) 3 Web JCLI <http://www.innocencenetwork.org.uk/wp-content/uploads/2014/09/wrongful-convictions-innocence-project.pdf> (accessed 30/09/16) p.5

<sup>187</sup> M Naughton, ‘The Criminal Cases Review Commission – Innocence versus safety and the integrity of the criminal justice system.’ (2012) 58 Criminal Law Quarterly 207 p.214

of law: the authority for law to decide what counts as legality.<sup>188</sup> It was suggested this was because law could not conceal its paradox through reference to external influences or internal errors. Thus we may expect the reform agenda of IPs to be met with systemic resistance because of its implications for law's finality, authority and potential exposure of law's paradox. This will be explored in Chapter 6 through discussion of the Justice Select Committee Review on the CCRC in 2014-2015 to which IPs contributed. Nobles and Schiff's analysis will be utilised to reflect on the submissions made by IPs and the outcome of the review.

#### **4.1.3 Consequences of autopoietic theory: Limitations on interpretation**

Nobles and Schiff summarised systems theory as explaining that coordination is achieved in society through "the use of common reductive terms, self-referential communication, and (at the level of discourse) widely shared values."<sup>189</sup> Thus: "reductionism through differentiated systems of communications makes complex social life possible."<sup>190</sup> They suggest this places limitations upon interpretation through the need to interpret meanings by reference to pre-existing communications within the same system.<sup>191</sup> They saw autopoietic theory as stressing that what counts as a communication in legal system requires one to integrate what they wish to say/argue/claim with existing legal communications.<sup>192</sup> Restricting what can be communicated and still be 'law' enables society to exist in a highly differentiated, and yet coordinated form.<sup>193</sup> This interpretation of autopoietic theory is particularly relevant to IPs. Nobles and Schiff have also applied this reasoning to thinking about criminal appeals, where they stressed that whatever an individual's opinion is on the merits of the legal system and its procedure, it is only through accepting the authority and legality of the appeal court that parties are able to have their issues decided in the first place.<sup>194</sup>

This has implications for literature model of IPs and INUK's aims. Naughton had envisaged IPs as working outside of the legal framework, which he perceived as unjust. Systems theory would predict that IPs would experience tensions if they sought to work outside of the legal

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<sup>188</sup> R Nobles and D Schiff, (n.3) p.306

<sup>189</sup> R Nobles and D Schiff 'Criminal Justice: Autopoietic Insights' in J Priban and D Nelken (eds.) *Law's New Boundaries: The consequences of legal Autopoiesis* (Dartmouth Publishing Company, Ashgate Publishing Ltd. 2001) p.201

<sup>190</sup> *Ibid.* p.201

<sup>191</sup> R Nobles and D Schiff (n.189) p.201

<sup>192</sup> This claim of Nobles and Schiff raises questions over legal pluralism and social systems theory. This will be considered further when discussing whether we could analyse IPs as rival communication subsystems within criminal justice. (R Nobles and D Schiff, (n.189) p.201.

<sup>193</sup> R Nobles and D Schiff, (n.189) p.201.

<sup>194</sup> R Nobles and D Schiff, (n.59) p.12

framework, when it came to progressing cases through the system.<sup>195</sup> IPs leaders did acknowledge the need to work identify grounds of appeal, otherwise they would be peripheral to their clients.<sup>196</sup> However, what is key is the extent to which IPs also aimed to challenge the system in this way. Price and Eady described submitting an application to the CCRC which urged them to take seriously “the cause of factual innocence.”<sup>197</sup> Furthermore, Naughton criticised lawyers working with INUK for resigning themselves to the legal framework and failing “to step outside the very processes INUK seeks to challenge;” and he urged for their help in this goal.<sup>198</sup> The extent to which IPs saw themselves as challenging the legal system, and how they went about this, is important for how we conceptualise IPs within systems theory.

## **5. An Exploratory Framework: IPs and Social Systems Theory**

Therefore, it has been suggested that systems theory, and particularly Nobles and Schiff’s analysis of miscarriages of justice, has important implications for analysing IPs, as portrayed in the literature. The following research questions emerge from the decision to use Social Systems theory as a theoretical framework to examine the UK innocence movement.

### **5.1 Research Questions**

Firstly, what do IPs represent in a systems theory analysis?

Secondly, how far can systems theory provide insights into the research findings?

Thirdly, how far can systems theory explain why there appears to have been a failure of the original innocence movement reform agenda?

These research questions will be addressed in Chapter 6 when Social Systems Theory will be utilised as a theoretical framework for examining the development and operation of IPs in the UK: in doing this it will attempt to conceptualise IPs within the theory, and will draw on the empirical data to determine what insights the theory can provide into the evolution of the innocence movement.

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<sup>195</sup> J Price and D Eady ‘IPs, the CCRC and the Court of Appeal: breaching the barriers?’ (2010) 9 Archbold Review 6 p.6; and M Naughton, (n.155) p.34

<sup>196</sup> J Price and D Eady, (n.195) p.6

<sup>197</sup> J Price and D Eady (n.195) p.8

<sup>198</sup> M Naughton, ‘Can lawyers put people before the law?’ (July 2010) Socialist Lawyer 31 p.32

## **Chapter 3**

### **Methodology**

#### **Introduction**

As discussed in the thesis introduction, despite up to 38 IPs existing in the UK over the last decade, there has been no empirical research on the development of IPs and the innocence movement in the UK. The predominance of IPs and their innovative approach to investigating miscarriages of justice makes them worthy of examination. Additionally, the turbulence of the movement, with the folding of INUK and the decline in the number of projects, has added to topical interest. The lack of empirical research thus far on IPs and the UK movement meant this research project was largely exploratory: this needed to be reflected in the methodological choices. This chapter will explain the methodological approach taken in the research. It will firstly discuss the research aims, the research design and the research strategy: this will involve consideration of the epistemological underpinnings to this study. This chapter will then discuss the approach to sampling, how ethical issues were resolved, and how data analysis was undertaken. Finally, it will discuss the potential limitations of the research design and methodology, and reflect on the implications for how the research findings can be utilised.

#### **1. Research Aims**

First and foremost, this research sought to fill the gap in the empirical literature on IPs. The research questions aimed to examine the following broad issues. Firstly, what were UK IPs aims and objectives, and how did they approach casework investigation? Did this match the model of IPs in the literature? The literature on IPs suggested they would only be concerned with claims of “factual innocence,” and Naughton suggested IPs should carry out truth-finding investigations to interrogate claims of innocence. This was identified as important for exploration. What is meant by “factual innocence” and how do IPs seek to assess this? And how do IPs seek to carry out truth-finding investigations? This aspect of the research sought to explore the different ways we construct the relationship between guilt and innocence and miscarriages of justice, and how IPs construct truth. The second aspect of the research sought to explore how successful IPs were, and the limitations, difficulties and challenges which they experienced. This was in light of the recent folding of INUK and the decline in number of projects, as well as the apparent lack of success of the UK movement over the last decade in terms of overturning convictions and achieving reform. Therefore, the research aimed to gather

the broadest picture of the UK innocence movement as possible, as well as aiming to explore different interpretations and constructions of key concepts in criminal justice.

## **2. Research Design**

Given that the UK literature only came from around 6 individuals across 4 projects, it was important to try and gather a broad sample of IPs. The research design thus took the form of a comparative, multiple-case study,<sup>1</sup> but one which was also open-ended to reflect the exploratory nature of the research.

### **2.1 Semi-structured interviews**

It was decided to explore the research questions using qualitative methods. Aside from a general investigation into how IPs were operating, the research aimed also to examine how IPs sought to carry out “truth-finding” investigations: this required exploration of different understandings and epistemological conceptions of establishing truth. This lent itself to interpretivist research methods which enable consideration of how people understand and construct their social world, such as qualitative interviewing.<sup>2</sup> Using interviews also allowed for a broader sample than would be possible with a smaller ethnographic case study for example, and provided a means for exploring how IP leaders described their approach to investigation and pursuit of “truth.” It was decided that semi-structured interviews were the best tool for the exploratory nature of the research.

Bryman suggested that with semi-structured interviews the researcher should have a list of questions or topics to be covered, but the interviewee should have a great deal of leeway in how to reply.<sup>3</sup> This was important for this research. It was intended to cover the same key issues with all participants, such as how they described the aims, objectives and functions of their institutions; their approach to casework; how they perceived and interacted with the criminal justice agencies; and their views on the criminal justice system. However, because so little was known about IPs, it needed to also be flexible to enable the respondents to raise issues they felt were important for discussion. Gillham suggested that semi-structured interviews should ask the same questions of all those involved, and to ensure equivalent coverage, the interviewees should be prompted with supplementary questions where they do not deal with one of the sub areas of interest; he also said approximately the same amount of interview time

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<sup>1</sup> A Bryman Social Research Methods (Oxford University 2012) p.74

<sup>2</sup> C Warren ‘Qualitative Interviewing.’ In J Gubrium and J Holstein (eds.) Handbook of Interview Research: Context and Method (Sage Publications 2001) p.83

<sup>3</sup> A Bryman (n.1) p.471

will be allowed in each case.<sup>4</sup> In this instance, the interviewees were not always asked the same questions and the interviews varied in length; but this was partly because there was a range of different approaches and perspectives emerging from the participants. Certain questions on the guide were not relevant to some participants, or they were less engaged with these questions because they did not identify with them. For example, those participants who did not describe factual innocence as significant to their approach were not asked questions about how they might determine this. However, certain core questions would be asked of each participant. The interview guide is provided in Appendix 1 and the questions asked most consistently to all participants have been put into bold.

Whilst quantitative methods could have served a useful purpose in this area, such as a survey, this would have been inappropriate for the research aims here. Surveys can attract a higher response rate because they are easier to disseminate and because they can be completely anonymous. They are also less time consuming for participants than partaking in qualitative studies. Furthermore, there is a perception that surveys are more objective with less researcher contamination and bias in interpreting the results because responses are categorised and portrayed numerically, although of course this is debatable.<sup>5</sup> Some of the interview questions could have been answered by a survey, such as looking at the age of UK projects; how many cases had been worked on; how many cases were submitted to the CCRC or CACD; and perhaps their basic aims and objectives, for example. Knowledge of this is lacking, especially in the wake of the INUK collapse, and thus there is a gap which such an approach could fill. However, quantitative methods would have been inappropriate for pursuing other research aims, such as how the participants constructed “factual innocence” and how the IP approached truth-finding investigations. The interview guide demonstrates the types of questions which were being asked; any attempt to pigeonhole these into categories for quantitative analysis would have distorted the participants’ answers, because the aim was to encourage participants to explore issues themselves.

Bryman explains that qualitative researchers prefer a research strategy that entails as little prior contamination of the research world as possible, which avoids the imposition of inappropriate frames of reference on people.<sup>6</sup> This issue is more acute in relation to this research topic which is so under-researched, and would have resulted in the imposition of the researcher’s own

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<sup>4</sup> B Gillham, ‘Research Interviewing: the range of techniques.’ (Open University Press 2005) p.70

<sup>5</sup> A Bryman, (n.1) p.405

<sup>6</sup> A Bryman Social Research Methods (Oxford University 2004) p.282

understandings and expectations on the participant through the categories chosen for counting. This is exacerbated by my own experience working on an IP, which inevitably means I have my own preconceived ideas about IPs and how they operate. As the research unfolded, the initial expectations of the findings did not manifest in the data, and therefore this confirmed that a questionnaire would have been an inappropriate choice. For example, as it emerged that several participants did not identify with the factual innocence focus of casework (an issue unexpected from the literature), a survey focusing on this would have potentially misrepresented participants' views if they were expected to answer questions about it. Furthermore, it is unlikely a quantitative questionnaire would have revealed the tensions underlying the movement, which emerged as a major theme from discussions around aims and objectives and casework approach: this shows the merit of having chosen to use semi-structured interviews.

## **2.2 Interview Guide<sup>7</sup>**

Advice was drawn from Bryman in designing the interview guide.<sup>8</sup> He suggested a flexible design to enable the interviewer to glean the ways in which the participants viewed their social world.<sup>9</sup> The researcher must address what they need to know to answer the research questions, whilst seeking to get an appreciation of what the interviewee identifies as significant and important in relation to the topic areas.<sup>10</sup> This formed the basis for developing the interview guide used (again see Appendix 1.)

Ideally, an interview guide will be tested and refined through pilot interviews. Gillham suggested there should be two stages to piloting; firstly, an initial pilot to hone question wording, focus and order and to identify redundant questions or where questions need replacing;<sup>11</sup> and secondly one which focuses on the schedule as a whole and how it fits together; what prompts should be used; and initial themes emerging.<sup>12</sup> Clearly this maximises the effectiveness of a researcher's interviews with participants. However, pilot interviews were not undertaken in this research. Given the elite nature of participants; the relative difficulty of arranging interviews given the spread of IPs across the country and the busy schedule of academics, any pilot interviews would have sacrificed a key contribution to the sample; as pilot interviewees are not traditionally re-interviewed for the research given their obvious

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<sup>7</sup> See Appendix 1

<sup>8</sup> A Bryman, (n.1) p.472

<sup>9</sup> A Bryman, (n.1) p.473

<sup>10</sup> A Bryman, (n.1) p.473

<sup>11</sup> B Gillham, (n.4) p.74

<sup>12</sup> B Gillham, (n.4) p.74

contamination from the initial process. This potentially risked the interviews being less effective, entailing a risk of unhelpful or irrelevant questions. Although some of the questions did end up being irrelevant to certain participants, this was an important finding; there is a risk that pilot interviews could have eliminated important questions which may not be relevant to all participants, but could be especially so for some. This again may be more relevant to this thesis topic which was entirely new and not drawing on previous research and thus it was unclear what could be expected.

The first section of questions on the interview guide were reasonably straight forward in terms of asking participants to account for their aims and objectives. The interview guide provided potential prompts and follow up questions if required, but the participants were extremely clear on what they saw as the main aims and provided comprehensive answers.

The second section focused on exploring how IPs investigated a case. This section of questions was not as significant to the research findings as expected. As explained above, based on the literature, the original aim of the research was to explore how IPs constructed factual innocence and approached truth-finding. However, it soon emerged that factual innocence was not particularly significant to the majority of IPs in their approach, and thus a number of these questions became irrelevant. The questions around how IPs assessed case eligibility would have provided an important insight into those who did focus on factual innocence; but this section was often inapplicable to many participants where their IP was a member of INUK and received cases from them. Furthermore, it was difficult for the IP leaders to describe their approach to casework in detail because so much was dependent on the specific issues and intricacies in a case. Therefore this latter issue would have been better explored with a triangulation of actual case documents, which is discussed further below. Although the questions in this section turned out to be less important than expected, they were still essential in demonstrating that the majority of IPs did not identify with the casework approach outlined in the literature. The same issues applied to the questions on making applications, which were also designed in expectation of IPs suggesting potential factual innocence was an important consideration for making their applications to the CCRC, which largely turned out not to be the case. Although, again, these questions still served a purpose in establishing how IP leaders dealt with making CCRC applications.

The questions aimed at determining if, and how, IP leaders might identify a distinctive IP approach and whether they attached significance to being an IP were sometimes confusing for



participants. When designing the question, the expectation was that participants would draw on some of the issues identified in the literature which defined and distinguished IPs. However, the fact some participants were unsure of the question's meaning was important for revealing that they did not appreciate the significance of distinctions that seemed central in the literature. This demonstrates the importance of designing open questions in semi-structured interviews. Furthermore, it was considered important not to influence participants here through referencing the role of IPs in the literature, because as members of INUK they may have adjusted their account to match this. Thus, where they asked for clarification of what the question meant, they were just encouraged to think about any potential differences between IPs and other organisations or clinics looking at criminal appeals.

The concluding questions asked participants for their views on the impact of IPs; their successes and limitations; and the future of the innocence movement. These were straightforward and provided important data which revealed some of the tensions underlying the innocence movement.

Overall, despite not being piloted, the interview guide worked reasonably well; the open nature of the questions allowed for the emergence of issues which were unexpected, which fulfilled its aims of not restricting participants' responses. Even where questions were less important or less relevant than expected, this revealed important data about how participants viewed the role of IPs.

### **3. Research Strategy**

Bryman explained the difference between an inductive approach and a deductive approach: whilst an inductive approach uses the observations and findings from the data to construct a theory; the deductive approach develops hypotheses from the literature and then subjects these to empirical scrutiny.<sup>13</sup> Becker considered the most effective approach to research was to modify the thesis focus according to emerging themes within the data.<sup>14</sup> This was the strategy taken here. Given there was so little known about IPs in the UK literature, an inductive approach was considered more appropriate for the exploratory nature of the research.

The research direction was revised alongside emerging themes in the data. There was a constant interrelation between research findings and the revision of research questions; and themes emerged in the data which could not have been anticipated from the literature. Initially, due to

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<sup>13</sup> A Bryman, (n.1) p.24-26

<sup>14</sup> H Becker, *Tricks of the Trade* (The University of Chicago Press 1988) p.9

the international and domestic literature on IPs and the emphasis on factual innocence, the thesis situated IPs within scholarship on theories of truth-finding. The original research questions sought to explore IPs approach to fact-finding and methods of proof, which is evident in the interview guide questions around determination of potential innocence. However, as it became clear the majority of participants did not identify with the literature depiction of IPs, it was not possible to engage in discussions about those topics and thus the data was limited in what it could contribute in this regard. Rather, the research focus shifted towards thinking about how far sampled IPs differed from the expectations in the literature, and whether it was possible to construct a typical IP model in the UK. Furthermore, at an early stage in the interviews, it began emerging that there were perceived fundamental problems with the UK innocence movement, and difficulties and tensions around INUK: this had initially been unexpected. Then when INUK folded half way through the research project, these issues became more central to both the research and the participants. Therefore, the research questions were reformulated to explore the future of the UK innocence movement and specifically the extent to which we may analyse it as a rise and fall.

An inductive approach was essential to this research and has resulted in some significantly important findings about the UK innocence movement, which are of interest to those involved domestically, but also to the innocence movement internationally.

#### **4. Sampling**

Purposive sampling was used as means for seeking to recruit participants from different types of IPs. At the outset of the research, most IPs were based in University Law Schools and were members of INUK. It was intended to sample as many IPs as possible from this selection, but also to sample “outliers,” or those projects which did not conform to this. For example, when the research design was formulated there were three independent IPs, two which had never joined INUK, and one which had left; and there had been three IPs which had operated within journalism schools. Therefore, it was hoped to sample at least one project from each of these categories.

The method of sampling proceeded from a gatekeeper who was a director of an IP and had been involved in the movement for several years; thus she was familiar with a significant number of individuals who ran IPs. The vast majority of the sample was obtained through the gatekeeper: she was able to identify potential participants for the research, and provided an initial point of contact. However, given the potential limitations of relying on a gatekeeper and

especially given the fraught relationships in this area (both of which will be discussed further below), it was also attempted to broaden the sample through contacting other IP leaders which I could identify: they were contacted through email or phone. It was also intended to sample at least one university project which worked on criminal appeals that was not an IP, as a counterpoint to the IP model; this was because the literature suggested there were distinctive characteristics to IPs which would potentially distinguish them from other units looking at criminal appeals (which have been generically termed criminal appeal units for the research purposes).

As explained, there were up to thirty-eight IPs which have existed between 2005 and 2014. In total, there were twenty-five IPs contacted with a request for participation, either through the gatekeeper or through my own methods. Of these, 13 IPs agreed to participate in the project; one refused; three cancelled or failed to arrange; seven failed to respond. There were four criminal appeal units which were identified and contacted and three agreed to participate; one failed to respond. It was unknown if any further criminal appeal units existed beyond these but this was an adequate number for sampling as the main thesis focus was on IPs; the criminal appeal units were primarily being used as a counterpoint to this.

The breakdown of the participating sample of IPs is presented in the following table: this lists those characteristics deemed important.

**Table 1**

	<b>Participant(s)</b>	<b>University School/ Dept.</b>	<b>INUK Status (up until fold)</b>	<b>Interviewed Pre/Post INUK collapse</b>	<b>Running/Closed at time of interview</b>
<b>Project1</b>	Participant/a	Law	Member	Pre	Running
<b>Project2</b>	Participant/b	Journalism	Left INUK	Pre	Running
<b>Project3</b>	Participant/c	Law	Left INUK	Pre	Running
<b>Project4</b>	Participant/d	Journalism	n/a	Pre	Closed
<b>Project5</b>	Participant/e – ex-director	Law	Independent	Pre	Running under new directorship
<b>Project6</b>	Participant/f	Law	Member	Pre	Running
<b>Project7</b>	Participant/g	Law	Left INUK	Pre	Running

	Participant/h (Co-directors)				
<b>Project8</b>	Participant/I (ex-director) Participant/j (current director)	Law	Left INUK	Pre	Running
<b>Project9</b>	Participant/k Participant/l (Co-directors)	Law	Left INUK	Post	Running
<b>Project10</b>	Participant/m	Law	Member	Post	Running
<b>Project11</b>	Participant/n	Law	Member	Post	Closed
<b>Project12</b>	Participant/o	Law	Member	Post	Suspended
<b>Project13</b>	Participant/p	Law	Member	Post	Running

Therefore, there were sixteen participants drawn from thirteen IPs in the participating sample. These three extra participants are accounted for as co-directors of Project9 and Project7, along with participant/i who was the ex-director of Project8.

The sample is considered reasonably varied and fairly representative of the different types and variations of types of IPs, as well as of experiences in running them.

In terms of types of IPs, the majority sampled were based in law schools, which was reflective of the most typical model; two were sampled from journalism schools (out of three known to exist/have existed in the UK.) The sample also captured a range of potentially different experiences of the UK innocence movement. It contained one (out of two) IPs which had been wholly independent of INUK; five which had left INUK voluntarily; and six which had remained members of INUK up until the fold. This enabled exploration of the role of INUK and the different projects' relationship with it. For example, for the IP which was independent of INUK, it was possible to explore why they did not join INUK, and how they operated independently with their own case screening and methods. For those eight participants from five IPs which left INUK, it was possible to discuss why they left INUK and how their experience varied as INUK members and not. The six participants from the six IPs which were INUK members up until its fold could explain their experiences as being part of INUK, and

why they were a member. As the collapse of INUK occurred around half-way through the research fieldwork period, the sample contained eight projects where the directors were interviewed prior to its collapse, and five projects whose directors were spoken to afterwards. This enabled comparison between how participants spoken to prior to the collapse viewed the health of the movement, with those who were spoken to after the INUK fold. The sample also contained two projects that had closed down, which were Project11 and Project4: this enabled exploration of why their project had closed. Similarly, there were also two participants who were ex-directors of projects, which enabled reflection on their experiences running it and explanation of why they had left. Furthermore, 10 of the sampled IPs are still operating (out of an estimated 17 former or current IPs which are still functioning):<sup>15</sup> therefore, arguably, this sample provides a reasonable indication of the potential future for the movement.

There were also four alternative organisations in the sample. Three criminal appeal units which were all based in law schools. The experiences here were also varied: Unit1 had been long established, however the other two were more recent. Unit1 provided a different model to the typical IP and therefore provided an important contrast to the IP model. Unit2 was set up specifically as a criminal appeal unit and not an IP, because it was linked with a law firm: this participant had also worked on an IP and so was able to offer critical insight into whether he perceived there to be differences between this new unit and an IP. Unit3 was actually intended to be an IP, but INUK collapsed before it was established: this enabled exploration of the impact of the INUK fold on new clinics. The Centre for Criminal Appeals was also sampled, which was a newly established law firm specialising in criminal appeals that was intending to link up with universities following the collapse of INUK.

Overall, this sample reflects a broad range of types of IPs and enables comparison of these with other types of criminal appeal units which were far fewer in number. This research sample also enabled examination of the IP movement as it unfolded over the critical period between December 2013 and January 2015 and was able to capture a broad range of experiences in relation to that. Although there is some inconsistency with those IPs interviewed prior to the collapse and those post, this captures a range of different views leading up to it, and those

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<sup>15</sup> It is very difficult to know how many IPs or other criminal appeal clinics are still operating as there is no central record. This figure of 17 is based on that estimated by Alexander but only includes IPs or former IPs, and has also subtracted those listed which are now known to have closed. (see M Alexander, 'Innocence Projects – Green Shoots.' (10<sup>th</sup> June 2016) Criminal Law & Justice Weekly <http://www.criminallawandjustice.co.uk/features/Innocence-Projects-%E2%80%93-Green-Shoots> (accessed 31/08/16).

following it. This sample is unique and cannot be replicated because of the crucial time which the research was underway.

## **5. Ethical issues**

The application for ethical approval was made to the Cardiff University Law School Ethics Committee and was based on both the school guidelines for ethical approval and the ESRC's Framework for Research Ethics which was in force at the time.<sup>16</sup> Ethical approval was obtained for research interviews on the grounds of obtaining the participants informed consent. The information sheet and accompanying consent form which was provided to participants can be found in Appendix 3.

This research raised some risks for the participants. Firstly, although elites are not typically deemed a vulnerable group, there have been scholars who have urged us to view them in this way.<sup>17</sup> Lancaster discussed this in relation to elite interviews carried out in the policy network. She found that the participants risked problematic consequences from discussing certain aspects during the interviews, such as “retaliation...embarrassment, potential job loss;” or the compromising of organisational partnerships and the damaging of relationships; and, for her participants, the risk of jeopardising “delicately balanced politicised policy processes underway.”<sup>18</sup> Whilst the participants in my research are not in the field of policy making, similar issues were anticipated as a potential concern. As members of INUK, IPs were required to abide by strict protocols in carrying out their casework and if identified, participants could have put themselves, their IP and their institution at risk, if they were deemed to have acted improperly in any way; this could also have resulted in expulsion from INUK. There is also the broader issue of projects being part of a university, and the participants as employees of the institution could place the university at reputational risk if there were serious problems with the project revealed. Furthermore, there were complicating issues, such as the fraught nature of relationships within the UK innocence movement, described as “in a state of civil war.”<sup>19</sup> As I was from an institution involved in the innocence movement where the IP had been involved in disputes, there was the potential concern that respondents may worry about adverse consequences from participating in the research.

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<sup>16</sup> ESRC Ethics Guidelines 2010 <http://www.esrc.ac.uk/files/funding/guidance-for-applicants/esrc-framework-for-research-ethics-2010/>

<sup>17</sup> K Lancaster, ‘Confidentiality, anonymity and power relations in elite interviewing: conducting qualitative policy research in a politicised domain.’ (2016) *International Journal of Social Research Methodology* DOI: 10.1080/13645579.2015.1123555

<sup>18</sup> Ibid. p.7

<sup>19</sup> D Jessel ‘If Andrew Mitchell can see the light, it could happen to everybody...’ (3<sup>rd</sup> June 2014) *The Justice Gap* <http://thejusticegap.com/2014/06/andrew-mitchell-can-see-light-happen-anybody/> (accessed 19/06/14)

Lancaster explained that, to protect her participants, she allowed them to examine their transcript after the interview to check for inaccuracies, misrepresentations, and to provide clarifications; she also used this to reassure participants where she wanted them to be more expansive in their responses.<sup>20</sup> This approach was also adopted in this study. Participants were assured they could check the transcript to ensure they felt comfortable in the interview; affording them this opportunity minimised the risk of any repercussions to the participants if they felt something could be misinterpreted. There are problems associated with this approach. Lancaster explained that she found participants would sometimes delete sections of the interview; or one participant had asked for a new interview.<sup>21</sup> This raises issues with the quality of the data and its potential obfuscation. However, it was preferable for the participants to feel comfortable in participating in the research, and this was important in encouraging them to participate. In this study, allowing participants to check transcripts did not result in significant problems. Only one participant removed anything that was deemed of potential interest; one requested that direct quotes were run past them before publication which was mostly an administrative burden. However, there was one participant who said she did not want the interview data to be quoted verbatim, but she was happy for its contents to be used. This was unfortunate as direct quotes can provide a better insight into the participant and their views and approach, but it did not detract hugely from the information provided.

It was also decided to keep the participants anonymous. This was intended to ensure that participants were protected from any adverse consequences of participating in the research; and furthermore, this anonymity can encourage participants to talk more freely because they are less concerned about repercussions. However, it was necessary to warn participants on their consent forms that there was a chance of them being identified; this possibility is largely unavoidable given the small population of projects and individuals involved in them. It has been acknowledged in the methodological literature that guaranteeing complete anonymity can be an unachievable goal.<sup>22</sup> The participants were warned specifically that there was a chance of them being identified through key facts about their project, such as the time it had been operating and the number of applications made to the CCRC, or referrals to the Court of Appeal (CACD) for example.<sup>23</sup> Within the research setting of IPs and university clinics, there is a chance other participants or individuals involved in this area will be able to identify the

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<sup>20</sup> K Lancaster, (n.17) p.8

<sup>21</sup> K Lancaster, (n.17) p.8

<sup>22</sup> B Saunders, J Kitzinger, C Kitzinger, 'Anonymising interview data: challenges and compromise in practice.' (2015) 15(5) *Qualitative Research* 616 p.617

<sup>23</sup> There are only two innocence projects so far to have achieved a referral to the Court of Appeal

participants based on certain details. Steps have been taken to try and ensure that the participants' anonymity is protected as far as possible based on these details; for example, at no point in the data is there any indication about whether any of the sampled projects had successful referrals from the CCRC to the CACD, given that this an extraordinarily small population. Furthermore, where the risks of identifying the specific participant have been considered most acute, the data has not been attributed to their research identity; this aims to ensure, even if they are identifiable from that quote, this does not compromise their anonymity throughout.

There are concerns within qualitative research that anonymity can distort the data and omit part of the story, or conceal important contextual issues.<sup>24</sup> There are potential issues with this in this project. Primarily, through some key details which have been omitted, such as any data relating to referrals to the CACD; and significantly, there have been some important details around relationships and the historical context of the innocence movement which have been excluded because of the risks of exposing a participant's identity. There are other issues which may have been of interest, such as thinking about which universities are providing what clinical legal education provisions. Also, given the uncertainty around the movement in the UK, knowing which universities have submitted applications to the CCRC could have been important for some, along with which projects are continuing to operate and in what format. Some key details have been included even though they reduce the population of projects to which they relate: for example, whether or not the IP is run as a module; where it was based in a journalism department; or where it had left INUK. However, the participants were warned in the information sheet that they could be identifiable from key facts about the project. Also, when checking and approving the transcripts the participants were afforded the opportunity to delete anything which they did not want included.

## **6. Data analysis**

Due to the scale of the data generated from the project, it was decided to carry out computer assisted qualitative data analysis, using the program NVivo.

The approach to data analysis was thematic coding of the interview transcripts. I coded the data whilst the data collection was ongoing, rather than waiting until the data collection had finished. At the outset, based on the research questions, there were specific themes I was interested in examining, such as aims, casework approach, construction of factual innocence

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<sup>24</sup> B Saunders, J Kitzinger, C Kitzinger, (n.22)



and truth-finding; however as the data analysis developed, other codes emerged, particularly around tensions within the movement. The nodes used are listed in Appendix 2. In this document, the 'tree nodes' are in bold, with the codes which were grouped within them underneath and in normal font. A 'tree node' is where the NVivo software allows you to have sub-nodes under another node. This was used where there was a bigger theme with subthemes within it. I went through each interview three times to double check the coding and to ensure that newly created nodes had been considered and applied to former interviews.

There have been some potential issues raised with using CAQDAS<sup>25</sup> software. Firstly, Bryman explained that some qualitative analysts consider that the regrouping of certain chunks of data under the retrieve process in CAQDAS software decontextualizes the data and disrupts the narrative flow.<sup>26</sup> This was found to be problematic at times, with certain extracts of data being distorted in their meaning without looking at the sentence in the context of the paragraph. Care was taken to read the interviews again in whole and this did flag up some areas where a quote from the participant had been taken out of context. Sometimes the coding of the data into separate nodes within a respondent's answer did detract from the meaning conveyed when it was read as a whole. Johnston explains that researchers can find they experience problems with using CAQDAS software because they become "too close" to the data and fail to see the wood for the trees.<sup>27</sup> It was found that the nodes developed became too extensive and ended up disconnecting certain thematic areas too far, which potentially had the effect of making the coding process more lengthy and complicated; but this was largely due to researcher inexperience. In future, a better strategy would be to familiarise oneself with the research data in its complete form, before beginning to develop codes and applying the coding process: familiarisation through interview transcription was insufficient.

Overall, the coding process was not as effective as it could have been. There were too many nodes created, and often one extract was coded under many different similar nodes. Thus retrieval<sup>28</sup> has not always been as straightforward as hoped, because sometimes data expected to be under one node had been put under another. However, having transcribed the interviews myself, and having read them in whole several times and coded them three times, I am confident that the data has been examined extremely closely and core themes have been

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<sup>25</sup> Computer Assisted Qualitative Data Analysis

<sup>26</sup> A Bryman, (n.1) p.593

<sup>27</sup> L Johnston, 'Software and Method: Reflections on Teaching and Using QSR NVivo in Doctoral Research.' (2006) 9(5) *International Journal of Social Research Methodology* 379 p.383

<sup>28</sup> Retrieval refers to the process of using NVivo to group the data extracts under the node they were coded under

identified. Therefore, although perhaps coding could have been more efficient, these difficulties are not considered to have impacted on the results and analysis.

## **7. Limitations of Research Design**

### **7.1 Sampling**

Given there were approximately 38 IPs<sup>29</sup> which have been established across the UK at various times, the sample of 13 could potentially be viewed as fairly limited. As explained, up to 25 IPs were contacted for participation but there was a non-response rate and some interviewees failed to follow up with arrangements. It was decided that sixteen participants from thirteen IPs (along with four other organisations) was adequate for exploration of the thesis topic, because it captured a broad range of types of IPs and other units, and was comprised of participants with different experiences.

Whilst it is considered that this is as an adequate spread and sample, there are limitations to it which ought to be recognised and the implications discussed.

Firstly, the majority of the sample (excepting two participants (16 and 20)) were contacted through the gatekeeper. There are disadvantages to this because it means the sample is largely representative of individuals known to, and familiar with the gatekeeper. The use of a gatekeeper for this research was simultaneously beneficial and prejudicial. Obtaining and carrying out interviews with elites can be difficult in terms of firstly gaining access, and then obtaining trust.<sup>30</sup> This situation is worsened in an environment such as the innocence movement, where there are fraught relationships to the extent that it has been described as a “civil war.”<sup>31</sup> Thus, having a gatekeeper helped not only to gain access, but also to gain trust through association. However, simultaneously this was a double edged sword, because the gatekeeper had also been involved in disputes. This clearly also posed potential problems for sampling. It was attempted to counteract this through contacting potential participants myself, however, this did not yield significant results with only two interviews being arranged this way. My association with Cardiff Law School IP was difficult to navigate because the IP had left INUK in 2010 following the deterioration in relationships between key individuals involved. This did pose problems at various stages in the research, for example being refused permission to attend INUK conferences. It is possible that the link with Cardiff Law School IP could have

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<sup>29</sup> One of these was in a law firm: the focus in this thesis was on university based IPs and so this was excluded from the sample.

<sup>30</sup> R Mikecz ‘Interviewing Elites: Addressing Methodological Issues’ (2012) 18(6) *Qualitative Inquiry* 482 p.483

<sup>31</sup> D Jessel ‘If Andrew Mitchell can see the light, it could happen to everybody...’ (3<sup>rd</sup> June 2014) *The Justice Gap* <http://thejusticegap.com/2014/06/andrew-mitchell-can-see-light-happen-anybody/> (accessed 19/06/14)

contributed to the decisions of some individuals not to participate. However, this was not as much of a problem as was initially feared, as the sample did contain a wide range of participating IPs.

Whilst the sample generally reflects the key different types of IPs and experiences, there are some issues with its representativeness with regard to some unique cases of IPs.

Firstly, Michael Naughton as the leader of INUK did not form part of the sample. He was initially approached for discussion over participation in the research but declined to participate. An interview with Naughton would have enhanced the research discussion, and given his articles on IPs were largely several years old, it could have enabled discussions over any evolutions in his approach. Furthermore, it would have been useful to explore Naughton's reasons for closing INUK in more detail than was possible based on his public announcement. However, arguably this limitation is not as significant as it first seems. Given the majority of the literature details Naughton's approach to casework with the UoBIP and his aims and objectives, more was known about this project than any others in the UK.

Secondly, it was originally intended to sample one IP in Scotland. Scottish IPs were potentially of interest because the Scottish CCRC is a different body and operates under a different test to the "real possibility" one in the UK: thus it was initially intended to explore whether their experiences with the SCCRC were different compared to relations with the CCRC. However, there were only ever two IPs in Scotland and whilst an interview was arranged with one, the participant failed to respond to emails confirming the arranged time, therefore unfortunately this had to be dropped. With hindsight it would have been beneficial to try and contact the ex-leader of the other Scottish IP to improve the representativeness of the sample, as it only contains IPs from England and Wales; but this IP had closed down before the research commenced and thus was not initially considered. Despite this potential limitation, sampling a Scottish IP was not essential to answer the research questions, which was looking in general terms at the different models of IPs: there was no indication there were any differences in the model of Scottish IPs which were also INUK members. Both of these IPs have also now closed and so they would not have contributed to the examination of the future of the movement; although as is discussed next, speaking to more closed IPs would potentially have been beneficial. Therefore, it should be clarified that whilst the thesis can discuss the "UK innocence movement" to the extent that it relates to INUK; the sample is limited to a consideration of IPs within England and Wales.

Thirdly, given that an emerging theme within the research was tensions and problems underlying the innocence movement, it would potentially have been beneficial to sample more IPs which had closed. This was not the original focus of the research which was concentrated on how IPs were operating; but speaking to more IPs which had closed (both prior to and following the INUK fold) would have enabled a better exploration of difficulties within the movement and the potential reasons why projects were closing. There were four closed IPs contacted which failed to agree to participation; thus the sample only contained Project4, which closed prior to INUK's fold and Project16 which closed following it. Beyond this, other participants provided reasons why they thought IPs were closing, but the inferences from the data about why IPs may have closed can only be speculative, as closed projects represent only a small proportion of the sample.

Finally, through having sampled only IP leaders, this thesis inevitably provides a "top-down" narrative of the innocence movement, which could have been counterbalanced by sampling and interviewing student caseworkers on the projects. However, the central focus of this thesis was examining the aims and objectives of the UK innocence movement, which was something best explored with the leaders of the projects. The student caseworkers are transitory and generally focused on the specific casework itself, rather than the broader objectives of the movement. Therefore, although sampling student caseworkers may have provided a broader perspective on how IPs approached casework, it would not have added to the main substance of the thesis in terms of analysing the movement goals.

## **7.2 Researcher bias**

Inevitably, researchers will bring certain preconceptions to the data, or what Becker describes as 'images'. He advises researchers to make their implicit assumptions as explicit as possible throughout the research process.<sup>32</sup>

I have brought my own experiences of working on an IP and my understanding of the IP movement to this thesis. I have worked on the Cardiff Law School IP since 2009 (seven years at the time of writing). I started working on the project whilst it was a member of INUK and attended INUK training; since then the project has left the network, and has been running independently for six years. I have worked on approximately 9 of the innocence project cases and have been involved in writing CCRC applications and responses on several of these. I am

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<sup>32</sup> Becker H, (n.14)

also involved in the training of students joining the IP. This inevitably makes me more vulnerable than other researchers to bringing preconceptions and preconceived ideas to the research in terms of design, expectations and interpretation of the data. Also, given that some participants in the sample knew of my involvement with the IP, this may also have influenced their responses and the way they discussed the work with me.

Therefore, the preconceptions which I brought to the research will be discussed.

Firstly, when I attended the INUK training there was a focus on limitations of the criminal appeal system and its focus on restricted legal appeal grounds, rather than the potential wrongful conviction of a factually innocent person. Discussions of reform were also important to the training at Cardiff Law School IP, which seeks to engage students in reform issues. It was considerations around the systemic approach to miscarriages of justice and debates over reform which particularly interested me from the outset in being involved in the Cardiff Law School IP, and therefore also formed the basis of my interest in IPs as a research topic.

Secondly, I have worked on a case at the IP which has caused me to become critical of certain aspects of the criminal appeal system. In one case, I have been astounded that the individual remained convicted of the offence in question, and have been frustrated by the CCRC's rejection of it for referral. I believe that many would consider this conviction to be unsafe following an examination of all the evidence in this case (both fresh evidence and original evidence) and it has also been my experience that others share this view. This inevitably has caused me to be critical of, and reflective upon, the criminal justice system in ways that others may not be.

Thirdly, based on my experiences on the project, the INUK training, and what I had read, my preconception was that IPs approached investigating miscarriages of justice in a different way, through a focus on investigating the potential factual innocence of clients, rather than focusing on establishing appeal grounds. Furthermore, I anticipated that IPs would have a strong reform agenda. This was also a reason which drove me to select IPs as a research topic.

Therefore, whilst the literature did support this understanding of the innocence movement, this was also a preconception which I brought to the research. Despite the fact the majority of the sample did not identify with this approach, these factors have remained an important focus in writing up the results. This reflects what initially interested me in the innocence movement, as well as my interest more broadly in how the criminal justice system works and issues around truth-finding. Whilst it is an important finding for the international and UK movement that UK

IPs did not identify with these ideas, other researchers may have focused more on other issues that have arisen, such as a more in-depth examination of the everyday challenges faced by IPs, which was also an emerging theme.

Therefore, it is accepted that the presentation of results in this thesis is, to a certain extent, reflective of the researcher's construction and interpretation of the data from participants.

### **7.3 Limitations of qualitative research**

There are limitations to the use of qualitative research methods. Firstly, a general criticism of qualitative research is that it cannot be generalised in the same way as quantitative research. It has been argued that whilst quantitative research holds generalisability as a paramount concern, there is a perception that in qualitative research, generalisability is “neither important, attainable, nor relevant in relation to the objectives of the research.”<sup>33</sup> There has been a tendency for defences of qualitative research to suggest that rather than generalisability, the aim is to produce an “illuminating description” and perspective consistent with that specific situation.<sup>34</sup> However, one scholar Morse has criticised this as a “get out” clause and considers that if qualitative research is not generalizable then it is “of little use, insignificant and hardly worth doing.”<sup>35</sup> Instead, he suggests rather than obtaining a ‘demographic,’ sample of the population at large, a qualitative researcher selects a participant for the contribution they can make to an emerging theory, which is then applicable beyond that group to “all similar situations, questions and problems.”<sup>36</sup>

The research provides some basis for provisional generalisation to thinking about the UK innocence movement as a whole. The sample selected was intended to be representative of different types of IPs and of participants with different experiences; thus, to a certain extent, the results are considered to give a broad insight into the UK innocence movement. It is acknowledged that the individual participant accounts are their own subjective viewpoints and experiences. However, where several participants have discussed similar issues or experiences, this does give weight to inferring that this issue can be generalised beyond the individual experiences. Furthermore, we can also use these different insights and experiences to generalise to broader issues in the innocence movement. For example, the variation in responses from

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<sup>33</sup> C Delmar, ““Generalizability” as Recognition: Reflections on a Foundational Problem in Qualitative Research,’ (2010) Vol 1(2) Qualitative Studies 115 at p.117

<sup>34</sup> J Schofield, ‘Increasing the Generalisability of Qualitative Research’ in A.M. Huberman, and Matthew B. Miles (eds.), *The Qualitative Researcher's Companion* (Sage Publications 2002) p.174

<sup>35</sup> J Morse, ‘Editorial’ (1999) Vol 9(1) Qualitative Health Research 5 p.5

<sup>36</sup> Ibid.

participants suggests that there is no typical IP model, and therefore we might expect further variations and constructions from IP leaders beyond this sample.

A significant criticism of qualitative methods is that they lack ‘validity.’ Cho and Trent explain that validity refers to whether the researcher’s claims about knowledge correspond to the studied reality, or the participants’ construction of reality.<sup>37</sup> This concern is due to the degree of influence which the researcher has over the collection, presentation and interpretation of the data, this inevitably leaves room for researcher bias and interpretation. It is accepted that, to a certain extent, data is co-constructed by the researcher and the participants in that particular context.<sup>38</sup> Therefore, if another researcher was to speak to the same participants, even with the same interview guide, they may yield different results. However, it has been attempted to counterbalance both of these issues through being transparent about the method and approach taken, and the experiences and opinions brought to the research. Linked to this issue is the criticism that qualitative studies are not replicable because it is impossible to ‘freeze’ a social setting.<sup>39</sup> However, it is argued the irreproducibility of this research makes it more valuable. It was carried out during a critical time in the innocence movement, documenting the build up to the fold of INUK and the fallout following its closure. Thus, it provides a unique insight into the innocence movement in the UK, which, at least in its original form, is now over. The data generated from this is considered important beyond simply analysing IPs in the UK, to looking at the provision of clinical legal education and to thinking about criminal justice reform.

#### **7.4 Limitations of methods**

There are potentially several limitations to using interviews as a means of data collection. Roulston explains that there are several critiques of qualitative interviews related to a concern that interviewees might thwart the research purpose in generating truthful or credible data.<sup>40</sup> Gillham cautions that people will express attitudes verbally, which they do not display in their behaviour; and may be compellingly convincing in doing so.<sup>41</sup> This situation is potentially worse for interviewing elites. Morris explained that when interviewing elites there is a presumption that you will be lied to; and that elites will only agree to be interviewed when they have something to say; will deflect difficult questions, and portray themselves in a good light.<sup>42</sup>

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<sup>37</sup> J Cho and A Trent, ‘Validity in Qualitative Research Revisited,’ (2006) Vol 6(3) *Qualitative Research* 319 p.320

<sup>38</sup> S Carter and M Little, ‘Justifying Knowledge, Justifying Method, Taking Action: Epistemologies, Methodologies, and Methods in Qualitative Research.’ (2007) 17(10) *Qualitative Health Research* 1316

<sup>39</sup> Bryman A, *Social Research Methods* (n.1) p.390

<sup>40</sup> K Roulston ‘Considering Quality in Qualitative Interviewing.’ (2010) 10(2) *Qualitative Research* 199 p.203

<sup>41</sup> B Gillham, (n.4) p.7

<sup>42</sup> Z Morris, ‘The Truth about Interviewing Elites.’ (2009) 29(3) *Politics* 209 p.211

Berry explains that “Interviewers must always keep in mind that it is not the obligation of a subject to be objective and to tell us the truth” and that whilst a researcher has an objective from the interview, so often does the interviewee.<sup>43</sup>

In qualitative research it is often thought that the quality of the research can be improved through triangulation of data, that is collecting data from a number of sources; and the triangulation of methods, which requires using different methods to collect data.<sup>44</sup> There are three main purposes for using triangulation in your research design: as a validation strategy, an approach to generalisation of discoveries, and as a route to additional knowledge.<sup>45</sup> Patton explains that triangulation is based on the premise that “no single method ever adequately solves the problem of rival explanations” and thus a combination of methods is “more grist for the research mill.”<sup>46</sup> The use of one method only ever provides one insight into the questions and potentially the research is limited through its reliance only on interview data.

However, it also depends what the method is aimed at collecting. For several aspects of the research questions, interviews were the ideal choice. For example, the accounts of the participants particular aims and objectives in running the IP; and their views on the criminal justice system and the innocence movement more broadly. These issues are justifiably examinable through interviews because they are interpretivist questions, which rely on opinions. Furthermore, the data is used to report accounts of experiences and views, rather than attempting to make claims about objective truth. There is a risk that participants could gloss over certain issues, such as problems faced by the IP, if there were reputational risks involved for the project or the university; but this is difficult to avoid.

However, when it came to exploring how IPs investigate cases, interviews could only provide a limited insight. When discussing their approach, participants can only give a general account, which would be better illuminated with an examination of their investigation in the individual cases they work on. To better examine how IPs are investigating cases would require a triangulation of interview accounts with an analysis of casework documentation and/or participant observation of group meetings. This would have provided the most effective method of exploring how IPs approached their casework, as it would have enabled the participants’

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<sup>43</sup> J Berry ‘Validity and Reliability Issues in Interviewing Elites.’ (2002) 35(4) PS: Political Science and Politics 679 p.680

<sup>44</sup> U Flick, ‘Triangulation in Qualitative Research.’ in U Flick, E Von Kardoff and I Steinke, (eds.) *A Companion to Qualitative Research* (Sage Publications 2004) p.179-180

<sup>45</sup> Ibid. p.183

<sup>46</sup> M Patton ‘Enhancing the Quality and Credibility of Qualitative Analysis’. (1999) 34(5) *Health Services Research* 1189 p.1192



accounts to be put into context with examples from their actual casework documentation or discussions about cases. Originally when the research focus was specifically on examining how IPs construct factual innocence and truth-finding in their casework, it was intended to do a smaller, in-depth study of IPs which would have sought to triangulate interviews in this way. However, as the research focus changed to exploring the IP models more broadly, the main purpose of the research was to explore how participants described their casework and investigation aims. Therefore, the use of interviews was sufficient for this purpose.

Nevertheless, there is merit for future research to examine more closely how IPs (or other criminal appeal units) approach casework; this is especially so given the criticisms IPs have faced over their lack of casework success. This would require a broader integration of methods, such as that suggested above.

## **Conclusion**

Therefore, the research proceeded inductively and was an evolving process with an ongoing interaction between data analysis and the research questions to reflect the emerging themes in the data. This was essential in such an under-researched area. The research results must be understood as reporting a particular construction of the innocence movement in the UK; however this thesis has aimed to portray as closely as possible the participants' accounts and understandings of the innocence movement in the UK and their IPs' approach. It is recognised there are limitations to the research sample, which means that generalisations beyond those studied would need to be tentative; however, this sample is thought to reflect, not only the different types of IPs which existed in the UK, but to also contain a variation of participants who might be expected to have different experiences of running a project. There have been fundamental changes during the research process, which means that not all sampled projects and participants' accounts would remain unchanged following the INUK fold; however, the flipside of this is the uniqueness of this sample, which tracked the IP movement evolving during a critical time within the movement, which cannot be replicated.

## **Chapter 4**

### **Results Section 1: Constructing an innocence project ‘model’**

#### **Introduction**

This chapter seeks to determine the extent to which the empirical data supported the model of innocence projects (IPs) in the literature: this was explored through examining how the respondents accounted for the aims, objectives and functions of their IP. Therefore, this chapter will address the matters under the first research question. The literature suggested there was a fairly typical model of IPs. Central to this was a distinctive approach of IPs towards defining and investigating alleged miscarriages of justice: this was distinguishable from traditional approaches to understanding and responding to wrongful convictions within law. IPs were described as focusing on a “lay” construction of a wrongful conviction in terms of “factual innocence,” distinguishing this from the “legal” construction examining a convictions “safety.” This chapter will demonstrate that whilst the sampled IPs were expected to share the key characteristics of the IP model identified in the literature, this did not manifest in the data. Rather, the empirical data demonstrated there was considerable variation between the sampled IPs, with some identifying more with the traditional legal approach and understanding of wrongful conviction. Therefore, for heuristic purposes and to present an effective picture of the range of responses in the interviews, this chapter proposes two opposing normative models: the “Factual Innocence Model” and the “Formal Legalism Model.” The sampled IPs will be located on a spectrum between these two polarised models based on how the respondent IP leader accounted for their aims, objectives and functions. The characteristics of these models are discussed below. As ideal types, none of the sampled IPs share all the characteristics of either model; however some IPs subscribe more to one model than the other. Those IPs analysed as somewhere in between and which adopt aspects of both models have been termed “Mixed Models.” The analysis proceeds from the “Factual Innocence Model” end of the continuum, and will discuss the IP considered closest to this, before progressing towards the IP which is determined as closest to the “Formal Legalism Model.”

This chapter will thus explore based on the empirical data whether, in practice, we should analyse IPs as taking a distinctive approach to investigating miscarriages of justice. To aid this, their approach will be contrasted with the generically termed “Criminal Appeal Units” within the sample which were initially expected to be distinguishable in how they constructed their

aims, objectives and functions. This chapter will demonstrate that whilst the literature suggested IPs represented a distinct approach to investigating miscarriages of justice, the empirical data did not support this analysis. In concluding, this chapter will reflect on why this might be: this will involve a consideration of the tensions which were identified as underlying the IP model in the literature.

## **1. Characteristics of the models**

### **1.1 Factual Innocence Model**

As explained, the factual innocence model represents an ideal type. This model draws on Naughton's account of the IP model in the literature as head of INUK, but also adopts aspects of the wider literature on values associated with IP work. This model includes the following characteristics:

A focus on factual innocence claims, where the individual is claiming actual innocence for the crime they were convicted of: respondents may distinguish this focus from the legal construction of a miscarriage of justice pertaining to the safety of the conviction in law. Applying the theoretical framework of Social Systems theory, IPs subscribing to this model would not thus be using legal communications or coding in terms of law (legal/illegal) or the sub-code within criminal appeals (safe/unsafe): we would expect them to instead be focusing on "lay" communications surrounding their clients' guilt or innocence.<sup>1</sup>

Such an IP would identify with aspects of the "innocence lawyer"<sup>2</sup> approach: examining the potential innocence of their clients would be central to their investigation and a primary aim. In pursuit of this, they would examine all the available evidence which could support or refute their client's claim, whether formally admissible or not. They may identify their casework approach as a neutral, truth-finding inquiry. Consequently, they may distinguish their relationship to clients from that in legal practice (in pursuit of a clients' best interests) and adopt a position of neutrality; at least until they believed their client is potentially factually innocent.

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<sup>1</sup> This reference to distinguishing legal and lay communications is taken from Roberts and Weathered's explanation for the differences in IPs focus on "factual innocence" as opposed to legal safety (see S Roberts and L Weathered, 'Assisting the factually innocent: the contradictions and compatibility of innocence projects and the Criminal Cases Review Commission.' (2009) 29(1) Oxford Journal of Legal Studies 43)

<sup>2</sup> This is based on the account of Risinger and Risinger as discussed in the literature review: see p. and M Risinger and L Risinger 'The Emerging Role of Innocence Lawyer and the Need for Role- Differentiated Standards of Professional Conduct.' in S Cooper, (eds.) *Controversies in Innocence Cases in America* (Ashgate Publishing Ltd. 2014)

This type of IP would have a reform agenda as central to its aims. Reference to this being an ‘agenda’ is crucial to this model, and represents more than respondents simply being alive to reform issues. Under this model, respondents would identify a specific agenda which reflects the cause-orientation of IPs in pursuing their distinct aims. We might expect IPs in the UK to share a similar agenda to INUK, in focusing on the factually innocent: we might also expect respondents to also engage in discussions about the limitations of the criminal justice system.

IPs under this model would not prioritise IPs as simply tools for training future lawyers and teaching professional skills. They would emphasise the importance of educating students about miscarriages of justice, and other educational benefits would be seen as ancillary rather than paramount. They may instil cause-lawyering ethics into students in encouraging them to share in the IPs reform agenda and would encourage students to be passionate about the cause of the wrongly convicted. This could be distinguishable from a traditional formal legal education approach that focuses on preparing students for practice and teaches students to develop as value-neutral practitioners.

This type of IP would distinguish its role from other units looking at criminal appeals for at least some of these reasons.

### **1.2 Formal Legalism Model**

This model is the antithesis to the “Factual Innocence Model.” Here the reference to formal legalism is used to depict a concern with traditional lawyering values and a formal approach to legal practice. This draws on the criticisms of the approach and philosophy of IPs within the broader literature, and on the characteristics of certain IPs or criminal appeal units within the sample.

IPs under this model would disagree with the distinction between “factual” and “technical” innocence and would focus on the legal construction of a miscarriage of justice around safety. Participants under this model would use legal communications when describing their approach to casework: they would focus on legality/illegality or, in the context of criminal appeals, on the sub-code of safety/unsafety, rather than focusing on factual guilt or innocence.

Such an IP would describe their casework approach as examining the conviction’s safety and identifying any possible grounds of appeal: seeking to establish their clients’ potential culpability would not be a primary aim. They would subscribe to the traditional client-lawyer approach of pursuing their clients’ best interests, rather than understanding their role as a

neutral, truth-finding inquiry. Under this model, IPs would not identify with the “innocence lawyer” role, but with a traditional, value-neutral lawyer role.

This type of IP would not have a reform agenda as central to its aims or see itself as cause-oriented.

Their focus would be on the educational benefits of IPs for providing students with lawyering skills and preparing them for practice. They may recognise broader educational benefits of IPs, such as teaching students about problems with the criminal justice system, but they would not prioritise teaching students about miscarriages of justice and instilling this within them as a cause.

### **1.3 Mixed Model**

This category is for IPs identified as having adopted different characteristics from the "Factual Innocence Model" and the "Formal Legalism Model" but which did not particularly conform to either. In terms of systems theory, participants may use different systemic communications in different contexts: they may identify with Roberts and Weathered’s model of IPs which said they would apply the lay understanding of wrongful conviction in certain contexts, but use legal communications and the legal construction of a miscarriage of justice when participating in the legal system.

In this section, the discussion around aims, objectives and approaches of projects are only discussed to the extent that they are relevant to their classification under one of the models.

## **2. Factual Innocence Model**

The projects identified as closest to the “Factual Innocence Model,” are, respectively: Project3; Project7; Project9 and Project4 (when operating). None fully conform to this model, but those classified here identify with key elements of the model to a significant, but varying degree. As explained, the projects are discussed in their order on the spectrum, with Project3 being identified as closest to the “Factual Innocence Model,” followed by those gradually moving towards the “Mixed Model.”

### **Project3**<sup>3</sup>

Participant/c's project was classified as closest to this model because of his account of the IP's casework approach and how he defined and distinguished an IP.

Participant/c was the only participant who defined the "*primary mission*," of the project as "*to establish the factual innocence of our clients or otherwise.*" This was a fundamental characteristic of IPs in the literature. He explained: this "*requires us to form an opinion, based upon the investigations or the best investigations we can do, as to the guilt or innocence of our client,*" which means establishing as far as possible, that "*everything that we've been told is, or seems to be, the truth from our client.*" Thus, participant/c saw investigating the claim of innocence as central to their approach, which identifies with Naughton's casework model in the literature.<sup>4</sup> His focus on the investigation determining guilt/innocence identifies with the lay communications around wrongful conviction, rather than coding in terms of safety/unsafety. Furthermore, participant/c also indicated belief in innocence was significant in progressing the case: they would submit a CCRC application when, "*we've investigated thoroughly and we believe that there's grounds to perhaps establish factual innocence.*" When putting the case to the CCRC, participant/c said they would strongly argue on their clients' behalf, because "*we must have strong belief that he's factually innocent,*" and therefore "*the argument must be that the conviction should be overturned.*" This subscribes to aspects of Risinger and Risinger's "innocence lawyer" role incorporated within the "Factual Innocence Model," where they suggested innocence lawyers would "care deeply" about whether the client is innocent.<sup>5</sup> This also implies that even when communicating with legal institutions the IP will employ a lay construction of a wrongful conviction, arguing for the conviction to be quashed on grounds of potential "factual innocence," rather than constructing this in terms of legal safety.

Participant/c distinguished IPs for the characteristics under the "Factual Innocence Model." He said they ran a separate clinic alongside the IP, which used "*a different standard, because it's just essentially a criminal appeals part of the clinic, rather than an innocence case.*" He distinguished this, explaining: "*I think innocence should look for something quite specific. You want to demonstrate, what I would call, a sort of proper miscarriage of justice case, where someone has been convicted for something which they haven't done and that requires*

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<sup>3</sup> This project was based in a law school. It had been a member of INUK, but had recently left to operate independently.

<sup>4</sup> M Naughton, 'Can Lawyers put people before the Law?' (July 2010) Socialist Lawyer 31

<sup>5</sup> M Risinger and L Risinger (n.2) p.133 (footnote 9)

*additional pressures and filters which you don't have in criminal appeals.*" This again reflects the "innocence lawyer" approach of requiring belief in innocence to be established before accepting the case.<sup>6</sup> He suggested with a general criminal appeal unit: *"you're looking for weaknesses in the other side's arguments without necessarily thinking to see whether the person you're working with should be a person that's free."* He adopted the distinction in the literature between factual innocence and procedural issues pertaining to legal safety: *"these people can have done, may have done it, but there may be some police misconduct which sets it aside or some technicality or that sort of thing, and I think that is different."* Therefore, participant/c distinguishes IPs for their distinctive approach to responding to wrongful conviction, and he draws a distinction between IPs and other criminal appeal clinics as was seen in the literature.<sup>7</sup> He clearly emphasises how IPs employ a lay construction of wrongful conviction, which distinguishes them from the understanding in the system of law. How participant/c distinguished IPs was also reflected in how he saw their educational aims. He explained with a criminal appeal type clinic *"you're really from an education point of view teaching the students how criminal appeals work, and you're looking to get a person off, and that can be on technicalities, that can be on factual innocence, or whatever, but the standards that you're playing with aren't the same."* This reflects an approach to formal legal education insofar as it suggests the clinic is about preparing the students for practice as value-neutral practitioners. However, he said with an IP: *"with factual innocence, you've got an idea that this is someone who has been wrongly treated and punished for something he hasn't done...and I think that is different."* Thus, participant/c appears to recognise IPs as having distinctive educational aims, which perhaps instil a moral and ethical cause-oriented approach within students: this goes beyond educating them to think like criminal defence practitioners.

Participant/c also identified with aspects of INUK's reform agenda. He explained: *"I was reasonably hopeful, post CCRC that we would have a much easier way of correcting them [miscarriages of justice], which hasn't really transpired from my experience."* However, after seeing their approach in some of the project's cases, he reflected his *"big concern"* was *"that they just seem to be doing desktop investigations...and of course that's not going to help."* He also questioned their approach to case referral: *"they're there to correct injustices but they put*

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<sup>6</sup> Such as waiving their attorney client privilege. (M Risinger and L Risinger (n.2) p.133)

<sup>7</sup> Naughton distinguished IPs from the criminal appeals division of the Student Law Office at Northumbria University. See p.20 in literature review; or M Naughton, 'Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education.' (2006) 3 Web JCLI <http://www.innocencenetwork.org.uk/wp-content/uploads/2014/09/wrongful-convictions-innocence-project.pdf>

*so much higher burden on themselves, a higher burden than they really need to based on the law, before they will push a case to the Court of Appeal.”* He explained that Project3 had had limited success in casework, and reflected: *“some of the things we’d need to do first, is maybe change some of the legal rules.”* He said they contributed to the Nunn case over post-conviction disclosure,<sup>8</sup> and said they were planning to do an Amicus Brief. Therefore, participant/c did suggest Project3 was engaged with reform and identified with aspects of INUK’s reform agenda: although he did not suggest they had a reform agenda which was central to their aims.

Project3 was classified as closest to the “Factual Innocence Model” because participant/c most strongly defined and distinguished the IP for its casework approach and focus on factual innocence: in doing so, it was evident he was not coding in terms of legality/illegality and safety/unsafety, but utilising a lay construction of wrongful conviction in emphasising the focus on guilt/innocence. He also engaged with the INUK reform agenda to a certain extent, although this was not central to defining Project3 under this model.

### **Project7<sup>9</sup>**

Project7 was co-directed by participant/g and participant/h; although participant/g now primarily oversees running the IP. This project subscribed to the “Factual Innocence Model” primarily through participant/g’s educational aims and both directors strong reform agenda.

Participant/g got involved in the IP through his background in miscarriage of justice campaigning. He was employed solely to oversee the IP and has no legal academic or practice background. His central focus was to instil the miscarriage of justice cause within students, rather than on clinical legal educational skills related to employability. Participant/g described his aims as *“spreading the word”* and inciting, *“publicity, or concern, or education about this rather hidden, dubious subject.”* He wanted to develop within students *“a passion for, or a sense of awareness,”* about miscarriages of justice, with the hope of *“changing people’s perspectives.”* Participant/g explained that Project7 was linked with a wrongful conviction support group, which he thought important in enabling students to interact with *“people who are affected by this problem.”* He described the project’s *“biggest success”* is that several students had become very interested in miscarriages of justice. He explained that students *“didn’t realise these sort of problems existed,”* which he thought was *“worrying for a law*

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<sup>8</sup>A number of INUK projects submitted evidence for this.

<sup>9</sup> This project was based in a law school: it had been an INUK member but had left the network to operate independently.



*department.*” Therefore, he saw the IP as “*a very important aspect of what happens here.*” Participant/h who co-directed the project identified more traditional clinical legal education aims: she established the project as part of her role as pro bono director, which dictated her priorities, “*I’m employed by the University to educate students, so that has to be my primary aim.*” However, she valued the IPs social justice angle and thought it was a “*fantastic cause.*” Therefore, particularly in relation to participant/g there did appear to be a cause-orientation to the project beyond its traditional clinical legal education aims: this will be further evidenced when discussing reform.

Participant/h had run the project initially before participant/g was employed to oversee it: her account of their approach to casework approach in these earlier stages subscribed to the “Factual Innocence Model.” Participant/h explained they had closed one case, because “*we were convinced...that the man had psychopathic tendencies, because he was not ever saying I’m innocent, I was never there, he was always throwing up very technical arguments and almost playing mind games.*” This reference to “technical arguments” reflects the discussion in the IP literature concerning a legal construction of wrongful conviction around “legal and procedural technicalities.” She explained: “*So none of the students felt comfortable from day one that he was innocent... so we just decided we couldn’t take it any further, because the students weren’t committed to it and neither was I.*” This reflects the “innocence lawyer” role incorporated in the “Factual Innocence Model,” which saw a belief in the clients’ innocence as central to their approach. However, participant/h reflected that this was “*naïve.*” She said originally, “*I thought you could look at everything and speak to the client, and you’d have a gut feeling they were innocent*” but she explained the Simon Hall confession changed her views.<sup>10</sup> She questions: “*how do you know someone’s innocent? That’s when the problems arise.*” Participant/h now expressed scepticism over the IP concept: perhaps “*the word innocence, causes more problems than it actually resolves...because it is impossible to prove innocence in 99.9% of cases.*” Therefore, her account suggests a gravitation away from factual innocence as a central focus, and suggests she recognises the tensions surrounding a lay construction of wrongful conviction.

Participant/h also described how she thought IPs would approach “*potential wrongful convictions in a different way.*” She explained her understanding was, IPs “*wouldn’t be*

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<sup>10</sup> This was briefly discussed in the literature review under potential challenges to IPs: Simon Hall was a client of Bristol University innocence project, with wide public support and a campaign for his innocence, but he confessed to crime in question in 2013

*constrained by what the law says; because the law says if there is no real possibility that it will be overturned, then it isn't going to go any further.*" She continues: *"so I thought that innocence projects would look more widely, they would look for new evidence but as well as that they'd look at the existing evidence, and the existing arguments."* This identifies with the broader casework approach of the "Factual Innocence Model" by examining the innocence claim in light of all the evidence. However, she recognised the need to meet the statutory requirements: *"you're not going to get past the CCRC if you're coming up with a beautiful argument of how the jury got it wrong, because the evidence was there all along, it's not going to cut any ice."* She explained that their CCRC applications would rehearse the old defence arguments, *"for the sake of completeness, a duty to the client to do so, and for the sake of common sense, because if those arguments were valid at the time, they're still going to be valid now."* However, alongside this, she explained *"every single application had a new angle to it, even if it wasn't new evidence, it was presented as a new line of argument, which is something that the CCRC will pick up."* Therefore, participant/h's account implies there was a broader commitment to the client's potential factual innocence: the investigation would not be confined to the formally admissible evidence (although they did recognise the need to satisfy grounds within the statutory tests). This reflects the casework approach of IPs in the literature as incorporated into the "Factual Innocence Model."

Participant/g now oversees the project's casework. The project had sourced its own cases since leaving INUK, and participant/g explained: *"the problem is getting cases where, firstly you can have a reasonable assumption that the person is actually innocent, which you know, isn't always the case, and secondly, that there is actually something that you can reasonably do on it."* He would consider factors, such as *"why is this person still pursuing this, in this case? They've been released anyway, there's nothing to be gained if they are guilty by pursuing it."* This is similar to considerations under Naughton's typology of innocence claims and suggests a concern for potential factual innocence. However, participant/g explained the project would generally look at a case, even where the prosecution evidence looks overwhelming at face value, because this has proven false in some cases. Participant/g concluded that when assessing case eligibility, *"the main thing is not so much the evidence of guilt or innocence, it is more whether there is any scope to investigate anything with the resources that we've got."* Therefore, the main factor in case selection was possible scope for investigation; and whilst potential factual innocence appeared to be a factor for consideration, it was not determinative of the project accepting cases for investigation.

Participant/g did subscribe to aspects of the “Factual Innocence Model” in describing their approach to case investigation. He said: *“we do look for evidence of innocence, we look in practice at the case as a whole.”* Thus student investigations would not be confined to only looking at “fresh evidence” in the legal sense, but students would be encouraged to examine all the evidence, such as witness inconsistencies. He thought this important for *“developing the whole picture”* but also as *“important for the clients, even if they’re not going to get an appeal out of it, for somebody to actually understand what has gone on in the background, or hasn’t somehow come through at trial or got through to the jury.”* Participant/g did not suggest belief in factual innocence was a contributing factor to putting cases forward to the CCRC, but he said how the application was approached could depend on: *“what your views about it are...whether you’ve decided in your own mind actually that he’s innocent, or whether you just don’t know.”* For example, he said: in some applications they would flag up areas for concern and ask the CCRC to investigate; but in one case, where they were convinced of actual innocence, *“we’ve just argued very, very strongly...that this person is innocent and you have an ethical duty to do something about it.”* This emphasis on ethics suggests the IP does have a broader concern for factual innocence where this manifests. Therefore, Project7 identified with aspects of the “Factual Innocence Model” casework approach, but to a lesser extent than Project3: potential factual innocence appeared to be a consideration, but it was not determinative of IP involvement.

Project7 most strongly identified with the reform agenda of IPs in the literature which aligned it closely with the “Factual Innocence Model.” Participant/g said, *“I think the criminal justice system needs completely and utterly dismantling and reassembling.”* He disagreed with the restrictions on rehearing trial evidence: *“it is all very well to say it was available, it may very well have been subject to cross-examination, but that doesn’t mean that the right conclusion has been reached about it.”* Participant/h also disagreed with the restrictive approach to fresh evidence: *“because usually if there’s a problem, it’s there anyway just to be found, whether or not it’s new pieces of information are admissible or not.”* She continues: *“I think if the rules of the game are wrong they should be changed. And I think that they are wrong...it’s very weighted in favour of the system hugely, against an individual.”* In relation to the CCRC, participant/g said they had accused their IP of assuming a person is innocent, but he reflected: they *“work from the assumption that the person is guilty. It’s only if you can absolutely firm something up legally, then they, will really be interested in it.”* Participant/h raised concerns that the CCRC were unwilling to challenge the CACD: *“I think they could and should be challenging that if*

*they want to pass the criticism back to the Court of Appeal.*” She also criticised the CCRC for dismissing problems with police investigations and said: *“we are going to force them to address it.”* Therefore, both participants strongly identified with aspects of the innocence movement reform agenda in the UK literature.

Participant/h said that campaigning became part of the IP role, because: *“you’re fighting the system as well. You’ve actually got to become a campaigner, rather than just academically coming up with the evidence through these cases, you’re not going to get anywhere, it’s a complete waste of time, without actually campaigning.”* As a teacher and solicitor participant/h explained she was originally uncomfortable with this role, *“I didn’t think it was my job but it became part and parcel of what we had to do.”* Participant/h said she had hoped that IPs could persuade the public *“that the system is wrong, by showing people that this...is how narrow we have to address our arguments to go to play the game; the game really is wrong, the rules have got to be changed, because we’ve got all this other evidence.”* Participant/g also thought the IP was distinctive for its *“campaigning element”* through which they write articles and participate in consultations: he reflects, *“it’s not fantastic campaigning but there is that element of getting the message out there.”* Participant/g explained: *“I would like to be part of a movement which creates a body of opinion which can actually create change in the longer run.”* He explained how working in the *“miscarriages of justice world”* had demonstrated that *“ordinary people”* who may not have a strong academic background, can: *“do an incredible job, once they get in this position, and fight a cause.”* He reflected that IPs were *“more part of that, than part of the legal world.”* Therefore, participant/g explicitly suggests IPs operate outside of the legal world and are more closely linked with the miscarriage of justice world. Thus, Project7 did have a reform agenda as central to its aims and was cause oriented, strongly identifying it with the *“Factual Innocence Model.”*

Therefore, Project7 clearly subscribes to the *“Factual Innocence Model”* in its commitment to reform and cause-orientation, which fed into the educational aims also. With regard to casework, participant/g and participant/h both engaged with the *“lay”* definition of wrongful conviction. However, there was an indication that they were gravitating away from a factual innocence focus, and that whilst potential innocence remains a consideration, it is not the dominant issue in their strategies to selecting, investigating and referring cases for the CCRC.

## **Project9<sup>11</sup>**

This project was co-directed by participant/k and participant/l: it identified with certain aspects of the “Factual Innocence Model” but to a lesser extent than the previous two IPs.

Participant/l was in a similar role to participant/h, as her role involved developing pro bono schemes “*to provide students with pro bono experience.*” She explained she had always been involved with miscarriages of justice, and: “*mainly I wanted to find students with the same passion as I had as an undergraduate...and to get people interested in criminal law and criminal justice as well.*” Thus, she wanted to instil the miscarriage of justice cause within students. Participant/l said the IP differed from other clinical schemes for law students where they have “*an agenda at the start that they want to build on these skills, they want to have interviewing skills, they want to do all these different things.*” Whereas, “*the innocence students they tend to set off with a “I want to help overturn somebody’s conviction, I don’t think it’s right and I want to be involved in this,” rather than I’m going in this to be educated about X, Y and Z, so the skills they pick up along the way.*” Thus, participant/l suggested that skills-training was ancillary to IP students rather than their primary driver for participating. Therefore, aspects of participant/l’s account<sup>12</sup> identified to a limited extent with the “Factual Innocence Model” but it did not amount to the cause-oriented approach of participant/g discussed above.

The casework approach at Project9 identified with aspects of the “Factual Innocence Model.” Having left INUK, participant/k said they would continue to focus on factual innocence claims: “*we only want to take on cases of people saying I’m completely innocent.*” He explained this to mean they would not take on cases “*where someone said it wasn’t murder it was manslaughter, I was convicted of the wrong crime, because you think well there are people who are totally innocent, we’d rather be helping them.*” Thus, he distinguished the factual innocence focus from claims related to sentencing or defences, rather than for excluding abuse of process issues. Thus, participant/k identifies with a “lay” construction of wrongful conviction in terms of looking at claims of innocence, but this does not extend to the exclusion of communications related to legal/illegal in terms of legal and procedural technicalities. He said they would “*expect to be looking for fresh evidence,*” but they would use grounds of abuse of process or other legal grounds where they arise because “*it would be irresponsible not to.*”

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<sup>11</sup> This project was based in a law school: it had been an INUK member, but had also left to operate independently.

<sup>12</sup> Participant/k was not discussed here because he said the educational aspects were in participant/l’s remit rather than his: he was focused on the casework.

Furthermore, participant/l thought they would construe factual innocence more broadly than under INUK: *“because just taking on joint enterprise cases for a start.”* She said: *“now we’re not in the straitjacket of the actual factual innocence, we’re just going to have to take every case on its merits and see where we are.”* There was thus an intention to be less restrictive in how they defined this standard and a recognition of some of the tensions which perhaps existed in adopting a strict “lay” construction as was employed by INUK. Participant/k’s account of Project9’s approach to case investigation identified with aspects of the “Factual Innocence Model.” He described the project’s main aim as: *“to investigate the claims of innocence to people you call clients.”* Thus placing examination of the innocence claim as central to casework investigation, rather than legal appeal grounds. He also suggested the IP had a different relationship to a client than that of a legal practitioner: *“because we are investigating their claim with the possibility we may find supporting evidence for their claim, we may find supporting evidence for their guilt.”* This appears to suggest a more neutral stance to investigation than the partisan approach in legal practice.

Project9 did not have a reform agenda as central to their aims. Participant/k explained: *“I think I’m quite deeply pessimistic about the possibilities of reforming the system, I don’t concern myself with it...if other people want to do that I am happy to support them but I’m interested in the cases.”* Participant/l emphasised that where IPs did engage in reform it needed to be kept separate from their casework: *“you can also have the campaigning bit to you as well if you want to do that, and the consultation thing, but you have to work within the law as it stands.”* She said their students would engage with reform through contributing to consultations. However whilst Project9 was perhaps alive to reform issues, it did not have a strong cause-oriented reform agenda in the same way as Project7.

In relation to whether Project9 distinguished being an IP, participant/k reflected: *“having innocence in the title would hopefully attract the right kind of attention both from potential clients and...the media and so on, so they know we’re about helping people with their claims of innocence.”* However, he said: *“I suppose if a criminal appeals unit adopts the same criteria then it’s the same project really.”* Therefore, participant/k did not identify with the distinctive approach of IPs under the “Factual Innocence Model,” beyond thinking it important to attract claims of innocence was important.

Therefore, whilst certain aspects of Project9’s approach identified with the “Factual Innocence Model,” this was to a lesser extent than with Project7 and Project3.

#### **Project4**<sup>13</sup>

Participant/d had run Project4 in a journalism school. He left the role to train as a barrister, following which the IP was closed. Thus, participant/d was in a unique position as he was recalling how the IP had operated several years earlier and reflecting on this now as a criminal barrister. His account of Project4's approach when operational aligned it with the "Factual Innocence Model," but his current views identified more closely with the "Formal Legalism Model."

Participant/d said apart from, *"bringing the real world into academia,"* the IP *"wasn't educational in the slightest,"* it was purely a *"pro bono law clinic type, help me do this."* Thus, participant/d was primarily interested in the casework focus of the project. Participant/d explained the IP appealed to him because, *"anything that involves the option to fight the system strikes me as a good thing...and so it appealed to my sense of the disenfranchised, fighting against those in power."* Thus, he identified with the cause-orientated aspect of IPs under the "Factual Innocence Model."

Participant/d suggested factual innocence was partly significant to their casework approach. He explained: *"I think the students, perhaps more than me, decided that they were definitely innocent, right from the start."* Whereas, he reflected: *"I judged it on the evidence as I found it...but I wanted to believe they were innocent I think, whereas now I wouldn't."* This reflects how his views have graduated away from an innocence focused approach since being in legal practice. Participant/d explained that the project had closed a case because the students believed the client was likely guilty. This suggests belief in potential factual innocence was important, aligning Project4 with the "Factual Innocence Model." He discussed how the client had demanded an explanation for why the case was dropped: *"I just told him to his face that we didn't think he was innocent."* However he said: *"I think I would do that differently now as well! I think I might have just said 'the evidential basis on what your appeal stands is somewhat flawed.'"* This directly juxtaposes the lay construction of wrongful conviction around "innocence" with legal communications which would focus on the "evidential basis" for challenging the appeal. This demonstrates a graduation in approach from being in legal practice and how this impacts on the selection of social communication. In reflecting on their casework approach participant/d said: *"I don't know if we'd even thought about what the appeal grounds were."* He explained in one case there were *"causation issues about the brain injuries and so*

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<sup>13</sup> This project was based in a journalism school: it was an INUK member until it closed down.

*we just thought, well let's just look at all the brain evidence, and head injury evidence and see what it was and whether it was contradictory.*" Participant/d explained how Naughton would say: *"innocence is a double meaning, in that it's innocence eyes looking at it afresh."* He continued: *"to some extent he's right, if you are removed from it, and you don't have any baggage with it, and you're not case hardened, you know you're not cynical."* Therefore, this approach reflects the broader investigatory approach of IPs to focusing on investigating the claim of innocence, rather than concentrating on legal appeal grounds, aligning it with the "Factual Innocence Model."

Participant/d said he would now run the IP completely differently as a trained barrister: *"I'd have worker bees...who would sit in a room and go through the grunt work. I'd have analytical bees who are doing more legal work. And then I would have a team lawyer."* He explained: *"I don't think you can run an innocence project if you've never stepped foot inside a courtroom, I think you've got to be a practising barrister or solicitor advocate who understands how cases are put together."* This implies he no longer agrees with IPs being run by academics, but thinks they ought to be practitioner run, by barristers or solicitor advocates. Participant/d also now disagrees with the factual innocence focus commenting: *"as a barrister there's no such thing as technical or factual, you're either found innocent or you're found guilty... as a lawyer it's a completely bizarre concept, as a project, I don't agree with it."* Participant/d illustrates how the legal constructions of guilt and innocence do not distinguish between "factual" issues and "technical" points of law because each are equally valid determinations of your legal status. Thus, participant/d is now opposed to the factual innocence distinction employed by IPs. This account suggests a casework approach emulating legal practice and thus closer to the "Formal Legalism Model."

Therefore, participant/d's description of Project4 whilst operational did identify with aspects of the "Factual Innocence Model." However, his current views on IPs would place him at the alternative end of the spectrum, closer to the "Formal Legalism Model."

### **3. Mixed Model**

The projects identified as representing a "Mixed Model" are, according to their position on the spectrum: Project2; Project5; Project1; Project12; Project8 and Project10.



## **Project2**<sup>14</sup>

Participant/b ran Project2 in a journalism school. This was identified as a “Mixed Model” because participant/b opposed some characteristics of the “Factual Innocence Model,” and where Project2 had subscribed to its characteristics, it was gravitating away from this approach.

Participant/b’s account of the project’s casework aims prioritised a truth-finding approach, he explained: *“I just want to find out what actually happened. Not the claims and the counter-claims, and the hearsay and the possibilities, and the theories and meh. I just want to find out, what are the facts? What are the absolute concrete facts, and what actually happened in this case?”* He thought journalists perhaps took a different approach to casework than lawyers: *“Law students and solicitors and barristers, they will look at the evidence and then they will see how the evidence can be pushed through the system...it strikes me that they very rarely look up and think is this person innocent? Did they actually do it? You know, they entirely avoid these sort of meta-questions.”* He thought the latter was more central to a journalist. Thus, participant/b identified with the “lay” or “journalism” construction of wrongful conviction as innocence, but recognised lawyers as focusing on evidential points and legal constructions. This focus on truth-finding and potential guilt or innocence did identify with the casework approach of the “Factual Innocence Model.” However, participant/b said his approach had evolved: *“the more I’m in this game, the more I think that’s a naïve point of view”* because of the impossibility of establishing truth. He said the longer one was involved with IPs: *“the more you move away from that naïve point of view of ‘I want to know what happened,’ to the legal point of view, the solicitor’s, the QC’s point of view of ‘let’s just try and process the detail, let’s find interesting pieces of detail and see if the system will eat them.’”* Thus, participant/b described a graduation towards concentrating on legal grounds: *“when you get more experienced...you’ll be looking at the files...through the eyes almost of the CCRC.”* Thus, participant/b suggested Project2 was evolving away from the truth-finding focus and the “Factual Innocence Model” to a more legally focused approach.

Participant/b strongly emphasised that IPs should be independent and neutral in their role, which was a characteristic of the “Factual Innocence Model.” He explained, when students found information damaging to the client’s defence, he would say: *“that’s good, because if it’s true, and we can test it and it is an actual fact, then we’re, maybe a little bit closer to*

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<sup>14</sup> This project was based in a journalism school: it had been an INUK member but had left to operate independently.

*knowing what actually happened.*” Thus, participant/b saw Project2 as in a neutral investigatory role, rather than adopting the partisan, lawyer-client role. Participant/b reflected: *“I don’t think we should be called innocence projects anyway, I think it’s a horrible name.”* He thought it had negative connotations: *“I just don’t think it’s a useful phrase. It’s not a neutral phrase, I think we need to be more neutral.”* He suggested a preference for the name *“Justice Project.”* Therefore, whilst participant/b identified with the neutral inquiry model of IPs under the “Factual Innocence Model,” his emphasis on neutrality distinguished him from the “innocence advocate” approach under this model: this suggested Project2 was perhaps best understood as a “Mixed Model.”

Furthermore, participant/b disagreed with IPs taking a cause orientated approach. He reflected that some people identified IPs as a *“reforming force in the system,”* in *“forcing the criminal justice system to improve, and the Court of Appeal to improve its dealings with miscarriages of justice.”* However, he emphasised: *“I don’t think we should be campaigners, because we’d lose our credibility”* He said, as academics, *“we should analyse and give facts which will influence politicians, influence the justice select committee for example”* or provide evidence for regular reviews of the CCRC. He elaborated: *“But I don’t think this sort of campaigning and this sort of shrillness that INUK sometimes approaches the situation, I don’t think that’s particularly useful.”*<sup>15</sup> Thus, participant/b thought IPs could contribute academically to reform, but disagreed with campaigning and INUK’s approach. Participant/b also did not agree with INUK’s reform agenda. He explained: *“my view on the CCRC is entirely changed from the beginning to the end.”* He said when he started, *“I was influenced in my view of the CCRC by what was the official approach of INUK, which was very, very negative to the CCRC, very, very derogatory, at times also...personal attacks on the individuals, and my view was definitely coloured by that.”* He said INUK suggested IPs *“had to do all the investigations and really give the evidence to the CCRC and effectively they would just rubber stamp it...because you couldn’t trust the CCRC to do anything.”* He continued: *“There was this kind of sneering attitude of they only do desktop reviews and all this kind of stuff, terrible, terrible people.”* However, his views had changed after reading more and speaking to more people: *“it’s not perfect, but the image that was painted for me at the beginning was wrong.”* Therefore, participant/b disagreed with both INUK’s reform agenda and approach.

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<sup>15</sup> This is of interest, because, as discussed, Naughton did not intend for INUK to be seen as a campaigning organisation. In the literature review, it was suggested that Naughton also intended to approach reform through academic channels. However, participant/b had a different perception of its approach.

Project2 was identified as a “Mixed Model” because, although it identified with aspects of the “Factual Innocence Model,” with a truth-finding focus and a strong emphasis on neutrality, he was beginning to take a more legally focused approach. This illustrated his recognition of the difficulties in ascertaining “factual innocence” and how this is in tension with the approach in the legal system. Furthermore, participant/2 was also opposed to some key aspects of the “Factual Innocence Model:” he did not think IPs should be cause-orientated, but instead should be impartial in their approach. An important point to note is that Project2 had recently left INUK, which again suggested he was evolving away from the INUK model for IPs.

### **Project5<sup>16</sup>**

This project was classified as possessing some characteristics of the “Factual Innocence Model,” but in a diluted way, that respected a more formal, legal approach: thus it was categorised as a “Mixed Model.”

Project5 was the only sampled project to never join INUK. Participant/e established the IP because she wanted to encourage students *“to feel passionate about [miscarriages of justice]”* and to help in *“persuading future lawyers to be a bit more sceptical and to work harder.”* She did not think the law degree focused enough on justice issues and *“whether or not we are actually convicting the correct people,”* but *“just what is the law.”* Therefore, participant/e aimed to instil within students a concern for miscarriages of justice, alongside the broader educational aims of training future lawyers and providing context to the law: thus the educational aims did not particularly align it with either model, but adopted aspects of both.

Participant/e said they only accepted claims of factual innocence: *“quite clearly them claiming that they were innocent, as opposed to ‘I did it, but’...we used to have a lot of ‘I did it, but’...they were mainly rejected straight away.”* Therefore, their case screening excluded claims related to partial defences or sentencing issues, but participant/e did not suggest they excluded claims related to due process. Furthermore, participant/e said they would not distinguish between factual issues and those related to legal or procedural grounds in casework: *“It didn’t really matter, I mean obviously factual would be good, but we would go for legal...you couldn’t really divide it.”* In some cases they look for evidence that could exonerate their client, for example: *“the CCTV that shows him at this time somewhere else,”* but they would also examine evidential admissibility and other points of law. Participant/e explained

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<sup>16</sup> This project was based in a law school: it had never joined INUK, but was a member of the international Innocence Network.

that: *"I was always conscious that I didn't want the CCRC to think that we were idiots, and you don't want to get people's hopes up, if someone did do it or if someone's not going to get through the CCRC then why pretend that they are?"* Thus, Project5 operated with the CCRC's statutory requirements and the appeal grounds in mind. Project5 was termed a "Mixed Model" in casework, as although it selected claims of factual innocence, participant/e did not particularly subscribe to the distinctive investigation approach of IPs under the "Factual Innocence Model," which prioritised the interrogation of the factual innocence claim over concentrating on appeal grounds.

Furthermore, participant/e did not particularly distinguish IPs from other clinics looking at criminal appeals. She suggested the difference was perhaps that a clinic may be *"assessed"* or *"compulsory,"* but *"none of that applied to the innocence project...so it just depends on what the clinic is like and what the innocence project is like."* Thus she did not distinguish IPs for the characteristics under the "Factual Innocence Model."

Participant/e made no reference to Project5 as having a reform agenda.

Therefore, Project5 was considered a "Mixed Model" because it resonated with aspects of both models, but did not identify significantly with either.

### **Project1<sup>17</sup>**

Project1 was classified as a "Mixed Model" because participant/a identified with aspects of the "Factual Innocence Model" around education and reform; however Project1's casework approach appeared closer to the "Formal Legalism Model."

Participant/a identified with broader educational aims around miscarriages of justice. He thought students should appreciate the significance of cases such as the Guildford Four and Birmingham Six, which *"really shook the legal system to its foundation."* He thought the IP was *"an excellent opportunity,"* for students to see how cases operate, *"but also to get a clear indication of the deficiencies in the justice process."* Furthermore, he thought the IP was important in *"educating the lawyers of the future,"* by showing that *"mistakes can happen, and that how lawyers behave within that is absolutely vital."* He explained: *"unless people understand that justice is a difficult issue before they go out into the world of lawyering, they're not, I don't think, going to make very good lawyers, either ethically or pragmatically in terms of getting results for their clients."* Thus, participant/b perhaps identified with the "Factual

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<sup>17</sup> This project was based in a law school: it was an INUK member until its fold.

Innocence Model” in wanting to educate students about miscarriages of justice, but his aims were fairly typical of clinical legal education.

Despite Project1 being an INUK member until its fold, participant/a did not agree with the factual innocence distinction. He accepted the project would *“never take a case where somebody said you know what ‘I did it but what I want to try and do is...’”* Thus, he accepted the merit of focusing on claims of innocence rather than those related to partial defences or sentencing. However, he questioned how to define the factual innocence standard, observing: *“it’s often very difficult to distinguish between what you mean by innocence and what you mean by technically not guilty, because in law we don’t have a concept of innocence, we just have a guilty or not guilty.”* Thus participant/1 questioned the viability of adopting the lay construction of a miscarriage of justice within the social system of law. He discussed a case example where the client admitted locking someone in a room who subsequently died after falling from the window: the issue was whether they jumped or were forced. He reflected: *“If you lock someone in a room and don’t let them go, you’re guilty of an offence. But you’re not guilty of an offence of murder, unless of course you lock them in a room and then try and force them out the window. So it raises all sorts of issues on that.”* Thus, participant/a was unsure the distinction was valid.

In relation to casework, participant/a thought the IP’s function was to reach a resolution: *“I think that’s why people come, because they still feel that they’re a victim of an injustice”* or *“they don’t feel that the truth has been told,”* or *“that justice has been done.”* He considers: *“it’s our job to try and make sure that that actually happens, whether or not it results in an acquittal, or simply a referral back.”* He describes their casework aim as *“ensuring justice, the system has been right the way through its process and the issue has been resolved.”* His emphasis on ensuring the case had been through the system’s processes, places a trust in legal remedies which suggests he perhaps identifies more with the “Formal Legalism Model.” Participant/a also expressed discomfort with the IP name: *“I sometimes refer to it as a miscarriage of justice project and I’m more comfortable with that term...because an innocence project is making claims about the people you’re representing which are a little bit phony really.”* Thus, he preferred a name which reflected a broader interpretation of their role than a focus on factual innocence. Therefore, participant/a’s account appeared to align Project1 more with the “Formal Legalism Model” than the “Factual Innocence Model” in respect of casework.

Participant/a did think IPs could have an important role in reform, however Project1 did not seem to have a strong reform agenda. He discussed Naughton's approach with INUK: *"he's done it in quite an evangelical way I think, which has not always engaged the other side easily, but it has engaged the other side, it has raised the debate and it has put it into the public domain, and can we say, is this working properly?"* He considered that IPs being based in a university could academically contribute to reform: *"you've also got a research interest, and research in its broadest sense, writing about the system, critiquing the system."* He explained how Project1 had provided evidence to JUSTICE based on one of their cases, and commented that the *"role of innocence projects in sweeping up material which can then be used for research later on I think is potentially very positive."* Furthermore, he also thought lawyers should lobby for causes, and explained: *"a lot of lawyers actually work broadly for their clients on a whole range of issues and engage with the government on issues as well... so why shouldn't criminal lawyers be lobbying on miscarriages of justice issues, I don't think they do enough frankly."* Thus, participant/a was not opposed to IPs campaigning or having a cause-orientated angle, which was a characteristic of the "Factual Innocence Model." However there was no evidence that Project1 had significantly engaged with reform, or that it had a strong reform agenda.

Project6 was analysed as subscribing to the "Mixed Model" because, although he identified with aspects of the "Factual Innocence Model" in relation to education and reform, this was to a limited extent; also, his casework aims aligned more closely with the "Formal Legalism Model."

### **Project12<sup>18</sup>**

Participant/o co-directed Project12 with another individual. She was appointed after another staff member left, but had limited knowledge about the criminal justice system. She was not actively involved in casework, which was overseen by the co-director; thus she was limited with what she could discuss about the IP's approach. This made it difficult to ascertain Project12's place on the spectrum, however her account suggested it was perhaps closer to the "Formal Legalism Model."

Factual innocence did not appear central to the casework aims of Project12 as under the "Factual Innocence Model." When asked whether they applied the factual innocence distinction to their casework, participant/o commented: *"I haven't heard that, I mean I've read*

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<sup>18</sup> This project was based in a law school: it was an INUK member up until it folded.

*that in the innocence literature, and I think that's one of the things that my colleague explained to the students about how innocence assesses the cases, but I think in terms of the case we had I didn't hear it coming up in practice."* Furthermore, participant/o said when the new co-director joined, who was a former criminal practitioner, he felt the previous approach had been *"too academic"* and needed to be more practice focused. Participant/o said under the previous directorship, *"the students were basically researching stuff but in a way, even to me it seemed like they were doing things which just seemed a bit on the academic side and I wasn't sure how it was going to push things through."* Therefore, participant/o appeared to suggest Project12 had graduated towards a more practical, legal approach to casework, from a previously *"academic"* approach. This would likely make it closer to the *"Formal Legalism Model"* within casework, however, it is only possible to speculate from participant/o's account.

Participant/o said could not comment on whether she agreed with the reform agenda of IPs. However, she did suggest Project12 had thought about engaging with reform. She explained they contemplated having a *"larger group that did stuff on kind of general, kind of campaigning issues or something like that."* However, this was never established. Therefore, reform was clearly not a central focus of Project12 as under the *"Factual Innocence Model."*

Project12 was categorised as a *"Mixed Model"* because of the potential reform interest, but participant/o's account suggested the new co-director was taking a casework approach that was closer to the *"Formal Legalism Model"* with a practice oriented focus. However, it is difficult to properly analyse where Project12 may be on the continuum due to participant/o's limited role in casework.

### **Project8<sup>19</sup>**

Participant/i used to run Project8, but it was taken over by participant/j after she left. Participant/i was driven by the clinical, legal education benefits when setting up the IP, she said: *"I wanted to set up a module rather than I want to go and save the world."* She thought it could teach students *"about the criminal justice system, how to work, how to run a case, all the legal skills such as researching, interviewing, negotiation, communication skills, writing skills."* Thus she valued its role in preparing students for practise. Alongside this, she valued the IP for teaching students about the shortcomings of the criminal justice system: *"what the pitfalls are...and I suppose to promote the message as well that there are some unheard victims*

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<sup>19</sup> This project was based in a law school: it was an INUK member, but at the time of the interview it had recently left the network to operate independently.

*out there, that there are miscarriages of justice that occur and people need to be aware of that.*” Participant/i thus identified with aspects of both models, but was perhaps closer to the “Formal Legalism Model” in being driven more by clinical legal education than a specific agenda in relation to miscarriages of justice.

Participant/i explained that Project8 was focused on factual innocence, but reflected: *“I wouldn’t call it an innocence project...because I don’t think somebody has to be factually innocent. To me, if there’s been a miscarriage of justice, there’s a miscarriage of justice whatever it is.”* Thus, participant/i identified with a “legal” construction of wrongful conviction and rejected the lay construction of “factual innocence.” She described the aim of the IP investigation as to get the case *“to the CCRC and ultimately to the Court of Appeal.”* This suggests she saw them as working on behalf of their client rather than in the neutral truth-finding role in interrogating the innocence claim. She explained the IP would look for *“fresh evidence, it was something else that I thought would change if that went to the jury again”* but would also examine, *“how they were interviewed in the police station, how the arrest was made, all that type of thing, so whether PACE was actually complied with, was there any procedural irregularities.”* Thus, participant/i suggested their investigations were more oriented towards establishing the legal safety of the conviction, rather than looking to establish guilt or innocence. Therefore, Project8 did not identify with the distinctive approach to investigating factual innocence under the “Factual Innocence Model” but saw their investigation as oriented towards finding legal grounds of appeal: this suggests Project8 was closer to the “Formal Legalism Model” in casework.

Participant/i also did not see Project8 as driven by a reform agenda: *“It was purely an educational tool. If by some reason a reform happened, all well and good, but that wasn’t the main aim.”* She agreed there were problems with the criminal appeal system but said: *“I wouldn’t say that my criticisms are as vehement as INUK’s are.”* Of the CCRC she said: *“I don’t think they do a great job, but they do the job they can do in the parameters that they’ve got.”* Thus, despite Project8 being a member of INUK under participant/i she did not identify with its broader reform aims.

Overall, participant/i’s account suggests Project8 was closer to the “Formal Legalism Model.”

Participant/j now ran Project8. The IP had recently left INUK, and participant/j was unsure whether the factual innocence focus would remain: *“as we evolve into a criminal appeals clinic etcetera I think we will be looking more at the technical sort of issues potentially.”* He reflects:



*“if there was a case that I thought was really interesting, and...it wasn’t on the factual innocence side of it, I think I still would look at it.”* He described the project’s “core function” as *“to investigate whether or not their conviction is safe, whether there has been a wrongful conviction.”* Thus, participant/j utilises legal communications and applies the code safe/unsafe to examining their clients’ conviction. This adopts the statutory criteria for determining appeals and the legal construction of a miscarriage of justice, which subscribes to the “Formal Legalism Model.” Participant/j emphasised their focus was on identifying potential appeal grounds: *“I think fresh evidence is so difficult though half the time to uncover, so I think my mind-set is anything that we think could be a ground, and we can work it into an application, we will put forward.”* Therefore participant/j’s account appears to subscribe more closely to the “Formal Legalism Model” in casework: he concentrated on legal safety and the legal construction of a wrongful conviction, rather than prioritising a factual innocence focus as under the “Factual Innocence Model.”

Participant/j explained that Project8 had not yet got involved in reform: *“over the last few years it’s just been focused on the casework, as opposed to attacking the system.”* However he reflected that: *“university, it’s the prime opportunity for students to get involved in you know the protesting, or the petitioning or whatever it is, it’s the kind of grip that the students should have, and they need to take a lead from me.”* Therefore, he was not opposed to the IP having a cause-orientation and reform agenda. However, like participant/l, he emphasised the importance of keeping reform separate from casework, which should work within the systemic approach: *“I think there’s a whole issue there about reform and etcetera that we can all get together and argue for but essentially when we’re dealing with the casework we have to deal with the system that we’ve got.”* Thus, participant/j recognised the need to work within the legal system when undertaking casework: in systems theory terms, this suggests a recognition of the necessity of using legal communications within casework, and the need to separate this from the innocence movement reform agenda. With regard to the CCRC’s role and real possibility test he said: *“I’ve not really thought about it”* and reflected, *“I think there has to be a test though, to stop the Court of Appeal being clogged up...there has to be some sort of formula that’s used, whether or not I agree with it.”* Therefore, whilst participant/j suggested Project8 may get involved with reform, it had no specific reform agenda, nor did it particularly identify with INUK’s.

Participant/j also did not particularly distinguish the IP approach. He acknowledged that it was a “brand name” and “copyright trademark” and thought, *“if you’re an innocence project you*

*should be a member of INUK, so they should probably all follow the INUK model and their way of dealing with things.*” However, he saw no significant distinguishing features in practice: *“the work done by the innocence projects and any other appeal work, there’s maybe some distinguishing features, but they’re all ultimately there to do the same thing.”* Therefore, he did not identify with IPs as distinct for subscribing to features under the “Factual Innocence Model.”

Project8 was identified as a “Mixed Model” under participant/j (although former leader participant/i appeared closest to the “Formal Legalism Model”). Participant/j’s account of Project8’s approach to casework was closer to the “Formal Legalism Model” in defining their aim as to investigate the conviction’s safety; he indicated the project may move away from concentrating on factual innocence claims, but he recognised this as being their current focus. His views on the possibility of Project8 campaigning for reform potentially suggested it was more of a “Mixed Model,” although this project was clearly closer to the “Formal Legalism” end of the spectrum.

### **Project10<sup>20</sup>**

Project10 was identified at the far end of the “Mixed Model,” because, although participant/m saw factual innocence as important for case selection, it was significantly closer to the “Formal Legalism Model” in other respects.

Participant/m explained that Project10 was part of the wider law clinic and thus was focused on clinical legal education and preparation for practice, rather than the broader sociological or criminological angle. This suggests it aligned more closely with educational aims under the “Formal Legalism Model.” However, in compliance with INUK membership obligations, she said they would hold broader events on miscarriages of justice to increase awareness and encourage further thought. Thus, whilst she saw engagement with the broader issues as part of INUK membership, their clinical legal education aims were at the forefront.

In describing their approach to casework, participant/m said they would close a case if they found evidence during the investigation which suggested the individual was guilty, in accordance with INUK protocols. She thought this was also a sensible decision, because with limited resources it made sense to concentrate on those claiming actual innocence. Participant/m was interviewed shortly after the INUK fold, and was unsure how they would

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<sup>20</sup> This was based in a law school: it was an INUK member up until the fold.

assess case eligibility in the future. However, her views suggest it is likely the focus on factual innocence claims would remain. She described their investigation aim as to find something that merited application to the CCRC. Thus, she did not identify with the broader truth-finding focus or the other distinctive investigatory aims within the “Factual Innocence Model.”

Participant/m did not think pushing for reform was part of her role in directing the IP. Discussing INUK’s criticisms of the CCRC test, she reflected that it was prudent to utilise the system in the best possible way. Furthermore, she was persuaded by the CCRC’s defence that they wanted to concentrate their limited resources on casework investigations, rather than directing them towards reform. Thus, Project10 did not engage with a reform agenda, but concentrated its efforts on casework.

Participant/m was unsure what the question meant when asked if she attached any particular significance to being an IP, or whether she distinguished it from another general, criminal appeal clinic. Participant/m was unsure of the question’s meaning. She suggested that perhaps a criminal appeal clinic would require more involvement from criminal practitioners; whereas the IP was primarily student and university orientated. She clarified that Project10 does not provide legal advice in accordance with INUK protocols. Therefore, she did not see IPs as distinct for any of the characteristics under the “Factual Innocence Model.”

Therefore, Project10 appeared to mainly adopt the characteristics of the “Formal Legalism Model,” except for perhaps their continued focus on “factual innocence” in case selection.

#### **4. Formal Legalism Model**

The projects identified as conforming most closely to the “Formal Legalism Model” were: Project11, Project6 and Project13.

##### **Project11**<sup>21</sup>

Participant/n had recently closed Project11, which was a member of INUK until the fold. Project11 was identified as subscribing to the “Formal Legalism Model” because of participant/n’s focus on legal appeal grounds and disagreement with the factual innocence restriction.

Participant/n said the project had strong educational aims: *“I think particularly because our course here...is so black letter law, so doctrinal, intensely doctrinal, I suppose my primary aim*

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<sup>21</sup> This project was based in a law school: it was a member of INUK up until the fold, and had decided to close down when INUK announced it was folding.

*really was to give the students the opportunity to look at legal issues in a broader context.*” She explained, whilst they teach criminal procedure and evidence, she was unsure whether the students really understood how difficult it was to challenge *“a conviction where jurors are playing a really important role in deciding guilt.”* She thought the IP enabled students to *“see doctrinal issues through quite a powerful alternative lens.”* Therefore, participant/n emphasised the educational aims of exposing students to work on real cases and difficulties with the system; however she did not emphasise instilling within students a miscarriage of justice cause, which was characteristic of the “Factual Innocence Model.”

With regard to casework, participant/n said: *“as a lawyer I’m not sure that my interest is as narrow as factual innocence, I’m quite interested in people who’ve been convicted on technicalities,”* because *“if somebody has been convicted of murder and actually they could have run a partial defence and been convicted of manslaughter, why shouldn’t I be interested in that?”* She reflected: *“I just think everybody has got a right to have their case put, and that surely extends to somebody who’s got a partial defence or a defence.”* Therefore, participant/n disagreed with IPs drawing a distinction between claims of factual innocence and those related to partial defences or sentencing appeals. Thus, participant/n identified with a legal construction of wrongful conviction, rather than a lay construction prioritising factual innocence. Participant/n also suggested as law students, they took a formal, legal approach to casework: *“instinctively, they’re doctrinal; so they’ll look at the text and go to the judgment and they’ll say okay, where are the holes in this judgment? Where is there a little bit of, that I can wedge something in, that I could open up a problem or an area of challenge? And I think that for them is more comfortable.”* She elaborated: *“my students always were much more comfortable looking at stuff where you know there’s actually a bit of law around this, or working with the sorts of experts that trial lawyers would be working with; rather than doing some of the crazier more creative work.”* Thus, participant/n suggested the students focused more on points of law, and thus were trained to use legal communications when participating in the legal system, rather than to interrogate the factual innocence claim more broadly such as under the “Factual Innocence Model” approach. She said that working towards the statutory tests was a central focus of their investigation: *“we were very conscious of the CCRC threshold, so we really used that to structure our work.”* In working towards the statutory tests, participant/n suggests they focus on meeting the legal tests with legal communications, which in this context would require coding in terms of safety/unsafety. Therefore, participant/n’s

account suggested Project11 was closer to the casework approach under the “Formal Legalism Model.”

Participant/n did discuss INUK’s reform agenda and agreed there were “*legitimate concerns about the CCRC, and its running and its role and all that kind of stuff,*” and said, “*I felt pleased that that point was made.*” However she thought it was poorly handled: “*thinking longer term about how innocence projects need to work and learn from the CCRC to improve their operation and to better understand what’s in the CCRC’s gift, for example their investigation and stuff, and I didn’t think that was very well handled.*” Thus whilst she thought that INUK’s reform agenda had some potential merit and “*welcomed the attempt at engaging in bigger debates,*” she disagreed with its approach. Thus, although she was alive to reform issues, Project11 did not pursue reform as an aim or have a reform agenda.

Therefore participant/n’s account of Project11’s aims and approach suggested it subscribed more closely to the “Formal Legalism Model.”

### **Project6<sup>22</sup>**

This project was characterised under the “Formal Legalism Model” because participant/f, as a former criminal defence practitioner, approached IP casework in this way.

Participant/f identified with the traditional clinical legal educational aims of wanting to “*increase students’ awareness of criminal justice issues*” alongside hopefully giving them a “*useful experience, that they can sort of use when they become lawyers.*” Therefore she saw the IP as focused on preparing students for practise.

Participant/f made no reference to “factual innocence” as significant to their casework. When asked whether they applied this distinction, she acknowledged that INUK would filter their claims in this way. However, she said in one of their cases: “*it is a joint enterprise murder...and this is an INUK case, they gave it to us. There was no dispute that he was there and there was some level of involvement, so there is no chance of us proving him factually innocent.*”<sup>23</sup> Therefore, participant/f did not identify with this distinction on a practical level. Participant/f was interviewed prior to INUK’s fold and was a member up until that point, thus it is unknown how they are approaching case selection following its collapse. However, it

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<sup>22</sup> This project was based in a law school and was an INUK member up until its fold.

<sup>23</sup> This is of interest for two reasons: firstly, in suggesting that INUK did not always select clear cut cases of factual innocence; but also because there were other participants who understood that INUK would not accept joint enterprise cases (participant/l) – this suggests there were some inconsistencies in how INUK described their case selection, or a misunderstanding between member projects.

seems unlikely they would continue to restrict the project's focus to factual innocence claims, as participant/f explained: *"because I'm a criminal lawyer I'd just put in the [CCRC] application anyway. I wouldn't be so concerned about whether I thought they were innocent or not."* Thus, participant/f did not identify with the factual innocence distinction and identified with the legal construction of a "miscarriage of justice".

Participant/f described the "main goal" of casework as helping people *"get access to justice"* and to *"progress towards submitting, hopefully a successful application to the CCRC and then getting it referred back to the criminal court of appeal."* She said, ideally with all their cases, they *"would hope to uncover new evidence that could justify a CCRC application, to justify a referral to the Court of Appeal."* Thus, the aims were advancing the clients' case, rather than a neutral, objective truth-finding investigation. She said they focused on the statutory requirements: *"we're really conscious of the test the CCRC apply because you know, I'm a lawyer and I've got to look at it like a practice lawyer...and think well this is the test the CCRC applies so let's try and give them what they want."* Participant/f thus approached casework from a legal practitioner's perspective, which is distinguishable from the investigation model of INUK IPs portrayed by Naughton in the literature. In this way, participant/f implies that Project6 utilises legal communications, and that in working towards the statutory tests will be examining convictions in terms of safety. Significantly, she actually distinguishes the IP approach from a neutral truth-finding one, explaining that whilst the CCRC approaches cases *"from a 'let's find the truth' we're independent,"* she reflects: *"we're not. I think our role very much is let's try and find evidence that's going to support our client's case."* She continues: *"because I'm a criminal lawyer I see our job as finding the evidence that's going to prove their innocence instead of finding the evidence that's going to prove their guilt."* This is a key difference from the literature description of IPs as neutral, truth-finding inquiries, and it represents a traditional partisan legal practise approach. Therefore, in casework Project6 was much closer to the "Formal Legalism Model."

Participant/f did not identify Project6 as having a reform role or agenda. She thought there was an argument that *"the CCRC are a little bit too cautious, and maybe a little bit too concerned about what the criminal court of appeal would think and trying to second guess what they were going to say."* However, when discussing INUK's aims to modify the "real possibility" test (to examine whether there is doubt over the conviction's safety), she reflected: *"I don't think that's going to change, so maybe I'm just a bit of a realist."* Thus she did not identify with the reform role of IPs under the "Factual Innocence Model."

Participant/f was unsure what the question meant when asked if she attached any particular significance to being an IP. She explained her aim was to establish a criminal appeal project, and *“the reason we went with innocence is because...they were established and they have protocols and we just thought okay we’ll go to their training and we’ll follow that.”* When asked if she saw the IP as distinguishable from a more generic university clinic looking at criminal appeals, she responded: *“We’re just operating as a criminal appeals unit yeah, I think so...”* Therefore, participant/f clearly did not see IPs as distinct for the characteristics under the “Factual Innocence Model.”

Therefore, participant/f’s account suggests Project6 most closely subscribes to the “Formal Legalism Model.”

### **Project13**<sup>24</sup>

Participant/p was also a criminal defence practitioner. This project was an INUK member until its fold, but participant/p took over following this, and had been running the IP for around 3 months. Her approach also subscribed to the “Formal Legalism Model.”

Participant/p focused on educating students about legal grounds for appeal, and points of law that arise in the case: *“I’ve always scheduled some training that’s specific to our case and the points that in law are raised from our case...and then I think the other thing generally was pointing out to them what they need to look out for in terms of whether there is anything new.”* Thus, this approach suggests the focus was on preparing students for practice and educating them about how criminal appeals work.

Participant/p made no reference to “factual innocence” as central to the IP casework. She had recently received a request for help from a prisoner and explained: *“the first thing I’m looking at is the general points that you would look for in appeal cases, so...we’re not looking for certain types of cases or anything like that, or certain lengths of sentences...it will just be is it possible?”* Therefore, she suggested the focus was on whether there were potential avenues for investigation. When asked whether the IP would distinguish “factual innocence” claims from other claims based on technical legal issues, she said: *“I would think that we should be able to look at both [factual and technical] for me...because we’re not a university with lots of different areas, this is a law school and everybody here is in some way training to be a lawyer or interested in the law.”* She explained it *“would be useful and beneficial to us here. It wouldn’t*

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<sup>24</sup> This project was based in a law school: it was an INUK member until its fold.

*necessarily be in other institutions but for here that would work to look at both, so that's the direction.*" Furthermore, when investigating the case she said: *"as a practitioner...I just couldn't look at a case and ignore the legal principles. Because if they've been wrongfully convicted on a point of law they still shouldn't be in prison."* Thus participant/p did not agree with drawing a distinction based on "factual innocence." This suggests that Project13 adopts a legal construction of a miscarriage of justice and thus examines convictions in terms of legal safety. She also identified the investigation aim as *"about making sure that all the options of appeal, or possibilities of an appeal have been explored."* This suggests a focus on potential appeal grounds was at the forefront, as under the "Formal Legalism Model," rather than the broader investigatory approach under the "Factual Innocence Model." This again suggests their approach was to code according to safe/unsafe or legal/illegal, rather than examining potential guilt or innocence.

Participant/p did not identify Project13 as having a reform aim or agenda. She reflected: *"it would have to be taken with some caution if they were getting involved in reforming or anything like that...I would be cautious and make sure they had the level of understanding of all the different kinds of impact it would have in terms of reform, but certainly you know I don't see why they shouldn't."* Thus, although she was not opposed to IP's getting involved in reform, Project13 was clearly not cause-oriented as under the "Factual Innocence Model."

Project13 was characterised as closest to the "Formal Legalism Model" because of participant/p's approach to casework and disagreement with the factual and technical innocence distinction.

## **5. Summary**

The above analysis demonstrates that there is no typical "innocence project," in the UK. Rather, that we might locate IPs on a continuum between two different models. Despite the strong emphasis on factual innocence as significant to IP work in the UK, the data suggested this was much less important in practice for the majority of IPs. The full implications of this will be considered below.

But firstly, it will be examined to what extent the sampled IPs differed in their approach from the generically termed "Criminal Appeal Units" in the sample.



## **6. Criminal Appeal Units**

The research involved interviews with three further leaders of university clinics, which looked at miscarriages of justice; however they were not termed “innocence projects.” The aim was to see whether we could distinguish the IP approach from other such clinics.

Unit1 – participant/q

Unit2 – participant/r

Unit3 – participant/s

At the outset of the research, there were only two known units looking at criminal appeals that were not IPs (one of which was Unit1<sup>25</sup>); although there may have been others. Unit2 and Unit3 were established during the research period.

Unit1 preceded the establishment of INUK and therefore it never had any involvement with INUK and the “innocence movement.”

Unit2, ran by participant/r, was specifically set up as a criminal appeal unit, rather than joining INUK as an IP. Participant/r had previously been involved in an IP and was thus aware of the movement.

Unit3 was established with the intention to join INUK as an IP, but INUK folded before this was realised.

Based on the sample, there were significant and material differences between IPs and Unit1, but there were no significant differences between the other two Units and the majority of sampled IPs. However, Unit2 and Unit3 were distinguishable in their approach from the “Factual Innocence Model” of IPs.

### **Unit1**

Unit1 was run by practitioners and divided into different areas of law. It was part of a four year qualifying degree where students would work full time in the clinic. This was a fundamentally different model to that of IPs, which were generally either extra-curricular for undergraduates, BPTC/LPC students, or GDL students; or some universities used it for credit as an undergraduate module for students.<sup>26</sup>

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<sup>25</sup> The other unit failed to respond to requests for participation.

<sup>26</sup> Project3, Project8, Project9

Participant/q was previously a criminal practitioner before arriving at the university to teach, and was appointed to work in the unit because of her practising certificate: *“anybody who joins the university as an academic member of staff who is a practising lawyer will be encouraged to work in the [clinic] obviously because you can only work here if you have a practising certificate.”* This instantly reflects an important difference, as several IPs are run by academics, and having a practising certificate is not a requirement. This reflects the distinction drawn by one participant between IPs and other criminal appeal clinics.<sup>27</sup> Participant/q explained that students are expected to have *“professional responsibility for clients,”* and everything they do is scrutinised because it is sent out under the tutors’ practising certificates. This reflects another important difference as Unit1 thus subscribes to the professional lawyer-client relationship. As explained in the literature review, Naughton distinguished IPs from having this obligation to clients, which he valued for increasing their independence.<sup>28</sup> Within the sample, none of the IP leaders were acting in the professional capacity of a practitioner, and therefore were unable to give legal advice. Although participant/j<sup>29</sup> suggested there was a possibility he (or another) would renew their practicing certificate to run the IP.

Participant/q explained the main aim of the clinic was to prepare students for practice: *“it’s trying to give them the most authentic experience that I can. Because obviously I’ve been in practice and I know what it’s like day on day, I know the sorts of things that you have to deal with, and I want to prepare them for that, as fully as I possibly can.”* Therefore, Unit1 specifically aimed to simulate legal practice for student experience, where each student would be granted a caseload<sup>30</sup> of two to three cases. Participant/q said alongside this, students were encouraged to *“think critically about how our criminal justice system works and what part they are going to play in all of that as well.”* She described a task where she would ask the students to compare and rank what they think criminal courts should do, versus what they think they actually do; this included objectives such as: good value for money, acquit the innocent, convict the guilty, give deterrent sentences etc. She explained, *“We want them to be mindful practitioners, we don’t want them to be robots, we want them to think about the work that they do.”* The students are thus encouraged to think about problems within the system, to develop them as ethical practitioners, which is a characteristic of the sampled IPs and clinical legal

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<sup>27</sup> See participant/m, Project10

<sup>28</sup> M Naughton ‘The Importance of Innocence for the Criminal Justice System.’ In M Naughton (ed.) *The Criminal Cases Review Commission – Hope for the Innocent?* (Palgrave Macmillan 2009) p.34

<sup>29</sup> (Project8)

<sup>30</sup> Although clearly a much smaller number than in practice

education more broadly. However, Unit1 was particularly practise focused as under the “Formal Legalism Model,” rather than cause-oriented as with some IPs.

Unit1’s casework approach was driven by legal practise. The students initially must engage with “*Archbold or Blackstones and go and have a look what general grounds of appeal are successful... so they can actually start working on appeals.*” Thus, the starting point for students is the law and becoming acquainted with legal communications in this area. Then participant/q said, the direction of their investigation “*has got to come from the client, because obviously it’s their instruction.*” Again this is distinguishable from the IP approach in the literature where Naughton suggested IPs were neutral truth-finding inquiries, which were not bound to the usual lawyer-client relationship. As explained above, participant/k from Project9 (under the “Factual Innocence Model”) said the IP had a different relationship with clients because they would investigate the claim of innocence with the possibility of finding evidence of innocence or guilt: this is distinguishable from working on the basis of client instructions. Thus, this type of IP relationship with clients was distinguishable from that of Unit1, where the approach reflected a practise approach as under the “Formal Legalism Model.” IPs under the “Formal Legalism Model” did not agree with a neutral approach. Participant/n from Project11 said the lack of client direction was a problem with INUK cases; she thought investigation “*needs to be client led.*” Furthermore, participant/p from Project13, which was considered closest to the “Formal Legalism Model” did suggest their casework investigation would be client driven. Therefore, insofar as IPs identified with the neutral, client relationship under the “Factual Innocence Model,” this was a distinguishing feature.

Participant/q could not comment on whether the IP approach was distinguishable from theirs as she did not know much about them. She suggested perhaps the perks of Unit1 may be enabling students to liaise with practitioners and CCRC commissioners, as she was unsure whether IP students would get chance to do this. As a point of comparison, participant/q was told about the “factual innocence” and reform focus of IPs (according to the literature) and she commented: “*Yeah it is more about practise than innocence I suppose,*” which suggests they adopt a legal construction of a wrongful conviction and focus on legal communications as would be employed by practicing lawyers, rather than focusing on potential guilt or innocence. She continued: “*We don’t kind of seek to challenge the establishment and the CCRC, we go through the system. But when somebody says no we can’t go any further we accept that...we don’t fight on at all costs you know.*” Thus, Unit1 was oriented towards pedagogical aims and

preparing students for practise, rather than the broader, cause-oriented approach of IPs under the “Factual Innocence Model.”

Therefore, in relation to the “Factual Innocence Model” of IPs there is a significant distinction between Unit1, which identifies wholly with the “Formal Legalism Model.” However, there are also differences between IPs under the “Formal Legalism Model” and Unit1, which are largely structural. Unit1 is integrated into the law school degree and the students work on it full time for a year. This is distinguishable as IPs were all either extra-curricular, or incorporated as an elective undergraduate module. Furthermore, there was a requirement for Unit1 to be run by practitioners.

## **Unit2**

When participant/r was interviewed, this unit was in the process of being set up and had not started running. Participant/r had worked on an IP previously. He established Unit2 as a criminal appeal unit, rather than as an IP. Unlike Unit1, this unit was an extra-curricular project, rather than for credit.

Participant/r described Unit2’s aims as similar to that of IPs: *“we’re not so different from innocence projects, in the sense that we’re trying to convince the CCRC that look there is a real possibility here, in terms of getting it to the Court of Appeal.”* Thus, participant/r specifically employs legal communications as dictated by the statutory test for the CCRC in determining their investigation approach. However, he said a key difference between Unit2 and IPs was that *“we’re very much going to be guided by lawyers.”* He reflected that when working on the IP *“we might see a case that we thought was really good to go somewhere and we’d present it to a lawyer who’d immediately say no. Neither [project director] or I were lawyers so we weren’t expecting that, we didn’t know what to look out for.”*<sup>31</sup> This point demonstrates the effect of employing a “lay” construction of wrongful convictions within a legal context and a recognition of the problems with not communicating legally. Participant/r explained that Unit2 would collaborate with the Centre for Criminal Appeals (CCA)<sup>32</sup> which would provide them with cases, and the practitioners would oversee their work. Unit2 was thus specifically established to work with the CCA, unlike IPs which were largely established to

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<sup>31</sup> Although the INUK literature did specify the original intention was to work alongside lawyers, participant/h and participant/j referred to this and explained it had become difficult to realise this due to the lack of available time to liaise with practitioners: this is discussed more in Results section 2.

<sup>32</sup> The CCA operates on the basis of “strategic litigation” and selects cases based on issues which they think need to be heard in the Appeal Court – this will be discussed further in Result Section 2

work with INUK (although there are now several IPs or former IPs working with the CCA which will be discussed in the following chapter).

Participant/r was only involved in the early stages of the IPs establishment, but he said this experience helped him in setting up Unit2 and knowing what to expect of students. He also reflected that: *“I think it taught me that it’s a better idea to forge good relations with the CCRC.”* He explained that whilst he agrees with a lot of INUK’s criticisms of the CCRC: *“I can also see it from the CCRC’s point of view and I think you’re better off engaging with them rather than sort of keep saying they’re useless necessarily.”* Participant/r explained that he had no first-hand experience of the relationship between IPs and the CCRC, but said *“I’ve heard sort of third hand about the tensions there has been between innocence projects and the CCRC.”* He explained his understanding was that *“the CCRC a lot of the time just try and tell innocence projects that there’s nothing here and innocence projects don’t accept it.”* This would likely refer to those IPs which subscribe more to the “innocence lawyer” approach under the “Factual Innocence Model:” there was little evidence of this tension within the sample, except for perhaps with Project7 reflected in their criticisms of the CCRC. Nevertheless, Participant/r wanted to avoid tensions and said, *“You do have to engage with the CCRC. Better or worse, we do have the real possibility test and I think on the one hand, by all means campaign against that and argue against that, but when it comes to actually getting cases to Court that’s what we actually work with.”* Therefore, as acknowledged by some IP leaders, participant/r emphasised the importance of working within the legal system in casework. This demonstrates the tensions which underpinned the aims of IPs in the literature which were discussed in Chapter 2.

With regards to reform, participant/r said he thought there were *“a million and one problems with the criminal justice system,”* and whilst *“innocence is probably the main problem...there’s also the discrimination stuff, it’s still rife in our criminal justice system.”* He expressed concern that: *“my problem with the criminal justice system as a whole, is lack of respect for human rights at every stage predominantly the prisoners’ rights.”* He was unsure whether the unit would get involved in reform yet, commenting: *“Possibly in the future, again see how things go, start off small and just work on the cases and then see what we learn from there and what bits need reform.”*

Therefore, Unit2 was not significantly different to the majority of IPs sampled and mostly reflected the “Mixed Model” approach. However, again there was a structural difference as

Unit2 was specifically linked to the CCA which would dictate how they operated, rather than with the majority of IPs which signed up to follow INUK protocols.

### **Unit3**

Unit3 was also in its infancy at the time of the interview. Participant/s explained he intended to start an IP and join INUK, but it folded before they started operating. Following the collapse, participant/s said he changed the name because of the copyright issues with calling it an “innocence project.” This unit collaborated with another not-for-profit unit that works on miscarriage of justice cases.

Unit3 was intended to be interdisciplinary. It was based in a law school, but worked alongside journalists and campaigners. He too indicated they would be working with the CCA and thought the involvement of practising lawyers would enhance their work. He explained: *“that interdisciplinary approach I think would be a) very useful for the students, b) very much needed by the miscarriage of justice sector and c) what would probably be, if not a unique selling point, quite an unusual approach.”* Thus, this was a slightly different model to IPs because of its links with external organisations and combined expertise.

Participant/s’s educational goals for Unit3 echoed those of the majority of sampled IPs in enhancing employability and teaching them about systemic failures: *“to show them that things can go wrong, why they go wrong, and obviously a big push in my institution is to enhance employability and that’s an excellent way of enhancing employability.”* He also said: *“I’ve found it’s marvellous to teach about the law, and the values that underpin the law and you know they’re quite shocked when you say well the trial is not there to find the truth, the judge is there to ensure fair play between two gladiators essentially isn’t it?”* Thus, like the majority of clinics discussed, he saw its role as teaching students more broadly about criminal justice issues, rather than as purely focused on employability.

Participant/s explained they got cases from the external unit he was collaborating with and said: *“I’m assuming they’re going to be factually innocent cases that [unit leader] is interested in.”* He had intended to be working on such cases as it was the *“founding principle of innocence network rather than any sort of purely due process issues.”* Thus, Unit3 was modelled on the “Factual Innocence Model” in this respect, and at first sight appears to suggest an identification with a “lay” construction of wrongful conviction. However, in discussing their casework approach, participant/s explained how he had watched a Rough Justice program featuring UoBIP where the client’s partner was encouraging the students to agree the client was innocent.

He said: *“to be fair the whole firm of Bristol students, they were trending that way, they were starting to think he was innocent,”* but reflected: *“whereas I would much rather the students think in the way is this a safe or unsafe conviction.”* Therefore, participant/s emphasised a focus on legal safety rather than guilt or innocence: this approach is thus different to the classical “Factual Innocence Model” of IPs in the literature. The casework approach had characteristics of both models and potentially suggests Unit3 was a “Mixed Model.” Participant/s said they would approach drafting CCRC applications from a neutral perspective: *“if you’re making an application, you’ll have thought the system has failed in some way or potentially have failed in some way, and as the system is an adversarial approach then an alternative approach is probably preferable.”* Participant/s said he was used to tribunal work, which he perceived as closer to an inquisitorial than adversarial approach, which perhaps explains this view. Thus, Unit3 did partly identify with the neutral, inquiry approach under the “Factual Innocence Model.”

Participant/s indicated that Unit3 would potentially get involved in reform when it had more experience: *“because of my clinical background, I am interested in law reform clinics anyway.”* He suggested the areas for focus would be on unreliable evidence, such as *“witness identification, uncorroborated evidence that is admissible, and that you’ve had some beneficial impact on those sort of areas, that you’ve improved the system.”* Thus, he shared the reform aim of IPs, but did not necessarily identify with INUK’s reform agenda concerning the criminal appeal rules and the CCRC role.

Overall, participant/s did identify with aspects of both the “Factual Innocence Model” and the “Formal Legalism Model” and thus most closely reflected a “Mixed Model” approach. This unit was closest to the majority of IPs, which is unsurprising given it originally intended to join INUK.

## **7. Summary: addressing the research questions**

### **1. Defining and distinguishing an “innocence project”**

**(a) To what extent do sampled IPs identify with the distinctive aims, objectives and functions of innocence projects as portrayed in the literature?**

The “Factual Innocence Model” was developed to reflect the model of IPs in the literature. The majority of sampled IPs either did not subscribe to the “Factual Innocence Model” or were

showing signs of gravitating more towards a “Mixed Model” or “Formal Legalism” approach.<sup>33</sup> Project3 was the only IP which identified a factual innocence focus as central to their casework investigation. The majority of IPs also did not identify with the broader investigation approach or identify with the “truth-finding inquiry” model: the projects closest to this were Project3, Project7, Project9, and Project2. Rather, the majority of IPs prioritised the focus on determining legal safety and directing their investigation towards finding appeal grounds.<sup>34</sup> This was a key difference to the how IPs constructed a ‘miscarriage of justice’ in the literature. Furthermore, across the sampled IPs, there was no significant engagement with reform or the reform agenda of INUK; with the exception of Project7 where both participant/g and participant/h had a strong engagement with reform issues. Beyond this, although some IPs suggested they engaged with reform such as through consultations (i.e. Project9) or through contributing to Nunn (i.e. Project3) they did not particularly discuss the broader reform aims of the “innocence movement” in the literature or suggest they were cause-oriented with a specific reform agenda. Therefore, the IP model in the literature was not prevalent amongst the sampled IPs: this raises potential questions over the extent to which we ever had an “innocence movement” in the UK as envisaged in the literature.

**(b) To what extent is it possible to construct a typical IP model based on the participants’ accounts?**

This section demonstrated that, based on the sample, there is not a “typical” IP model in the UK; it was proposed that the sampled IPs could be situated on a spectrum between two polarised models. Firstly, the “Factual Innocence Model,” which was developed based on the IP model in the literature; and secondly, its antithesis, the “Formal Legalism Model,” which was developed partly from the literature, and partly from an inductive analysis of the data. IPs were placed on the spectrum according to the participants’ accounts of their aims, objectives and functions, which included a consideration of their approach to casework investigation.

**(i) How do IP leaders perceive the aims, objectives and functions of the project?**

All participant IP leaders identified their project as having two distinct aims. Firstly, to investigate their clients’ cases to determine whether there are grounds for applying to the

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<sup>33</sup> There will be one theoretical explanation for this suggested in Chapter 6.

<sup>34</sup> To clarify, this is based on how participants described their approach to investigation. Naughton also recognised the need to identify appeal grounds, but he was clear that he did not think this should be prioritised as the main focus of the investigation.



CCRC (or potentially to the CACD);<sup>35</sup> and secondly, to provide an educational scheme for students. Although, the way in which IPs approached these aims differed: this will be discussed under the next question. None of the participants suggested that reform was a key aim of the IP, and many only engaged with reform to a limited extent. Although, Project7 did emerge as having a significantly strong reform agenda.

**(ii) How, if at all, do the accounts of these aims, objectives and functions and their negotiation differ between IPs?**

There were differences between the participants' accounts, with those varying most significantly between IPs subscribed to the "Formal Legalism Model" and the "Factual Innocence Model." This was particularly in relation to the relevance of factual innocence and the approach to case investigation. However, the differences were less significant between IPs classified as closest to a "Mixed Model." IPs under the "Mixed Model" generally focused on claims of actual innocence, which they distinguished from claims related to partial defences or sentencing issues. However, the factual innocence distinction was irrelevant to their approach to investigation; rather, they would investigate cases with a view to determining whether there were grounds of appeal. The educational aims between the IPs varied less significantly, with most participants emphasising the IP's role in teaching the students about the criminal justice system in context, and its limitations; as well as providing skills training for students and developing them as lawyers. Although, potentially participant/g and participant/c could be distinguished for their approach, which is discussed under question (iv). Also, for those participants closest to the "Formal Legalism Model," such as Project13, Project6, and Project10, they perhaps focused more on the IP's role in preparing students for practice, rather than the broader miscarriage of justice cause. An important finding is that active INUK membership was not determinative in making an IP closer to the "Factual Innocence Model," with current members sometimes being furthest away from some of its key characteristics, such as Project6, Project11 and Project10 and to some extent Project1.<sup>36</sup>

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<sup>35</sup> Only one IP said they had worked on any cases where they were seeking an out of time appeal which was Project7: this has not been discussed at length because it is not relevant to the research questions.

<sup>36</sup> Project13 was independent following the INUK fall and participant/p had not been in charge when the IP was under INUK membership: therefore, it is not possible to know how it was run under INUK.

**(iii) To what extent do the IP leaders experience tensions between their aims, objectives and function?**

The sampled IP leaders did not explicitly acknowledge experiencing tensions between their aims, objectives and functions. The literature review chapter proposed that IPs may experience tensions because the INUK model for IPs appeared to blur their role in reform and casework, through suggesting IPs should work outside the legal framework to better advance the interests of the factually innocent. Additionally, in Chapter 2 it was argued that employing Social Systems Theory as a theoretical framework suggested tensions were likely to emerge for IPs if they sought to employ a “lay” construction of a wrongful conviction rather than a “legal” one; and that furthermore, if IPs did not utilise legal communication in undertaking their casework they would struggle to progress cases through the legal system. As the majority of sampled IPs did not subscribe to the “Factual Innocence Model,” these tensions were not directly apparent: whilst the majority understood INUK filtered cases in this way, they emphasised a casework focus on identifying potential appeal grounds and working towards the statutory tests of the CCRC and the CACD. Thus, the majority of IPs sampled were utilising legal communications and working towards a “legal” construction of wrongful conviction which included technical and procedural legal issues bearing on the conviction’s safety.

However, the existence of tensions did sometimes implicitly emerge from participant accounts. Some IPs appeared to be gravitating away from the “Factual Innocence Model,” recognising difficulties with its premise. Participant/h (Project7) said she understood IPs as investigating *“potential wrongful convictions in a different way,”* in that they *“wouldn’t be constrained by what the law says,”* however, she acknowledged this would not enable IPs to progress cases through the CCRC. Participant/b (Project2) described his investigation as oriented towards truth-finding; however the difficulties associated with this approach meant he was gravitating away from this to concentrate on identifying potential legal grounds. Both participant/l (Project9) and participant/j (Project8) emphasised the need for a clear divide between IPs reform aims, and their approach to casework which needed to work within the legal framework. Furthermore, several participants expressed discomfort with the concept of “factual innocence,” such as participant/h, participant/b, participant/a, participant/i, participant/n and participant/p. A comment by participant/n was important for thinking about the tension between a factual innocence focus, and broader aims of the criminal justice process: she said as a lawyer, *“I just think everybody has got a right to have their case put,”* and that this means

considering all types of claims. Additionally, participant/p's reflection on their IP's function was important for thinking about the potential tension between IPs factual innocence focus and their role in legal education: she said, that at a law school where "*everybody here is in some way training to be a lawyer*" students should consider claims related to both factual and technical legal claims. This reflects the critique of IPs in the literature by emphasising the importance of teaching students about due process. Furthermore, in terms of systems theory, this illustrated a recognition of the importance of training students to communicate legally. Therefore, whilst IP leaders did not explicitly describe experiencing tensions in their aims and objectives there was some evidence in participants' responses of underlying tensions within the concept of IPs under the "Factual Innocence Model." The following chapter will discuss evidence of underlying tensions further when considering the difficulties IPs have faced in achieving their aims.

**(iv) How far, if at all, do the accounts of aims, objectives and functions differ between IPs and other criminal appeal clinics?**

The majority of sampled IPs did not adopt the distinctive approach of IPs outlined in the literature; only Project3 and Project7 attached any particular significance to being an IP for these reasons. For example, Participant/c from Project3 distinguished the IP from a criminal appeal unit for its factual innocence focus; he also thought this distinguished its educational approach, in going beyond teaching students "*how criminal appeals work*" to thinking about whether the person had been "*wrongly treated and punished for something he hasn't done.*" Also, Participant/g from Project7 distinguished the IP as more part of the "*miscarriage of justice world*" than the "*legal world,*" and he valued the IP for "*spreading the word*" and "*inciting publicity*" and "*concern*" within students about wrongful conviction. Therefore, based on the sample, the majority of IPs did not attach any particular significance to this clinic model. Thus, whilst there were important structural differences between Unit1 and the other sampled clinics, there were not significant differences between the approach of the IPs and the criminal appeal units, which were identified as somewhere on the continuum between a "Mixed Model" and the "Legal Formalism Model."

## **Conclusion**

This chapter was aimed towards determining the extent to which we can "define or distinguish" an IP. It has demonstrated there is no specific, typical "innocence project" model in the UK, and the sampled IPs largely did not identify with the model of IPs in the literature. So what are the implications of this? Firstly, all of the projects sampled (bar Project5) were members of

INUK; therefore, it was expected they would identify with these aspects of the movement to a greater extent. Although INUK appeared to represent a network of individuals across the UK collaborating to further its aims, many participants referred to it as a separate entity. It is debatable whether the INUK model was at all representative of the UK innocence movement: issues related to this are discussed further in the next chapter. Furthermore, some aspects of the “Factual Innocence Model” of IPs are also typical of the broader international innocence movement: the majority of IPs in the US also focus on “factual innocence,” and the international Innocence Network outlines a commitment to reform. Thus, it is questionable whether the UK ever had an “innocence movement” which equated to the international one. To conclude, it was evident that Naughton’s aim for the UK innocence movement to launch a “counter-discourse” of factual innocence was not realised according to the sampled IPs; nor did his model of IPs as “truth-finding inquiries,” working outside of the legal framework, translate into practice. The broader INUK aims around reform were also not subscribed to by the majority of sampled IPs. Arguably, these results suggest it is debatable whether there ever was a UK innocence movement in the sense portrayed within the literature. This question forms the basis for discussions within the next chapter.

## **Chapter 5**

### **Results Section 2: The UK innocence movement: a rise and fall?**

#### **Introduction**

This chapter addresses the second research question and will consider whether we can analyse the UK “innocence movement” as having undergone a rise and fall. This question has arisen for several reasons: firstly, due to the limited success of UK IPs since their inception; secondly, due to the decline in number of IPs; thirdly, due to the INUK fold in July 2014; and lastly, because it emerged as a theme within the data. Examining the potential “fall” of the UK innocence movement requires reflection on what it represented. The previous chapter suggested that, based on the sampled IPs, it was debatable whether the UK ever had an “innocence movement” as portrayed in the literature. This chapter will explore this further by tracking the movement diachronically: looking at why the sampled IPs were established; the experiences of the participants whilst running them; and how the participants reflected on the future for IPs and the innocence movement. It will demonstrate that the tensions underlying the INUK “innocence movement,” as pointed to in the literature, contributed to INUK’s fold and the decline in IPs. However, this chapter will suggest that, rather than analysing the movement as a “rise and fall,” we should understand it as a “rise and reconfiguration.” Whilst there is a future for miscarriage of justice work in the UK, it looks very different to the “innocence movement” which was portrayed in the literature.

This chapter will proceed in the following way. Firstly, it will examine the “rise” of IPs: this will explore why the participants got involved in setting up or running an IP, and will provide a basis for reflecting on why IPs spread across the UK. This will suggest there was potentially an underlying tension between INUK’s aims and the use of IPs as an educational tool, which manifested through IPs taking very different approaches (as was demonstrated in the previous chapter). Secondly, this chapter will examine the “functioning period” of INUK between 2004 and 2014: this will discuss how the tensions underlying the movement potentially contributed to the limited success of IPs over the last decade and Naughton’s decision to fold INUK in July 2014. Thirdly, this chapter will suggest that even prior to INUK’s fold, there was a perception from some participants that the UK innocence movement was approaching crisis point. Fourthly, the chapter will discuss Naughton’s announcement of the INUK fold in July 2014, which was effective in September of that year. This section will discuss Naughton’s reasons

for folding INUK and consider the impact of this decision: it will question to what extent this marked the end of the UK “innocence movement”? Lastly, this section will question whether we should analyse the innocence movement as a “rise and fall.” It will argue that the movement is better understood in terms of a “reconfiguration,” because whilst there are still a number of universities involved in miscarriage of justice work, the future landscape looks significantly different to the “innocence movement” as portrayed within the literature.

### **1. Innocence projects: the rise**

As discussed in the literature review, Naughton, as INUK’s founder, was the principal driver of the UK innocence movement: he had very specific aims for encouraging the establishment of IPs. Naughton believed IPs were needed in the UK to fulfil “unmet legal needs.” He intended for IPs to help victims of the existing legal framework within criminal appeals, by reinstating concern with factual innocence and encouraging reform of the system. INUK also aimed to educate students and the wider public about problems with the criminal appeal system and miscarriages of justice. During INUK’s operation it assisted in setting up 36 IPs. Thus, Naughton was successful in getting other universities on board; but why did so many get involved? Clearly the sample of 13 IPs cannot provide a basis for determining why all IPs in the UK were established. However, this section will attempt to provide some potential insights into why IPs may have spread across the UK through examining the participants’ motivations for establishing the IP.

Within the sample, those participants actively involved in setting up the IP were: Participant/a<sup>1</sup>; participant/b<sup>2</sup>; Participant /c<sup>3</sup>; participant /d<sup>4</sup>; Participant /e;<sup>5</sup> Participant/f<sup>6</sup>; Participant/g and participant/h<sup>7</sup>; Participant/i<sup>8</sup>; Participant/l.<sup>9</sup> The remaining participants<sup>10</sup> all got involved in the IP following its original establishment, and thus their responses are only discussed where relevant.

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<sup>1</sup> Project1

<sup>2</sup> Project2

<sup>3</sup> Project3

<sup>4</sup> Project4

<sup>5</sup> Project5

<sup>6</sup> Project6

<sup>7</sup> Project7

<sup>8</sup> Project8

<sup>9</sup> Project9

<sup>10</sup> Participant/j (Project8) participant/m (Project10), participant/n (Project11), participant/o (Project12) and participant/p (Project13)

There were two participants who were not driven by specific educational goals, but rather out of an interest in miscarriages of justice. Firstly, participant/g<sup>11</sup> explained he was indirectly involved in setting up Project7 (which was established by participant/h), although he did not initially work on it: *“I didn’t set the project up, although strangely I did sort of initiate the idea...because of my long campaigning and knowing Michael Naughton.”* He had been running a wrongful conviction campaign group in the area and hoped an IP at the local university could take the pressure off: *“you’d have all these people, who knew all about the law, and would suddenly start really making an impact on these cases.”* Participant/g directly identified with the broader cause-orientation of the innocence movement. As discussed in Section 1 he hoped to be *“part of a movement...which can actually create change in the longer run”* and saw IPs as *“spreading the word”* and inciting *“publicity, or concern, or education”* and *“a passion for, or a sense of awareness,”* about miscarriages of justice with the hope of *“changing people’s perspectives.”* Secondly, participant/d<sup>12</sup> who established Project4 in a journalism school explained: *“I liked the sound of it, I did a law degree originally, and it kind of peaked my interest.”* Participant/d did not see the project as educational *“in the slightest,”* beyond perhaps *“bringing the real world into academia.”* He also appeared to identify with the broader innocence movement cause in explaining that: *“anything that involves the option to fight the system strikes me as a good thing.”* Thus, these two participants were motivated to establish an IP because they identified with the broader political cause of the “innocence movement.”

There were three further participants that got involved because of a specific concern with miscarriages of justice, with ancillary aims related to clinical legal education. Participant /e<sup>13</sup> established one of the first IPs in the UK at a similar time to Naughton. Explaining her reasoning for establishing the IP she said: *“Well I’ve always had a fascination with miscarriages of justice...I’d always kind of felt like that was what I wanted to sort of do.”* Thus, once she was in an academic position and saw the opportunity for funding she decided to set one up. Similarly, participant/l<sup>14</sup> said she wanted to start an IP after hearing about INUK. She was responsible for developing pro bono schemes within the university and was particularly attracted to the innocence movement, because: *“I’d always been involved with miscarriages of justice really from when I was a student”* and *“I wanted to find students with the same passion as I had as an undergraduate.”* Furthermore, she also thought IPs were needed because of

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<sup>11</sup> Co-directs Project7 with participant/h

<sup>12</sup> Project4

<sup>13</sup> Project5

<sup>14</sup> Project9

systemic problems: *“I thought nothing much had changed, and it was so slow, and it was still the problems that were there before, that they weren’t dealing with the cases properly.”* Participant/b<sup>15</sup> was also driven by his interest in miscarriages of justice in establishing the IP: *“my background was sort of hard news, investigative journalism, this is the sort of thing that I enjoy doing,”* and when he started work at the university: *“I didn’t want to let the investigative journalism part of me sort of die away.”* He saw the IP as perfect to keep his interest going, but also to prepare students who wanted to go into hard news.

For the remaining participants, the increasing recognition within law schools of the benefits of pro bono or clinical legal education was an important influence for establishing the IP.

Participant/h was employed to develop pro bono schemes at the university to enable students to gain practical, legal experience. She got involved with INUK *“just by chance”* when deciding what schemes to introduce, after being approached by participant/g. She had not previously been involved in miscarriages of justice and did not know much about the criminal appeal system, but was attracted to INUK for the potential collaboration between universities: *“it made sense to try to combine the efforts”* in running student training. Participant/h also said she was persuaded by Naughton’s arguments about the problems with the criminal appeal system and thought *“it seemed to make absolute sense, that a group of universities working together productively, could potentially make a difference.”* Thus, participant/h was persuaded by the broader political aims of the movement in getting involved, although education was initially the primary driver. Participant/h explained how Naughton and others promoted INUK at conferences about pro bono and clinical legal education; thus this rising interest in experiential learning at universities is crucial to understanding the spread of IPs.

The remaining participants initially got involved for educational reasons. Participant/i<sup>16</sup> said her primary aim was the pedagogical benefits: *“I’ve been a clinician for many years running street law programmes, civil law clinics.”* She had an interest in criminal law, and so when she heard about INUK she saw it as a good opportunity, although she did not particularly identify with the broader political cause of the movement: as discussed in the previous chapter, she was primarily driven by educational aims rather than the broader reform aims: *“I wanted to set up a module rather than I want to go and save the world.”* Similarly, participant/a<sup>17</sup> explained: *“We were encouraged by other law schools”* to establish an IP and the *“main driver”* was that

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<sup>15</sup> Project2

<sup>16</sup> Project8 (now run by participant/j)

<sup>17</sup> Project1



it presented a *“huge opportunity for students to learn.”* Whilst the university had a civil clinic, they had not seen the possibility of running a criminal clinic, *“so if we were going to give our students any experience of doing criminal work then it seemed obvious to look at setting up a miscarriage of justice project.”* Similarly, participant/f<sup>18</sup> was a criminal defence practitioner by background and wanted to set up a criminal pro bono scheme for students; additionally, a student also wanted to establish an IP after seeing a program on UoBIP. She said they chose INUK because it *“was established, and they have protocols and we just thought okay we’ll go to their training and we’ll follow that.”* Clearly, as INUK was already established with a database of cases and working protocols, this provided a sound basis for universities wanting to run a criminal appeal scheme.

As indicated by participant/f, there was a growing awareness of INUK and IPs, which meant IPs were also driven by student demand. For example, participant/c<sup>19</sup> explained that, although he was interested in establishing an IP after seeing Naughton speaking at a pro bono conference, it was set up two years later when *“we had a student who was very interested in setting it up.”* Similarly, participant/m<sup>20</sup> explained the project was largely student-led, and was instigated by a law student prior to her arrival; the head of school was an ex-practitioner and supported it because of their interest in clinical legal education. Participant/n<sup>21</sup> did not establish Project11 but took over from a previous colleague. She identified INUK’s *“principal aim”* as educational, but with *“aims that flowed from that around, wanting to challenge and secure benefits for individuals.”* Therefore, she saw INUK as principally aimed at education, rather than political reform.

Although this section has suggested that some participants became involved with INUK and the innocence movement for its educational aspect, this is not to suggest the educational aims were more important than helping the clients. All participants emphasised a dual aim of seeking to help individuals appeal their conviction, whilst providing an educational experience for students. However, the majority of IPs in the sample were not established because they were driven by the political reform aims or cause-orientation of INUK: as discussed in the last chapter, the majority of sampled IPs did not have a distinct reform agenda. Furthermore, no participants said they were driven by a concern over the neglect of factual innocence within the criminal appeal system, which was a principal aim of IPs and INUK in the literature. None

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<sup>18</sup> Project6

<sup>19</sup> Project3

<sup>20</sup> Project10

<sup>21</sup> Project11

of the participants suggested IPs would focus on “unmet legal needs” in the sense used by Naughton as helping victims of the existing legal framework. Rather, six participants adopted the traditional construction of “unmet legal needs” and saw IPs as necessary to help those unable to source legal representation.

Therefore, in considering the rise of IPs in the UK, this section and the previous chapter provide little evidence that IPs spread across the UK because they shared INUK’s aims insofar as presenting a political challenge to the criminal justice system. The empirical data suggests there were mixed reasons for the rise of IPs. Whilst some became involved specifically because of an interest in miscarriages of justice work, the clinical legal education aims were a strong influence in IPs spreading across UK universities. INUK offered a convenient basis for universities that wanted to provide students with a criminal appeal project, because it was already established, and could provide cases and working protocols for projects, along with a support network. There was also an indication that whilst civil clinics were in place at several universities, most did not have a clinic in the criminal field; thus IPs provided a way to expose students to this type of work. Therefore, potentially a tension existed between the pedagogical aims of the movement and Naughton’s aims for the innocence movement to launch a counter-discourse of factual innocence, and to mount a political challenge to the criminal justice process. This is important to thinking about what the UK innocence movement represented and is significant to thinking about whether it has undergone a rise and fall.

The next section will discuss the participants’ experiences in running the IP during INUK’s operational period between 2004 and 2014. This will demonstrate that, whilst there appeared to be a functioning innocence movement in the UK, the interaction of several underlying tensions brought the movement to a crisis point.

## **2. INUK Functioning Period: 2004-2014**

This is characterised as the key operating period for IPs under INUK. This section will firstly discuss how questions were arising over IPs’ lack of casework progress. It will then explore some of the potential reasons for this by discussing underlying tensions within the IP role; the IP model; and within INUK. This will suggest a number of problems were emerging within the innocence movement leading up to the INUK fold in July 2014.

## **2.1 Casework progress**

Despite an estimated 38 IPs having been operational at various stages between 2005 and 2014, only three cases from IPs have reached the Court of Appeal. Two from UoBIP,<sup>22</sup> and one from CLSIP,<sup>23</sup> which was subsequently overturned in December 2014. Thus, if Krieger's measure of success for IPs in the US (according to number of exonerations) was adopted in the UK, the innocence movement would look significantly unsuccessful so far.<sup>24</sup>

During the interviews, participants were asked whether they felt successful in achieving their original aims. Almost universally, bar participant/d<sup>25</sup> and participant/o,<sup>26</sup> the participants said they felt the educational aims of the project had been achieved, or even "surpassed."<sup>27</sup> For example, participant/n<sup>28</sup> commented: *"if your primary aim is education I think the project was highly successful, if it's about achieving change, if it's about overturning convictions it wasn't successful because we didn't overturn any convictions."* Beyond participant/n, eight further participants said they did not feel particularly successful in casework thus far. Participant/g<sup>29</sup> said the aim to assist the clients and move towards overturning wrongful convictions *"is one we don't do very well on at all."* Similarly, participant/c<sup>30</sup> said *"we haven't actually done much for our clients, and that of course was the primary raison d'etre."* Similar views were echoed by participant/i;<sup>31</sup> participant/a;<sup>32</sup> participant/o;<sup>33</sup> participant/k;<sup>34</sup> participant/d;<sup>35</sup> and participant/h.<sup>36</sup> This is perhaps unsurprising given IPs lack of success in achieving referrals from the CCRC to the CACD, and that only one conviction has been overturned.<sup>37</sup>

However, as Krieger acknowledged, exonerations are not necessarily the "most accurate measure" of project success.<sup>38</sup> An alternative benchmark for measuring success (or at least

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<sup>22</sup> University of Bristol IP

<sup>23</sup> Cardiff Law School IP

<sup>24</sup> In the literature review it was discussed how Krieger used exonerations as a measure of success in his study of American IPs (Krieger, S. "Why Our Justice System Convicts Innocent People and the Challenges Faced By IPs Trying to Exonerate Them." [2011] 14(3) New Criminal Law Review 333)

<sup>25</sup> Project4

<sup>26</sup> Project12

<sup>27</sup> Participant/j (Project8)

<sup>28</sup> Project11

<sup>29</sup> Project7

<sup>30</sup> Project3

<sup>31</sup> Project8

<sup>32</sup> Project1

<sup>33</sup> Project12

<sup>34</sup> Project9

<sup>35</sup> Project5

<sup>36</sup> Project7

<sup>37</sup> Although this actually took place after a number of the interviews

<sup>38</sup> S Krieger, (n.24) p.371

progress) is proposed, which looks at the resolution of casework.<sup>39</sup> The substantial majority of participants (11<sup>40</sup> of 14<sup>41</sup>) who were asked<sup>42</sup> how they would define a successful investigation, suggested it would be successful where all potential avenues for investigation had been explored and a resolution was reached in a case. In some respects, this is so whether it progresses to the CCRC or CACD, because not all cases will be eligible for submission for appeal.<sup>43</sup> Therefore, the focus here will be on analysing the “resolution” of IP cases: there are different potential resolutions which need to be considered.

Most simply, IPs aim to provide assistance to individuals who want to appeal their conviction by investigating the evidence in their case. Following this, they may seek a legal remedy for their clients where the case is deemed meritorious. The two legal remedies which IPs may be working towards are dependent on the status of the case at the commencement of their involvement. If the individual has never applied for leave to appeal post-conviction, then the IP would seek to determine whether there were grounds for applying for leave at the CACD for an out of time appeal. Or, where an individual has already applied for leave to appeal following conviction, then the IP would seek to determine whether there is scope for applying to the CCRC for a review of the conviction’s safety. In some instances, IPs may conclude there is no basis for the individual to appeal their conviction and close the case. However, as was revealed in the interviews, IPs can have other roles beyond this. For example, one participant explained that in some cases, their investigation led to a renewed interest from lawyers who wanted to progress the case towards an appeal, which they considered a success. Additionally, another participant explained their project had been involved in contributing to two CCRC applications which were already ongoing. Therefore, IPs can reach various different resolutions in cases, which should also be recognised as making progress.

When the interviews were carried out,<sup>44</sup> only three out of the thirteen sampled projects had submitted applications to the CCRC on behalf of their client(s). One project had submitted six

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<sup>39</sup> Krieger did acknowledge that looking at exonerations may not be the most accurate measure of success, but he used it because it was the “cleanest and simplest.” (S Krieger, (n.24) p.371).

<sup>40</sup> Participant/g, Participant/b, Participant/c, Participant/e, Participant/a, Participant/i, Participant/j, Participant/k, Participant/m, Participant/n, Participant/o,

<sup>41</sup> Participant/d and f indicated the focus was on a successful referral to the CACD, and participant/p had just started so she said she was unsure how she would define that yet.

<sup>42</sup> There were 16 participants who ran IPs: participant/h and participant/l were not asked this, because both their projects had co-directors who oversaw the casework (participant/g and k) who were both asked this question.

<sup>43</sup> Of course, one could also take the view that IPs ought to be assessing fairly quickly into their investigations whether the case is eligible for taking it further: and therefore, where they have closed a case after a substantial investigation perhaps they are not successfully screening cases. This will be discussed further below. But what view is taken on this, will also depend on how you see the aim of IPs and their investigations.

<sup>44</sup> Between December 2013 and January 2015

cases to the CCRC and had also responded to the CCRC's provisional rejection in four of these cases. One participant said, whilst running their IP they made either five or six applications to the CCRC. They had since left the role, and whilst they knew none of the cases had been referred to the CACD as of yet, they did not know whether the CCRC had reached decisions in all of them. Another project had made one application to the CCRC and was awaiting the CCRC's decision. With regards to upcoming applications, one project was about to start drafting a CCRC application in one case; another project was also drafting a CCRC application in one case (which has since been sent to the CCRC); and another project had a case on the brink of going to the CCRC (awaiting feedback from a barrister), which has since been submitted. Finally, another participant indicated their IP was aiming to send a CCRC application by the end of 2014, but the outcome of this is unknown. As mentioned above, one project had intervened with submissions to two ongoing CCRC applications, but had not submitted any full applications yet. None of the participants said they had applied for an out of time appeal in any cases, except for one project which was working towards this in two cases alongside lawyers.

The CCRC was contacted in July 2015 with a request for information about how many applications they had received from IPs. They provided a caveat that the figures may not be wholly accurate as they do not officially record when an applicant is represented by an IP. The figures provided appear to include where an IP has responded to a provisional rejection from the CCRC or have made a resubmission on a case. Most applicants (unless they are deemed a 'reapplication') are allowed a limited time to respond to the CCRC's statement of reasons for rejection. The figures provided were as follows:

11 (10 across 6 cases) from Cardiff University

4 from Leeds University

4 (3 across 2 cases) from Bristol University

1 from Gloucester University

2 from University of East Anglia

1 from Nottingham University

2 from Sheffield Hallam University

2 from Bangor University

2 from London IP (City Law School)

1 from an unspecified IP - but they were not the nominated representative

Therefore, from 2005-2015 the CCRC records receiving 30 submissions from IPs (including re-submissions or responses to rejection).<sup>45</sup> Strictly in terms of the number of cases where submissions have been received from IPs, the figure is 25 cases from 10 projects. To put this into context, the INUK website states that it referred approximately 100 cases to member IPs during its operation,<sup>46</sup> and there were approximately 38 IPs in operation at various times over the last decade.

This level of applications has raised concern, notably with the CCRC who attended an INUK conference in November 2013; they questioned why despite numerous IPs in existence, they were not getting many referrals. They urged IPs to send in applications and not to keep hold of cases. Participants did discuss this. For example, participant/k<sup>47</sup> said: *“There has been criticism from the CCRC saying look there are all these IPs, we’re not getting many applications though. And I think they’re implying that if IPs take on cases and they don’t get on and do the work then they are holding up that the case, people could have applied straight to the CCRC and hopefully the CCRC would be doing it.”* This potentially gives merit to Quirk’s concerns over IPs exacerbating delays for their clients,<sup>48</sup> as was discussed in the literature. This is undoubtedly a cause for concern, but other participants explained the need for caution in submitting applications. Participant/a<sup>49</sup> raised this point: *“we get criticised by the CCRC for not making sufficient applications, but I think that it is probably caution in doing it...we’re imperilling our clients if we do too many of them, so we have to get them spot on.”* Similarly, participant/f<sup>50</sup> explained the CCRC were encouraging projects to send in cases with their current findings, regardless of whether they felt it was completely ready, because caseworkers at the CCRC would then continue the investigations. However, she was worried this may depend on the caseworker: *“I don’t know, I just think, yes if you get a good caseworker, then maybe they can do their own amazing investigations, but you might not get a really good proactive caseworker and they might just go no, and then what do you do?”*

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<sup>45</sup> The Northumbria SLO is not included in these figures as it is not an “IP”.

<sup>46</sup> [www.innocencenetwork.org.uk/history](http://www.innocencenetwork.org.uk/history) (accessed 17/08/2015)

<sup>47</sup> Project8

<sup>48</sup> H Quirk, ‘Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer.’ (2007) 70 Modern Law Review 759

<sup>49</sup> Project1

<sup>50</sup> Project6

The concerns raised by the participants are arguably justifiable. Once an application goes to the CCRC it has to pass the initial hurdle in getting the case accepted for a full review; at this stage, the CCRC can reject it outright based on the application. Only when it passes this initial stage will the CCRC allocate a caseworker and start investigating the case to determine whether it merits referral. Therefore, when submitting the application, IPs need to ensure they pass this initial stage otherwise the grounds within it become obsolete. As was discussed in the literature review, Hodgson and Horne's research suggested that having legal representation and applications that were drafted to a higher quality did increase the chances of the CCRC accepting the case for a full review.<sup>51</sup> Thus, arguably IPs should be aiming to ensure their application is as strong as possible before submitting it. Furthermore, when cases are accepted for full review by the CCRC, there can be a considerable amount of waiting time before the case is allocated a case review manager. In one case submitted by CLSIP, the CCRC accepted it for full review in spring 2015, but said it would not be allocated a case review manager until September 2017 because the person was not in custody. Therefore, IPs ought to ensure they have investigated the case as thoroughly as possible before submitting it to the commission, which could minimise the work which the CCRC has to undertake, and thus waiting times for the applicant. Notwithstanding these points, there are justifiable concerns about the number of IPs that have existed and the lack of applications made to the CCRC; and some would argue that IPs only exacerbate the delay at the CCRC.<sup>52</sup> However, one would hope that IPs could increase an individual's chances of getting passed the initial stage than had the individual completed the application unaided.

Linked to this, some participants felt their task was difficult because of the hurdles presented by the criminal appeal system. Firstly, as explained in Section 1 (see primarily Project7; Project3) there was a concern amongst some participants that it was particularly difficult to persuade the CCRC to refer cases under the "real possibility" test, and that both the CCRC and CACD applied the appeal rules too restrictively. Furthermore, several participants raised the rules on post-conviction disclosure as presenting a significant difficulty. Participant/h<sup>53</sup> explained: *"even if we identify that there was new DNA technology available or new ways of interpreting it, how could we first of all access the exhibits? Because we have the case of Kevin*

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<sup>51</sup> J Hodgson and J Horne, 'The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC)' (2008) (October 6, 2009) SSRN:<http://ssrn.com/abstract=1483721> or <http://dx.doi.org/10.2139/ssrn.1483721> p.12

<sup>52</sup> See H Quirk, 'Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer.' (2007) 70 Modern Law Review 759 p.772. The potential delays in casework at IPs will be discussed further below.

<sup>53</sup> Project7

*Nunn, and that says that the time for disclosure was at the trial and not at the appeal, so forget it if you haven't had disclosure.*" Participant/i<sup>54</sup> explained that *"in every single case,"* they were *"blocked by the police, not releasing certain items of evidence that were really crucial for us to test, or do something with."* Similarly, participant/c<sup>55</sup> said *"my big problem is there's evidence which I know is there and in the possession of different criminal justice agencies and they won't give it to us."* This was identified as presenting a significant challenge to IPs.

Two other participants thought a change to post-conviction disclosure was crucial to whether the UK innocence movement could succeed. Participant/g<sup>56</sup> said *"if there's one thing through my experience of working on IPs that you could change...it's this disclosure thing."* He suggests: *"I've even got to the point recently of saying well look you could abolish the CCRC if you just gave everybody the right to all the material and exhibits and papers they need, because then at least they'd have a chance of looking at it themselves."* At the time of the interview, the Nunn case was due to be heard in the Supreme Court, and he said: *"if that's lost, it's the sort of thing that makes you think well is there any hope at all."* Similarly, participant/j<sup>57</sup> said access to post-conviction disclosure would be a significant improvement: *"I would certainly like to see IPs or clinics or whatever having some kind of power to request material... I think often we come up with a stumbling block where we can't access material we have no right to that material etcetera, so some kind of move in that direction would make things a lot easier for us."* The case of Nunn<sup>58</sup> was heard in the Supreme Court in 2014 and the judges concluded that the police must "consider" requests for disclosure, and they ought to disclose exhibits where there is a "real prospect" it could reveal something affecting the safety of the conviction.<sup>59</sup> However, in the instances of disputed requests, they said those seeking disclosure should defer to the CCRC who can use their s.17 powers to gain access.<sup>60</sup> Therefore, this case did not result in a significant change to the law, and thus, the former problems raised by participants are likely unchanged. Furthermore, as IPs have no right to disclosure, they often rely on persuading the CCRC to use s.17: this is another reason IPs need to ensure their

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<sup>54</sup> Project8

<sup>55</sup> Project3

<sup>56</sup> Project7

<sup>57</sup> Project8

<sup>58</sup> R (Nunn) v Chief Constable of Suffolk Constabulary & Anor [2014] UKSC 37

<sup>59</sup> Judgment R (Nunn) v. Chief Constable of Suffolk Constabulary, cit., par. 42.

<sup>60</sup> Under the Criminal Appeal Act 1995, s.17, the CCRC can compel any public body to disclose materials; following the Justice Select Committee recommendations in 2015, it is being discussed whether to extend this power to private bodies also.



applications are of a high quality. Additionally, this limits the ability of IPs to uncover fresh evidence and will cause delays to their casework progress.

Beyond systemic issues, the data also suggested there were underlying problems and tensions within the innocence movement, some of which go towards explaining why IPs in the UK have struggled to achieve as much success as IPs in the US.

## **2.2 Tensions: IP role**

Because of the way that Naughton envisaged the role of IPs and INUK, there were potential difficulties in progressing cases.

Firstly, some participants said they found it difficult to identify grounds of appeal and fresh lines of investigation in INUK cases. Participant/n<sup>61</sup> explained they worked on six cases during their operation, but concluded in all of them there were no grounds to progress the case. At the time of interview, she had recently closed the IP and explained she had become “*increasingly frustrated about the sorts of cases we were receiving*” from INUK. She said her expectation was that there would be something “*realistic in the case that students can do something with,*” but “*if you’re handing me something that’s been to the CCRC three times before, has been the subject of national media scrutiny and investigation, and nothing has come of it...I know that the project is kind of the end of the line, but there’s got to be something to go on.*” Participant/j was also unsure about the efficacy of INUK’s screening process: “*judging on what I’ve received recently...it’s questionable about what they’re doing.*” Participant/f<sup>62</sup> explained that in some of the cases they received it was “*hard to think what new evidence or argument you could come up with*” because “*the jury’s heard all the evidence there possibly could have been.*” However, at the INUK Spring Conference in 2014 (not long before its fold), participant/f said INUK claimed to have developed a more rigorous eligibility criteria and she said: “*I imagine now the cases we would get would be cases where they think there was something we can look at.*” She commented on one of their cases and said: “*they wouldn’t take it now, I mean there’s so obviously nothing that can be done for him, so it’s got to go back.*” Participant/p was not explicit about this issue and had only taken on Project13 post-INUK fold, but she said their current case (from INUK) would soon be closed because they could not find any grounds of appeal. She explained the client continued to take issue with the same points, but the case had been to the CCRC and the ECtHR and had a “*lot of legal attention*” and

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<sup>61</sup> Project11

<sup>62</sup> Project6

*“judgments have been made quite clearly on those issues.”* Therefore, some participants felt it was difficult to proceed in the cases they had.

INUK’s philosophy and Naughton’s model for IPs could potentially explain some of these issues. Firstly, as discussed in the literature review, Naughton’s focus was on claims of factual innocence and he applied a typology which looked at the potential motivations of those claiming innocence to help distinguish between genuine claims and false ones. Secondly, Naughton was clear that IPs should not limit their focus to identifying grounds of appeal, but rather should carry out objective, truth-finding investigations which examined the innocence claim. Thus, Naughton’s concern was with potential factual innocence and not potential grounds of appeal. Furthermore, cases that have had a significant amount of legal attention are likely the most contentious cases, and therefore potentially the ones where there is more evidence supporting the factual innocence claim. This could explain the nature of cases INUK would refer to IPs. This related to Naughton’s overall view of IPs as required to fulfil “unmet legal needs” and to aid those who he saw as victims of the current legal framework, which he believed neglected potential factual innocence in favour of legal technicalities. Therefore, it is unsurprising that INUK cases could be difficult to work on within the existing legal framework.

Another issue which emerged from two participants was that INUK was reluctant for IPs to close cases. Participant/f<sup>63</sup> indicated they had recently decided to close one of their cases because they could not find grounds for appeal. She explained INUK had been resistant towards IPs closing cases, but she thought their policy had changed following the 2014 INUK Spring conference: *“having always said no you must do everything you possibly can, they seem to have sort of changed their view and said, well actually sometimes you do have to look at the case and think there’s nothing more I can do and hand it back and start again.”* Participant/c<sup>64</sup> also commented on this, Project3 had left INUK and he reflected: *“I think when we were in the network we were getting very different sort of signals. Two years back the complaint was that projects were being too willing to stop cases, the following year it was we were sitting on cases and not sending them to the CCRC.”* Thus some participants appear to have felt in a catch-22 situation, where they were encouraged to persist with cases, but simultaneously were struggling to find grounds of appeal. This could explain the difficulties which IPs have had in progressing cases towards CCRC applications and why IPs have appeared to spend a long time working on cases. Participant/j was critical of the INUK policy of recycling cases; he explained they

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<sup>63</sup> Project6

<sup>64</sup> Project3

received two cases that other IPs had already worked on and concluded there was nothing they could do. He said: *“they’ve just gone back into the filing cupboard and waited, so I have another issue with that.”* Again it is possible the reluctance of INUK for IPs to close cases is explicable through Naughton’s philosophy; as discussed in the literature review, he criticised lawyers for closing cases where no obvious grounds of appeal could be found, and encouraged active investigations to continue. This also reflects his focus on potential factual innocence, rather than a focus on legal grounds.

However, other participants explained that IPs would always have a difficult task because they inevitably receive the last resort cases. Participant/f<sup>65</sup> said: *“If they were obviously good cases they would have been cherry picked by a criminal appeals firm ages ago.”* Similarly, participant/d<sup>66</sup> stated: *“The innocence project, its last resort. The good cases they go to barristers, and the no win cases come to innocence projects...”* Furthermore, IPs are starting from a difficult position. Participant/d said the serious nature of the cases<sup>67</sup> means they will have been run by experienced practitioners: *“the chances are, they’ve thought of most of the things you’re going to think of...it’s going to take an awful lot of work to find the thing that’s not already been thought of and...to pass the real possibility test.”* Participant/n<sup>68</sup> also raised this: *“us being successful in this work, it’s really enormously difficult, because not only has it been through multiple layers of appeal, you know lots of people who have far greater expertise than I do who have seen this and done their best.”* Participant/b<sup>69</sup> considered there was something *“inherently wrong,”* in the system that the cases which have *“perplexed juries, and judges and QC’s and CCRC commissioners”* have been given to students to resolve. He draws a medical analogy saying if you had someone presenting with the rarest symptoms, you would not ask for a junior doctor, but would say *“get me the top brains in the world, and see this patient, because we’ve never seen anything like this before.”* He questions: *“Is it strange that IPs don’t get many cases to the Court of Appeal?”* And considers no, because they are *“the most difficult cases in the system.”* Thus, several participants thought the nature of the cases themselves made IP’s task difficult, and that this was an occupational hazard of being a last resort project. It is notable that the Student Law Office at Northumbria University, which has

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<sup>65</sup> Project6

<sup>66</sup> Project4

<sup>67</sup> INUK restricted its focus to serious cases with long tariffs (M Naughton, ‘The Importance of Innocence for the Criminal Justice System.’ In M Naughton (ed.) *The Criminal Cases Review Commission – Hope for the Innocent?* (Palgrave Macmillan 2009) p.30)

<sup>68</sup> Project1

<sup>69</sup> Project2

been operating for significantly longer than IPs has also only ever overturned one case, which was of Alex Allan in 2002. As explained in the literature review, this unit does not restrict its focus to factual innocence and is open to all claims, thus it is not necessarily attributable to problems with INUK screening and philosophy.

Nevertheless, there is arguably some evidence to suggest that there were tensions within Naughton's original aims for IPs which manifested in the casework efforts at member IPs. For those who were closer to the "Formal Legalism Model" within Section 1 (such as participant/p and participant/f who were both criminal defence practitioners) they found the nature of IP cases more problematic.

### **2.3 Tensions: IP Model**

There were three key themes related to tensions within the model of IPs, which are all interlinked with their role in clinical legal education. Firstly, difficulties around leadership of IPs; secondly, that the IP model is unsuited to typical clinical or pro bono schemes at universities; and lastly and most significantly, a lack of resources and funding.

Firstly, four participants suggested the lack of criminal practitioner involvement in running IPs was problematic. Within the thirteen IPs in the sample, three were run by ex-criminal practitioners; three were run by staff members who manage all pro bono/clinical schemes at the university (now two had co-directors); five were run by academics, some who may have formerly been in practice, but not in criminal law; and the remaining two were ran by journalists. Participant/h<sup>70</sup> explained that with all the universities involved at the beginning, none had the necessary expertise to *"properly be able to grab the casework problem by the neck,"* and she reflects: *"if I'm philosophically looking at why the innocence movement, I don't think, will succeed in this country, I think that's part and parcel of it. There are very few practitioners that are running innocence projects."*<sup>71</sup> Similarly, participant/d<sup>72</sup> who ran an IP in a journalism school but was now a criminal barrister, said: *"I don't think you can run an innocence project if you've never stepped foot inside a courtroom, I think you've got to be a practising barrister or solicitor advocate who understands how cases are put together."* Participant/o<sup>73</sup> explained that when a criminal practitioner took over running their project from the previous leader *"he thought it had been rather too academic approach."* She concluded

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<sup>70</sup> Project7

<sup>71</sup> Participant/h

<sup>72</sup> Project4

<sup>73</sup> Project12

that: *“you need someone with a lot of practical experience, because otherwise the danger is people go into academic mode, and with the best will in the world it’s not necessarily what is going to win the case.”*

Originally, it was intended for IPs to liaise with criminal practitioners to get expert advice concerning their casework. However, some participants explained this was difficult to realise due to the time constraints on practitioners. This was raised by participant/j:<sup>74</sup> *“that’s another issue why the INUK model is unsustainable because you’re heavily reliant on criminal practitioners who are also under stress and strain of their own time to offer free advice.”*<sup>75</sup> Similarly, participant/h<sup>76</sup> explained they had originally tried to consult regularly with practitioners, but this became difficult to maintain: *“as time has evolved, we’ve realised that practitioners are very, very busy and it’s quite difficult to get that ongoing relationship with them.”* Participant/f explained that she asked a barrister to look over their application to the CCRC in one case, and they were still waiting for the response 15 months later.

Thus, there was a perception that perhaps pure academics were ill-equipped to run IPs. In the American literature, Brooks, Stiglitz and Shulman suggested that having a traditional academic scholar running the clinic could be “disastrous” unless they had practised criminal law in the trial or appellate courts of a project’s jurisdiction.<sup>77</sup> However, Naughton, as the driver of the movement, was an academic sociologist, and this likely influenced how the UK movement evolved. As explained, Naughton wanted IPs to take a different approach, and he was critical of lawyers for subverting IP investigations to legal grounds. Furthermore, there was a view that students could bring fresh eyes and fresh perspectives to cases as mentioned by participant/d in the previous section. Participant/p who was a criminal defence practitioner also raised this as beneficial: *“I think that passion is quite often lost”* with those in practice, she reflected: *“I’m a lot more hardened to things than they are because I’ve experienced it in my career and everybody tells me they’re innocent. You know, who do you believe?”* Therefore, the impetus behind the movement means it is unsurprising that pure academics became involved in running IPs. Furthermore, because of the separation of the professional training courses from the undergraduate degree which is traditionally academic, several law schools do not run the

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<sup>74</sup> Project8

<sup>75</sup> Participant 11

<sup>76</sup> Project7

<sup>77</sup> J Stiglitz, J Brooks and T Shulman, ‘The Hurricane Meets the Paper Chase: Innocence Projects new emerging role in clinical legal education.’ (2001-2002) 38 California Western Law Review 413 p.427

professional training courses and therefore may be staffed with more academics that do not have practitioner experience.

There were three IPs in the sample ran by criminal practitioners (although only two of these were the participants in the interviews – participant/o from Project12 was co-director to the project, but the project itself was run day-to-day by a former criminal practitioner). Participant/f<sup>78</sup> who had been in criminal defence practice explained that this process was still new to her because she had not done any CCRC applications in practice. Therefore, having a criminal practice background does not necessarily mean individuals will be more experienced in criminal appeals; however, it is likely they have a better working knowledge of the criminal procedure, evidence and application.

Another issue related to staffing of IPs is the fluidity of academic jobs. Within the sample, participant/e; participant/i; and participant/d established IPs but had since left; the following participants had taken over running an IP following the previous staff member leaving; participant/j; participant/p; participant/o; participant/n; participant/m. This could have mixed results. Following participant/d leaving, Project4 closed. Although Project5 is still running, participant/e explained that when she left, *“Nobody else on the staff was interested,”* and when looking to replace her *“they put in a job spec to run an innocence project and nobody wanted to, not one of the applicants said that they would do that.”* Participant/o said she was appointed to oversee Project12 after a staff member left and explained how the university seemed *“to pull our admin jobs out of a hat.”* She had been appointed simply because she taught human rights but had no knowledge of criminal law or procedure. She had eventually managed to get another staff member involved who was an ex-criminal practitioner but commented that universities need to be *“making sure that they allocate them to people who actually know what they’re doing.”* Thus, there is a potential issue with staff turnover and finding adequate replacements. This illustrates a tension with having an IP as an educational tool; if an IP is popular with students, the university may be inclined to continue running it, even without adequate staffing.

Another issue raised by the participants was that the IP model was unsuited to running as a university clinic. Participant/h<sup>79</sup> thought the model was unsuited to the structure of pro bono/clinical schemes in UK universities: *“cases take too long and don’t fit within the usual clinical education model, so every single IP that I know has got similar problems so there’s a*

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<sup>78</sup> Project6

<sup>79</sup> Project7

*fundamental problem. The model doesn't work in my opinion.*”<sup>80</sup> She explained further: *“It's a very, very small period of time when they [students] can be doing this, and that lends itself to quick turnaround stuff like the general legal clinic stuff, but not to innocence it doesn't.”*<sup>81</sup> Participant/f<sup>82</sup> also considered that the *“biggest problem,”* was that the students were only active on the project for around five months before they began to disappear for exams and leave the university. Participant/i<sup>83</sup> explained this was a significant challenge for her when she directed Project8: *“it was a module, so when the module ended they went. So those non term times were difficult in that I still would then have to manage the cases, be around, be monitoring the cases and working on them and that was challenging.”*<sup>84</sup> There were a further five participants who suggested this was a difficulty with running the project, citing the short term times and therefore the limited student availability for casework.

This clearly raises ethical issues over case progress for IP clients, and four participants raised this as a significant problem. One example is participant/j<sup>85</sup> who explained he had recruited students as summer interns to keep the project active: *“we would only work on cases between sort of September and say April before their [students] exams start and then the rest of the time was just dead time you know...and when you've got clients that are in prison there's this huge issue there.”* There were two further projects in the sample who also said they recruited students to work during the summer (Project7 and Project9) but beyond this, it is unknown if any others do so. This solution does require extra resource from the university; because even if the students were available on a voluntary basis, it still requires supervision from the staff member. Participant/m<sup>86</sup> said their IP only ran effectively for six months a year, and would suspend operation during university exam time and holidays. She explained this was a condition of her agreeing to run the IP and likely also why the university was prepared to sanction one; she commented that it would be significantly more onerous for the university to resource if staff had to be employed to run the IP over the summer. Therefore, IPs can be inactive at some institutions for a significant proportion of the year which clearly delays casework progress.

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<sup>80</sup> Participant/h

<sup>81</sup> Participant/h

<sup>82</sup> Project6

<sup>83</sup> Project8

<sup>84</sup> Participant 10, Project1

<sup>85</sup> Project8

<sup>86</sup> Project10

Linked to this, several participants highlighted limited resources as a significant hindrance. This was particularly raised in relation to staff time. IP directors in the UK may also be overseeing all of the pro bono/clinical schemes at the university. Participant/h<sup>87</sup> was in this role and said: *“the only reason this project works is because [participant/g] is here. If he wasn’t here, this project would have closed four years ago, there’s no doubt about that.”* She explained her job role had increased in scope and that *“there is no way that I could do casework, no way, so this project would close.”* Participant/g who now oversaw the IP almost full time echoed these views: *“it does need resources like everything else... you don’t necessarily need me, but you need somebody in my role who can concentrate on it. I mean it’s impossible that a lot of its run by somebody like [participant 2] or lecturers.”* Participant/l<sup>88</sup> was also in the same role as participant/h and found it equally challenging: *“I was being pulled in all directions,”* with a heavy teaching workload and running another legal clinic. She reflected: *“I was finding it very difficult to monitor all the cases we were dealing with...I went through a period of thinking god we’re not going to get anywhere with this because I just I can’t, we need a full time person.”* Similarly, participant/l appointed participant/k to oversee the IP.

This issue was raised by others. Participant/n<sup>89</sup> had been running the IP in her spare time as a lecturer and said she had learnt *“big lessons around resourcing.”* She explained she had no allowance to run the IP in terms of other teaching responsibilities, *“so it was done purely because I was interested in this work and I believed in it.”* However, she said, that only gets you so far *“when you’re running meetings on Wednesday nights between 6 and 8 o’clock, and you haven’t had dinner, and you’ve been teaching all day, and you’re teaching all the next day.”* She explained: *“it’s quite exhausting, and frustrating, because I knew that there were ways to develop it that weren’t within my reach because there’s only one of me.”* This illustrates the difficulty with pro bono schemes which are not integrated into the curriculum because this sometimes means that staff are largely doing it in their spare time, rather than as part of their allotted teaching; it also limits the project in terms of what can be achieved. Participant/a<sup>90</sup> also identified lack of resources and staff time as the *“biggest limitation.”* He explained *“you can’t get researchers to engage in it because researchers have you know, REF requirements that they’ve got to produce...teaching colleagues then don’t have enough time to engage in it.”*<sup>91</sup>

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<sup>87</sup> Project7

<sup>88</sup> Project9

<sup>89</sup> Project11

<sup>90</sup> Project1

<sup>91</sup> Participant 9



He was running the IP as part of his role to oversee the university pro bono schemes. Participant/e,<sup>92</sup> who no longer ran Project5, also raised these issues. She said other staff members would ask her what workload allowance she got for the project; and she explained: *“of course I didn’t really.”* Furthermore, she said: *“and does it add to your kudos as a lecturer? No. I mean I got told a few times I’m wasting my time on it because it doesn’t lead to publications, there’s no REF impact and all these things.”* She reflected: *“So for your career it’s almost suicidal.”*

This raises some of the tensions between the academic and clinical side of a law school. Firstly, how clinical schemes can be marginalised within law schools, and how staff may be limited in their academic progression, which was discussed in the general American literature on clinical legal education.<sup>93</sup> This appears to be an issue in the UK, which is likely exacerbated by the split between the academic undergraduate degree and the professional training courses. Due to universities being driven by research funding, they are more likely to employ staff which have a strong research record, rather than because they have practitioner experience and could run an IP (or other clinic). Secondly, there is a clearly a crisis of resource for IPs in the UK. Law clinics are often seen as operating on the margins of the law school as skills training for students, rather than an academic venture. As discussed by Sylvester, such initiatives were often extra-curricular, rather than integrated within the university degree.<sup>94</sup> Five projects in the sample used the IP as a module or as an opportunity to do assessed work, which was Project1; Project2; Project3; Project8 and Project9. Clearly a benefit of having the IP for credit is that it would count towards staff teaching allowance. Participant/j<sup>95</sup> agreed having the IP as a module was beneficial for this, and could not understand how some individuals ran IPs in their spare time: *“I don’t know how on earth you could do that unless you were doing evenings and weekends as well.”* Problems regarding staff and student time (or lack of) was not a prevalent problem discussed in the American literature. In the US, Brooks, Stiglitz and Shulman discussed how several universities allocate credit for the scheme.<sup>96</sup> Thus, perhaps this is due to either the better integration of the clinical scheme into the university, or better funding for staff time.

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<sup>92</sup> Project5

<sup>93</sup> D Colbert, ‘Broadening Scholarship: Embracing Law Reform and Justice.’ (2002) 52(4) Journal of Legal Education 540

<sup>94</sup> C Sylvester, ‘Bridging the Gap? The Effect of Pro Bono Initiatives on Clinical Legal Education in the UK.’ (2003) 3 International Journal of Legal Education 29.

<sup>95</sup> Project8

<sup>96</sup> Stiglitz J, Brooks J and Shulman T, (n.76) footnote 66 p. 426

There did appear to be a perception within participants that IPs were significantly better funded in the US, which contributed to their success. Participant/i<sup>97</sup> considered: *“they operate very well in the States...but they have funding, without funding it is so difficult.”* She explained how the US IPs attract charitable funding because: *“they use the death row card, so once somebody is unfairly on death row people will give money, but they won’t to just ordinary prisoners.”* Participant/h<sup>98</sup> suggested that *“in Ohio, they get something like a million dollars a year from the Rosenthal foundation to run, and I know New York IP raises something like six million dollars a year to run.”* She reflects: *“every single IP in the states is funded properly as far as I know, and in this country none of them are, so that is the fundamental problem here.”* Participant/e considered the UK projects would never have the impact that American projects could have: *“because the Americans have such a bigger problem than we do, and they’ve got big impact, its big money, there’s masses of people involved.”* Thus participants perceived the US IPs to be much better funded, which would potentially help avoid some of the problems faced by IPs in the UK.

## **2.4 Tensions: INUK**

The data from participants also suggested there were problems within the network during its operation. In the sample, Project7, Project2, Project3, Project8 and Project9 had all decided to leave INUK to become independent, which illustrated that cracks were emerging within the movement.

One participant explained how complications arose when their project tried to take on a case which they found independently of INUK. INUK protocols required member projects to refer cases to the network for eligibility screening. This IP thought the case fully qualified according to INUK criteria, but INUK rejected the case. They decided to work on it anyway, even if it meant creating a separate unit to the IP to deal with it (although INUK folded not long after). Thus, there was the potential for disagreements between INUK and its members over case eligibility. Furthermore, participant/o<sup>99</sup> did not think INUK was as supportive as it could have been. She explained she valued being part of a network for the *“practical back up and stuff, but I didn’t actually feel that there was a lot of that.”* She said they would have run the IP independently had they been confident in doing so.

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<sup>97</sup> Project8

<sup>98</sup> Project1

<sup>99</sup> Project12

Beyond that, another participant was critical of INUK's structure. They explained it was originally intended for different IP leaders to buy into different jobs within the network and that it would "*become a democracy,*" but this never happened because "*Michael Naughton was too worried about losing any sort of control over it.*" They suggested it was difficult to distinguish between what was Naughton and what was INUK: "*INUK doesn't actually exist, it's not anything other than Michael and some people paying to join this organisation, there is no democracy, there's no system at all,*" and "*I think the problem is in the eyes of the outside world, people see INUK and think it's a group of universities who are all putting their weight behind this, the reality is they don't actually know what is being said in their name and that I think is a huge problem...until people actually confront it, it's going to simmer away.*" Participant/a<sup>100</sup> was a member of INUK and was interviewed shortly before the INUK fold. He had intended to continue working with them, but commented that it would be a "*slightly more federalist organisation*" soon. Thus, member IPs did not directly participate in running INUK, and it was a centralised organisation rather than a network of different universities contributing.

The participants from member projects appeared to view INUK as a separate entity, rather than as a network which they were part of, and would refer to "INUK's views," or "INUK's position." This was potentially problematic for several reasons. Firstly, when Naughton folded INUK he referred to the considerable burden of running it; had it operated as envisaged with different IPs doing different jobs, it may have been more sustainable. Furthermore, a stronger collaborative network could have potentially increased the movement's success, especially in relation to reform. Participant/h said that INUK: "*seemed to make absolute sense, that a group of universities working together productively, could potentially make a difference.*" However as was shown in the previous chapter, very few participants identified with INUK's broader aims for systemic change; thus this shared impetus was not a reality. Therefore, INUK did not appear to be operating as had been envisaged, at least by some.

### **3. The innocence movement: reaching a crisis point?**

It appears evident that between 2005 and 2014, there were already significant problems and tensions emerging within the UK innocence movement. This section will demonstrate that some participants, even prior to the official INUK fold, already considered that the movement was under threat.

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<sup>100</sup> Project1

In the interviews held prior to the INUK fold, there were four participants who already considered the UK innocence movement to be in decline. Participant/g<sup>101</sup> who was interviewed in December 2013 commented: *“I wouldn’t want to see the innocence movement fail and fold, there’s been a few signs of it beginning to get a bit fragile.”* Participant/h<sup>102</sup> (also interviewed December 2013) was stronger in her concerns: *“I think the university innocence project movement has peaked, and is now going downhill rapidly, and I don’t think that will reverse.”* She cited the numerous problems with the IP model, such as those discussed above and concluded: *“all those problems added together mean I think that innocence projects aren’t going to exist in perhaps five years’ time, they’ll be well on their way out.”* She explained there was an increased pressure on UK universities to provide pro bono schemes which meant, *“it’s only ever going to be more pressure on universities to do more, more cheaply, more quickly, so that students have the same experience.”* She considered with regards purely to providing clinical legal education, IPs were of no greater benefit to students than other clinics, which were much quicker and simpler to operate: *“I honestly think, that exposing students to IP work, they’re not going to get any more transferable skills than they are on [a sports law clinic] which takes six weeks from start to finish. They’ve still got that exposure to the law, they’ve still got something for their CVs, they’ve still got something to talk about in an interview.”* She considers, *“they don’t have the passion of saying, well for social justice reasons, I’m glad I studied law, because I know how wrong the law is, because I don’t think that adds anything.”* This illustrates the tension with IPs operating as educational schemes in universities where skills training and employability is the primary concern. Participant/h concluded that *“if I had realised...how long these things would take I would not have signed [university] up...I think now I do know what’s involved, I wouldn’t touch one with a barge pole.”* Thus, participant/h thought universities would potentially abandon the IP for simpler schemes.

Participant/b (spoken to in January 2014) also suggested that IPs were in decline and may soon be non-existent. He referred to the lack of official success:<sup>103</sup> *“all the innocence projects are left with the difficulty of saying [we’ve had IPs] for a few years now, and you are yet to have any success. So I think as a model, it’s probably a busted flush, it doesn’t work.”* Participant/b reasons: *“it’s debatable whether innocence projects as a system, as an idea are actually possible...it’s possibly unlikely that they could ever succeed.”* He considered that the Centre

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<sup>101</sup> Project7

<sup>102</sup> Project7

<sup>103</sup> This was in January 2014 – prior to the overturning of a conviction by Cardiff University

for Criminal Appeals (CCA)<sup>104</sup> was the new model for miscarriage of justice work and that: *“innocence projects are the old model and are probably flawed and don’t work.”* Similarly to participant/h, he suggested universities might opt for easier clinics, *“universities might think, let’s get out of this miscarriages of justice game, it’s just hellish, it takes too long...let’s get into something else where we can have nice resolution...they can have this magic thing called impact that everybody worries about.”* He concluded: *“you can see it now, one by one the innocence projects around the country are dropping, or going silent.”* Participant/b ran the IP in a journalism school and indicated that he would potentially close the project once the two outstanding cases had been resolved.

Participant/e<sup>105</sup> was no longer involved directly in the work, but she perceived the movement was in trouble in early 2014, reflecting: *“I did think the future was rosy, because there was so much interest in doing pro bono work. But I think now that universities have changed, in that there’s not enough time for staff to do things; there’s not any money around to do things...I think we’ll struggle really.”* She raised very similar concerns to participant/h about the lack of resource and the limited time which staff have to supervise the project. As discussed above, participant/e said the university struggled to replace her when she left: *“it’s not like there’s people around who have the skills and experience...and if you’re expecting someone to just turn up with the enthusiasm you’ve got to make sure they’ve got the time and the money to do that, new lecturers don’t, I mean no one really does.”* Participant/e concluded: *“I think IPs are dying out and just at a time when we’re going to start getting more and more miscarriages of justice, because of legal aid, because of forensic science... and no lawyers anymore with any time or any money...if anything IPs should be booming.”*

Thus, there was already a perception from some participants in the earlier stages of the research that IPs were closing, and that there were significant problems within the movement. The main factors identified were tensions related to the IP model and the difficulty of operating it as a university clinic. However, it was suggested there were also other tensions apparent within the role of IPs under INUK, as well as within the network as a whole. These underlying tensions explain why the UK innocence movement has thus far had a limited impact; particularly, in terms of casework. Furthermore, they were also a contributing factor to INUK’s fold.

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<sup>104</sup> The Centre for Criminal Appeals is a not for profit law firm set up to work on miscarriage of justice cases; this is discussed further below.

<sup>105</sup> Project5

#### **4. The INUK fold: July-September 2014**

Naughton announced in July 2014 that he would be folding INUK as a membership organisation for IPs in September; and thus would not be renewing memberships or accepting any new members. As explained, there were 25 member projects still listed on the website who would now have to operate independently. INUK provided several services to member projects. Firstly, it performed the case screening and passed eligible cases to member projects; it provided casework protocols for projects to follow; and it organised annual conferences and training where projects could come together to discuss issues.

Naughton cited a number of reasons for having to fold INUK in its current form. Firstly, the funding constraints meant INUK was unable to continue performing all these services.<sup>106</sup> Secondly, Naughton said a disproportionate amount of time was being spent on supporting IPs which failed to act in accordance with the protocols, or which were inactive in casework. He said he was dealing with complaints from prisoners who were dissatisfied with the work of member projects.<sup>107</sup> Naughton said INUK never had the capacity to “police” member projects.<sup>108</sup> Thirdly, he expressed concern that students were using IP work as a CV booster, whilst knowing little or nothing about INUK and failing to attend conferences.<sup>109</sup> Lastly, Naughton said the number of eligible cases which INUK was receiving had dried up, and that only a few in two hundred applications met the eligibility criteria.<sup>110</sup>

Thus, Naughton’s announcement suggested there had been a number of problems in running INUK. A crisis in resourcing was clearly a significant problem. One participant reflected that INUK’s “*growth outstripped its internal support systems*” and “*it’s sort of a victim of its own success.*” Beyond that, Naughton was clearly concerned the educational aims had subverted the aims of INUK: his suggestion that students use IP work as a “CV booster” and are not interested in INUK reflects this perception. When discussing the rise, it was suggested that whilst clinical legal educational aims were ancillary to Naughton and INUK, IPs were marketed as a clinical legal educational tool and this was a significant reason for universities supporting their development. Naughton also suggested the eligible cases were drying up, which has caused controversy. Green who runs the now Miscarriage of Justice Review Centre at Sheffield

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<sup>106</sup> Innocence Network UK: New Beginnings <http://www.innocencenetwork.org.uk/inuk-new-beginnings> (accessed 22/06/16)

<sup>107</sup> Ibid.

<sup>108</sup> ‘Innocence Network UK: New Beginnings’ (n.104)

<sup>109</sup> ‘Innocence Network UK: New Beginnings’ Ibid. (n.104)

<sup>110</sup> ‘Innocence Network UK: New Beginnings’ Ibid. (n.104)

University expressed surprise at Naughton's conclusion that there were no eligible cases, and said he knew of several organisations which were still receiving a large number of requests. He suggested: "the problem must be with INUK's assessment of eligibility," and that there seemed to be a "commitment to the prejudgment of cases," which he says Naughton criticised the CCRC for doing.<sup>111</sup>

Naughton's decision to fold INUK sparked debate amongst interested parties concerning "is the innocence movement really over in the UK?"<sup>112</sup> Price suggested it was time for universities to take stock, and she thought some may decide to focus on less challenging areas of real-client work.<sup>113</sup> Eady reflected on the "importance of grasping the essence" and urged universities to remember the "ethical commitment" of IPs, which "means caring about innocence and not sacrificing it on the altar of the restrictive rules of appeal."<sup>114</sup> Whilst Quirk argued this was the "chance of a new beginning" and urged for universities to think about what they can achieve with such clinics. She cautioned that "good intentions can still have unfortunate consequences" and that despite problems with the NHS, we would not want medical students performing brain surgery.<sup>115</sup> Green on the other hand foresaw the chance of a "bright future" for university miscarriage of justice work.<sup>116</sup>

Thus, the folding of INUK created a significant period of uncertainty over the future of the UK movement: so has the innocence movement suffered a fall or undergone a reconfiguration?

## **5. A fall? Or a reconfiguration?**

The immediate consequence of INUK folding was that a number of universities changed their name from "innocence project." The IP name is trademarked by the international network (hereafter IN).<sup>117</sup> As INUK was a member of the IN, it required annual reports from member projects, which provided a quality check on their services. However, following INUK's fold, to continue using this name they would have to join IN. The majority of UK IPs would not meet the requirements for joining, which stipulate that: "projects based at law schools or other

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<sup>111</sup> See A Green, "UK Innocence Projects: a bright future." *The Justice Gap* (August 21<sup>st</sup> 2014) <http://thejusticegap.com/2014/08/uk-innocence-projects-bright-future/>

<sup>112</sup> See J Price, 'Is innocence work really over in the UK?' (September 25<sup>th</sup> 2014) *The Justice Gap* <http://thejusticegap.com/2014/09/innocence-work-uk/> (accessed 04/08/16)

<sup>113</sup> Ibid.

<sup>114</sup> D Eady 'Innocence Projects: the importance of grasping the essence.' (September 24<sup>th</sup> 2014) *The Justice Gap* <http://thejusticegap.com/2014/09/innocence-projects-importance-grasping-essence/>

<sup>115</sup> H Quirk, 'The end of innocence, and the chance of a new beginning?' (8<sup>th</sup> September 2014) *The Justice Gap* <http://thejusticegap.com/2014/09/end-innocence-new-beginning/> (accessed 31/08/16)

<sup>116</sup> A Green, (n.109)

<sup>117</sup> For information, see: <http://innocencenetwork.org/>

educational institutions” must demonstrate that “the host institution has committed at least twenty hours per week of at least one faculty member’s time to supervise students on clinical work and oversee the program.”<sup>118</sup> In anticipation of this, a number of former INUK projects changed their name to variations of Justice Project, or Criminal Appeals Project or Miscarriages of Justice Review Centre. Therefore, by name, there are very few “IPs” left in the UK; only projects at the University of Greenwich; Cardiff University; and potentially the University of Brighton are thought to still use the name; although only the University of Greenwich has formally joined IN so far.

As explained, the interviews were ongoing between December 2013 and January 2015. There were five participants from four IPs who were spoken to following Naughton’s announcement of the INUK fold. Out of the thirteen projects sampled, only Project11 was completely closed following this. Participant/n explained they had been trying to get another case from INUK but were not getting a response and said: *“I took the decision then personally that it was the right time to bow out.”* She explained *“I felt that the network nationally was declining,”* and *“there were problems in the network,”* which she felt were impacting their project through the types of cases they were receiving. She also said that *“Every year it was a battle just to secure funding to cover our membership fee [of INUK] and our very minimal running expenses.”* She also referred to conflict associated with INUK and reflected: *“to have relationships break down like that, it’s not helpful.”* She reflected that following the loss of INUK *“I think it’s going to be really difficult for people. We lost something in the network being disbanded, and I think Bristol loses actually as well, you know I think we’re all losers...there’s a strength in a network, that’s going to be lost.”* Thus, participant/n saw the folding of INUK as detrimental to the UK movement.

Participant/m from Project10 was spoken to shortly after INUK’s announcement. She said they were likely to change their name because they did not meet the staffing requirements to join IN, and thought it unlikely the law school would want to raise these hours to comply. At this stage she was unsure of how things would progress. Project12 had suspended operation for the academic year of October 2014 – October 2015 and participant/o explained she was concerned over the future for their IP. Project12 had been in the process of getting a case from INUK, but participant/o said *“it sounded as if they were really scraping the barrel to find anything for us.”* She felt the INUK fold was problematic for their IP as they did not know how to source

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<sup>118</sup> <http://www.innocencenetwork.org/resources/membership-materials/membership-guidelines> (accessed 21/02/15)



their own cases which was a main reason for suspending operation. Participant/o said she liked being part of a network: *“as someone who’s really new to it, I would feel happy to be part of a network where there were protocols and you were working to certain kind of standard approaches because otherwise, one you’re reinventing the wheel so it takes longer, but also you know it’s safer if there’s a clear set of protocols and everybody kind of knows this is how you should approach things.”* However, she said they definitely intended to continue because there was still a strong appetite for the IP in the law school (although this project is thought to have now officially closed.) Thus, participant/o’s comments suggested that for less established projects, the folding of INUK was potentially problematic because of an uncertainty of how to go forward.

Participant/p<sup>119</sup> had just taken over Project13 shortly before the INUK announcement. She said initially there had been complications restructuring the clinic because everything had been prepared with INUK paperwork, and thus they had to create a new infrastructure, which was like starting from scratch. However, she said: *“we did want to continue the project, personally I think it’s worthwhile and secondly, I think it gives the students good experience as well.”* Participant/p said they decided to change their name from IP because they were ineligible to join IN because of the staff requirements. She said, similarly to participant/o, her biggest concern had been sourcing cases (as theirs was reaching the end of the line), she said: *“a week and a half ago my main issue would have been getting the cases through the door that we can deal with in a way that’s compliant with everything we need to be compliant with.”* However, she said through contacts they had just received a potential case and thus *“that might not be as much of an issue as I’d first thought.”*

One participant was particularly positive about their future independently following the INUK fold: *“I am cutting ties completely with INUK, so I’m not having anything to do with them.”* They explained: *“I want to disassociate myself completely with the innocence project INUK...and wanting to move away from the intellectual property issue with America.”* This participant felt they would be more successful independently *“the pressure of not being stuck in the INUK knot...it’ll be better, I’m quite positive about it.”* They also said they wanted to forge a good relationship with the CCRC which was not possible under INUK; they explained how INUK members were instructed not to attend events at the CCRC, such as their stakeholder conference. They also hoped to foster a more positive relationship between

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<sup>119</sup> Project13

universities and encourage the sharing of information: “*I want to stop the complete isolation and destruction of relationships over people disagreeing about fundamental points, because I thought that’s what academics do.*” This reflects on the innocence movement “civil war” which others have observed.<sup>120</sup> Another issue raised was that the cost of INUK membership and conferences was unsustainable.<sup>121</sup> This participant explained they had donated £1500 of their own money to enable more students to attend an INUK conference. They said future conferences ought to be free, but this may require regional collaboration.

Thus, although INUK’s collapse caused a period of uncertainty, the majority of participants spoken to following this intended for their clinic to continue, and some were positive over their future. Only Project11 had closed completely following the INUK fold (although it is thought Project12 has now closed); but beyond that all other sampled IPs are still in operation (except Project4 which had closed several years before).

Therefore, in terms of the sampled projects, the majority were intending to continue working on miscarriages of justice. Beyond this, it is unknown how many former or current IPs still operate in the UK, as there is no formal record of this. INUK used to list all of its member projects whilst it was operational, but this would not include reference to any other independent projects. An estimate would suggest that out of the 38 IPs which were created<sup>122</sup>, there are around 17 still operating in universities (although the majority under a different name);<sup>123</sup> and beyond this an estimated 5 other university clinics which look at criminal appeals (but which were never IPs.)<sup>124</sup> Therefore, whilst the number of IPs has certainly declined, there are still a number of universities involved in criminal appeal work. So what is in a name? What does the decline in IPs mean for the UK innocence movement?

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<sup>120</sup> D Jessel “If Andrew Mitchell can see the light, it could happen to everybody...” (3<sup>rd</sup> June 2014) *The Justice Gap* <http://thejusticegap.com/2014/06/andrew-mitchell-can-see-light-happen-anybody/> (accessed 19/06/14)

<sup>121</sup> Alexander suggested this was also raised in his study, with one participant explaining the costs were so prohibitive they had had to discontinue with the work (‘Innocence Projects – Green Shoots.’ (10<sup>th</sup> June 2016) *Criminal Law & Justice Weekly* <http://www.criminallawandjustice.co.uk/features/Innocence-Projects-%E2%80%93-Green-Shoots> (accessed 31/08/16).

<sup>122</sup> See INUK’s list of 36 IPs established as members: <http://www.innocencenetwork.org.uk/wp-content/uploads/2014/08/Innocence-projects-established-under-the-auspices-of-INUK.docx>; as explained, the other two IPs were at the University of Leeds and the University of Westminster

<sup>123</sup> Cardiff University; Portsmouth University; Winchester University; Leeds University; Nottingham Trent University; Sheffield Hallam University; Sheffield University; Plymouth University; BPP Holborn and BPP Leeds; Brighton University; Greenwich University; Leicester University; Lancaster University; University of East Anglia; Abertay University; Bangor University. (There is also one in a law firm White & Case LLP.)

<sup>124</sup> Northumbria University; Derby University; Birmingham University; Essex University; De Montfort University

It is suggested that the UK “innocence movement” has undergone a reconfiguration. The future landscape for university work in this area looks very different to the “innocence movement” portrayed in the literature.

Firstly, in terms of the factual innocence focus of IPs and the drive for reform, as discussed, the sampled IPs largely did not identify with these ideas; and therefore it is questionable whether there ever was an “innocence movement” in the UK as envisaged. Furthermore, for some IPs, which either left INUK voluntarily or which became independent when it folded, there was an indication that they may broaden their focus. Participant/j from Project8 explained he was still within the mind-set of the INUK model and factual innocence, but said *“I think that as we evolve into a criminal appeals clinic etcetera I think we will be looking more at the technical sort of issues potentially.”* Participant/l from Project9 said they would certainly broaden out the factual innocence focus: *“now we’re not in the straitjacket of the actual factual innocence, we’re just going to have to take every case on its merits and see where we are.”* Participant/p, who took over the project post INUK fold said: *“I would think that we should be able to look at both...this is a law school and everybody here is in some way training to be a lawyer or interested in the law, and therefore, it would be useful and beneficial to us here.”* Therefore, it appeared some IPs would move away from the strict factual innocence focus. Furthermore, for other participants, such as participant/a and participant/f, despite being INUK members at the time of interview, they did not particularly identify with the factual innocence focus. Therefore, it is possible they will too evolve further away from the INUK model in their independence.

Furthermore, some of the participants suggested they were seeking to form new alliances and aiming to collaborate with the Centre for Criminal Appeals (CCA).<sup>125</sup> The CCA ran a pilot educational scheme with a small number of UK universities between October 2015 and May 2016, which looks set to continue. The CCA is a not-for-profit organisation established by experienced criminal appeal practitioners, to look at miscarriages of justice. Within the research, there were two participants who ran IPs who spoke of collaboration with the CCA, as well as two participants running newly established criminal appeal clinics.

Participant/h<sup>126</sup> discussed the CCA in December 2013, when it was still in the fledgling period. She already saw the potential for university partnership with this organisation: *“I think a*

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<sup>125</sup> <http://www.criminalappeals.org.uk/> (accessed 03/07/15)

<sup>126</sup> Project7

*partnership between a group of universities and these organisations is probably the way things will head in the next five to ten years I would think.*” Participant/j<sup>127</sup> had voluntarily left INUK before it folded, and he discussed plans to collaborate with the CCA. He explained *“the INUK model itself is unsustainable,”* and the question was whether to continue running the IP or to evolve. He said *“I’m quite happy that my new involvement with the Centre for Criminal Appeals will help source some work.”* Participant/r (Unit2) said his unit was set up specifically to work with the CCA, and that their aims and objectives were driven by those of the CCA. He explained how the model would work: *“we just work on the one case, so that stops the issue of turnover of students, new students coming in, trying to get up to speed with the case.”* He continues: *“the students will come in September, get up to speed with the case, do the work that they need to do with the deadline of getting it ready for submission by the end of the academic year.”* Thus, this is a very different model to that under INUK, where the cases were the sole responsibility of the IP. Participant/s who ran Unit3 also said he was intending to collaborate with the CCA when the pilot started, and commented, *“the infrastructure which is being assembled, from what I hear, is going to be much more supportive than the infrastructure that it’s replacing.”* Therefore, these participants appeared positive about working with the CCA.

An interview was also held with a practitioner from the CCA (participant/t) to discuss the pilot with universities. Following the INUK collapse, participant/t said universities had approached them for collaboration; they obtained a grant from the legal education foundation and would be working with five or six universities. She considered the collaboration would be mutually beneficial: *“the main thing that we can bring to universities is specialist legal knowledge and the main thing that universities can bring to us is manpower.”* She said there was a concern that some university professors did not have *“the requisite knowledge”* and so the CCA could help develop that. She also commented that the time frames it was taking for IPs to get cases to the CCRC, *“suggests that perhaps not the right cases are being chosen,”* or that *“there are times when direction is lost or that there isn’t necessarily a strategy that is set up at the beginning that is being consistently followed.”* Participant/t explained the model in the same way as participant/r in that students would work on the case during their term time before sending it back. She hoped this could overcome some of the problems which had existed under INUK, saying *“I think that cases tend to get mired and they get stuck in the terms and the holidays and the students,”* and she said: *“I sort of do worry, at some universities, you know what are the cases that you have under your desks, you know? How long has that been sitting*

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<sup>127</sup> Project8

there?” Participant/t also thought there were problems with institutional funding: *“it’s amazing how hard it is when some law schools think the only investment they need to make in their clinical program is just to have a professor who does it. That’s just so insufficient. Particularly if that professor is 3-5 programs, it’s just not possible.”* She considered: *“I sort of wish that not all universities would feel like they have to have an IP, I sort of wish some of them would be like well we’re either going to invest in it and that’s going to cost between 10 and 15k a year”* or not. She had also worked in America and reflected, *“maybe one of the big things is that clinical legal education is far more established in the US and students will spend an entire semester just working on one project. And so when you have a group of five people working 5-7 days a week or something, of course they’re going to accomplish more than somebody who turns up on a Wednesday afternoon.”* Thus, participant/t echoed a number of the issues raised by the research participants within the INUK movement, and she hoped this collaboration would help overcome some of these.

Thus, the CCA model has the potential to resolve several of the tensions discussed in this chapter around the IP model, particularly around the ethical issues with cases being inactive at IPs during student holidays. It would also provide the practitioner involvement which had been lacking through the INUK model. The CCA do share some of Naughton’s aims, in a focus on claims of innocence and a reform agenda. Participant/t said they would use “strategic litigation”: *“we aim to get as many innocent people out of prison as possible, but we also aim to try and change the system whilst we’re doing it, so we pick cases that have strategic importance, so we try, so we have case which involves police misconduct; or prosecutorial misconduct; or a litigant in person; or mental health issues.”* Participant/t said they believed in *“boots in the ground investigations”* which means going out and tracking down witnesses and interviewing them. Thus, they also opposed the “desktop review” approach which INUK was critical of. Therefore, the aims of the CCA share commonalities with Naughton’s INUK approach. However, a key difference is that the CCA seeks change within the existing legal framework, whilst Naughton envisaged IPs as operating outside the legal framework to overcome what he viewed as limitations of the criminal appeal system. In this sense, we have another reconfiguration away from the original aims and objectives of the UK innocence movement, to an approach with significantly less tensions in its aims. To what extent can one work outside the legal framework but simultaneously effect change within it? This will be discussed further in the next section.

So, it has been suggested here that the UK innocence movement has not undergone a fall, but a reconfiguration. The innocence movement in the UK is over in one sense; in terms of its philosophy and Naughton's aspirations, especially following his closure of INUK and the UoBIP. However, there are several university projects continuing to focus on miscarriages of justice. Significantly, although doubts have been raised over the necessity of IPs, there was a strong sense within several participants that IPs were needed in the current legal aid environment. Participant/b<sup>128</sup> considered: "*I think the IPs do, if they are working properly, do a good job for the clients, because nobody else would do this, especially in the legal aid situation now....students are the only people that would put in the time..*" Participant/p<sup>129</sup> had recently joined the university after being in criminal defence practice and she agreed that there was a need for IPs in the current climate: "*I think they are more crucial now than probably ever...obviously I've come from a practice background and the legal aid reforms are affecting all my colleagues.*" However, she reflected, for the client "*it's swings and roundabouts*" because students cannot replicate a practitioner working on the case. Participant/t from the CCA also thought, despite her concerns, that university clinics could play an important role, and may even be necessary because "*there aren't enough lawyers in the system who are willing to take these cases...and the big advantage that students have over practitioners is that they're able to spend time in the field with huge numbers of documents, that sort of work is very well suited to the student environment.*" This view was echoed by others, including participant/k; participant/f; and participant/s.

As discussed in the literature, there are ethical concerns over clinical legal education schemes conflicting with client service:<sup>130</sup> three participants raised concern over this. Participant/g said there is this "*ethical dilemma*" underlying IPs as university clinics and the potential they could "*get used as sort of an education resource without having any real commitment to the client.*" Participant/d also said there was a danger of IPs being used "*to tick promotional boxes.*" He reflected: "*my biggest concern is that we were giving prisoners hope when there was none, and that's very dangerous...you're giving them hope, that a lawyer probably wouldn't.*" This view was echoed by participant/j who said "*there are certainly universities out there where it's an educational tool and they miss this idea about the actual client*" and the potential for false hope. However, despite these concerns, most participants said their clients were pleased

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<sup>128</sup> Project2

<sup>129</sup> Project13

<sup>130</sup> N Tarr, 'Current Issues in Clinical Legal Education.' (1993-1994) 37 Howard Law Journal 31 p.35

with their work. Participant/g<sup>131</sup> explained: *“almost universally I think they’ve come back to us and said you know, you’ve done better than anybody else in fact along the line.”* Similarly, participant/i<sup>132</sup> said: *“They always seemed to be happy we contacted them every week, had regular letters, phone calls, you know the odd visit, and they always would say they were very pleased with what we were doing for them.”* Participant/m<sup>133</sup> and participant/f<sup>134</sup> also said they had similar positive feedback. Only one participant indicated they had had any negative feedback. Thus, it is arguable that IPs are performing an important role. However, in the wake of the INUK collapse, there is no central network and thus no means for holding university projects to account for their work. Therefore, perhaps concerns over quality control are more justified than ever.

## **6. Summary: addressing the research questions**

### **2. Reflections on the innocence movement**

#### **(a) To what extent do leaders of IPs consider they have succeeded in their original aims and objectives?**

Whilst all IP leaders (except participant/d and participant/o) felt the IP had been successful educationally, none felt particularly successful in casework; it was discussed how IPs have been criticised by the CCRC for their casework progress. Their limited success could be explicable through the tensions underlying IPs and the UK innocence movement.

#### **(b) Have IPs developed and evolved during their operation? In what ways have they evolved and why?**

The previous chapter suggested the majority of sampled IPs did not reflect the IP model within the literature. For some of these projects, there was no indication this resulted from an evolution away from the “Factual Innocence Model,” but simply that they never identified with it. However, there was evidence within the sample that IPs were evolving away from the INUK approach, as Project2, Project3, Project7, Project8 and Project9 explained they had elected to leave the network to operate independently. There was also evidence that some IPs had evolved away from the casework approach under the “Factual Innocence Model,” in recognition of the difficulties around establishing factual innocence (such as for Project2 and Project7). This chapter has also suggested there may be a further evolution away from the factual innocence

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<sup>131</sup> Project1

<sup>132</sup> Project8

<sup>133</sup> Project10

<sup>134</sup> Project6

focus of the “innocence movement” post-INUK. Participant/j (Project8), participant/l (Project9) and participant/p (Project13), all suggested they might broaden their focus. Additionally, some participants did not identify with the factual innocence distinction, despite being current INUK members, such as participant/f and participant/a; this focus may change now they are operating independently. Furthermore, former IPs were seeking new alliances, such as with the CCA, to try and overcome some of the difficulties with the INUK model (such as inactivity over the summer; lack of practitioner involvement). Thus, there has been an evolution of IPs, which is best understood as a “reconfiguration.” This has occurred because of the combination of several tensions within the original “innocence movement.”

**(c) Is there a new model of pro bono clinic emerging? How is this different?**

As discussed, there are now very few “innocence projects” left in the UK, with the majority of former IPs having changed their name to avoid joining the international Innocence Network. In this sense, the majority of miscarriage of justice clinics in the UK are now operating under a new model because they are completely independent of the IP branding and “innocence movement.” Furthermore, in practical terms, those IPs collaborating with the CCA will be operating under a different model, which has the potential for overcoming limitations with the in-house IP model within a university school. However, the CCA collaboration is still on a small scale, and the majority of clinics involved still work on their own independent cases alongside this; so whilst this may represent a new model, it has not replaced the old one completely. Combining the analysis in the previous chapter with reflections on the future direction of former IPs, it seems unlikely there are many university projects left which represent the INUK model or “Factual Innocence Model.” Rather, the sample suggests the majority of miscarriage of justice clinics in the UK will be somewhere in between a “Mixed Model” and the “Formal Legalism Model,” which reflects a more traditional approach to approaching criminal appeals and clinical legal education.

**(d) Can we conceptualise the innocence movement in the UK in terms of a “rise and fall” narrative?**

In one sense, the UK innocence movement has undergone a “rise and fall”: at least according to the existence of INUK and the pursuit of Naughton’s original aspirations for IPs. However, it is questionable whether the UK “innocence movement” as envisaged by INUK was ever really in existence, as the majority of participants sampled did not identify with many of INUK’s aims. In terms of likening the UK “innocence movement” to an “innocence



revolution”<sup>135</sup> or “civil-rights” movement,<sup>136</sup> as has been suggested in the US, the data does not support this analysis. The folding of INUK and the demise of its broader aims and objectives resulted from the amalgamation of several underlying tensions within the movement; tensions which potentially contributed to the closure of other IPs in the UK. Rather, this analysis suggests the movement is better understood in terms of a “rise and reconfiguration,” because there are still a significant number of former IPs in operation. However, for those continuing with miscarriage of justice work, whether as an IP or different clinic, there was a sense of moving forward with potentially different emphases, and a view to resolving some of the tensions that had manifested within the INUK movement. Therefore, it can be concluded that the future landscape for university miscarriage of justice work does potentially look very different to the “innocence movement” envisaged within the literature.

## **Conclusion**

Therefore, this section has sought to demonstrate how there has been an evolution away from the innocence movement under INUK and as portrayed in the literature. Whilst this section has discussed how this resulted from a combination of tensions underlying the movement, the following section will seek to explore further why this evolution occurred drawing on theoretical insights from social systems theory. This will involve considering potential tensions within the innocence movement philosophy in a different way. A critical issue which has emerged within discussion of the “innocence movement” and IPs throughout the thesis revolves around how we define and construct a miscarriage of justice. The innocence movement was premised on reinstating concern with “factual innocence” or a lay construction of a miscarriage of justice as opposed to a legal construction which focuses on conviction safety. The tensions associated with this construction pointed towards Social Systems theory as a potentially important theoretical framework to examine the empirical data: this will now be discussed in the following chapter.

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<sup>135</sup> K Findley, ‘Innocence Found: The New Revolution in American Criminal Justice.’ in S Cooper (eds.) *Controversies in Innocence Cases in America* (Ashgate Publishing Ltd. 2014) p.3

<sup>136</sup> D Medwed, ‘Innocentrism.’ [2008] *University of Illinois Law Review* 1549 p.1550

## **Chapter 6**

### **The UK innocence movement: Insights from Social Systems Theory**

#### **Introduction**

This chapter seeks to employ Social Systems theory as a theoretical framework for examining the UK innocence movement and addresses the research questions which were identified in Chapter 2. This is the first in-depth attempt to examine IPs within Social Systems theory: it will firstly attempt to conceptualise IPs within this context, before reflecting on the insights which this theoretical approach can bring to interpreting and understanding the research findings. This chapter will proffer two new interpretations of IPs within Social Systems theory, and will further develop a previous attempt at analysing the place of IPs within this context. Furthermore, it will offer theoretical insights into the findings documented in the previous two results chapters, reflecting on the failure of Naughton's aspirations for the "innocence movement" to be realised. Social Systems theory raises the question, to what extent Naughton's vision of IPs under the "Factual Innocence Model" was capable of translating into practicable social reality. This chapter aims to cast important insight into the evolution of the UK innocence movement away from Naughton's original vision. It will be both explanatory in looking at the failure of the "Factual Innocence Model" to be adopted by other IPs; and exploratory in thinking about what a systems theory analysis of society means for the cause of IPs. This chapter will suggest the UK innocence movement provides an empirical illustration of the applicability of social systems theory to our understanding of society.

The chapter will proceed in the following way:

Firstly, before analysing the place of IPs within the theory and thinking about its importance to understanding the research findings, it is necessary to briefly reflect on the application of this theory to the empirical data. The use of Luhmann's theory to examine the interview data requires consideration of the role of people within the theory and their relationship with the social function systems.

The chapter will then proceed to its central discussion by firstly addressing the first two research questions outlined in Chapter 2. In determining what IPs may represent in a systems theory analysis, this chapter will proffer three potential ways of conceptualising IPs within

Social Systems theory and consider the consequences of each. Furthermore, in doing this, it will draw insights from this theoretical approach to reflect upon the research findings: why did the majority of sampled IPs not identify with the model of IPs as portrayed in the literature?

The chapter will then address the third research question as identified in Chapter 2. This will discuss the reform agenda of the UK innocence movement with reference to the 2014-2015 Justice Select Committee review of the CCRC: submissions from IP leaders will be discussed, as will the outcome of the review. This will consider the extent to which Nobles and Schiff's systems analysis of how the CACD defends law's authority and finality can explain why those IPs engaged with reform have faced difficulties in pushing their agenda.

This chapter will conclude by reflecting on the utility of social systems theory as a framework for analysing the UK innocence movement. It will also discuss the extent to which the empirical data appears to provide an illustration of the autopoietic nature of social systems and their impact on social life.

This analysis of IPs will draw on the literature and the empirical data. Before proceeding to the main analysis, how the theory is being applied to interpreting the empirical data will be discussed.

Lastly, this chapter will conclude by reflecting on the insights social systems theory can provide to understanding the evolution of the UK innocence movement traced this thesis, whilst also considering what a systems understanding of society might mean for our future expectations of how the criminal appeal system deals with wrongful conviction.

### **1. Application to Empirical Data**

Luhmann's theory operates at a high level of abstraction and there are difficulties with applying it to empirical work. Luhmann was sceptical of the possibility of empirical research as a means for exploring autopoietic theory, because the research will inevitably be a reconstruction of observations based on the meaning systems of the researchers involved, and no research can be judged to have objective validity.<sup>1</sup> However, there have been applications of systems theory to empirical studies, such as by King into child welfare, as discussed above.

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<sup>1</sup> See N Luhmann, *Theory of Society – Volume 1* (English translation, Stanford University Press 2013) and N Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System.' (1991-1992) 13 *Cardozo L. Rev.* 1419 p.1422

Priban said it is possible to distinguish “orthodox, liberal and pragmatic” receptions and elaborations of Luhmann’s theory.<sup>2</sup> Some scholars think autopoietic social systems theory “requires its most faithful interpretation and application” and deem any other approaches “heresy.”<sup>3</sup> Yet others, such as Teubner, have sought to apply it more liberally, by evaluating its central concepts such as “‘self-reference’, ‘structural coupling’, ‘normative closure/cognitive openness.’”<sup>4</sup> Priban says however: “the most common approach to Luhmann’s work has been pragmatic and predatory:” such scholars are less concerned with the consistency and complexities of arguments and terminology of Luhmann and more interested in using them for insights to support their own arguments and contribute to their own areas of study.<sup>5</sup> The application of systems theory within this chapter largely falls into the latter category. Luhmann’s theory has only been explored to the extent to which was deemed necessary for this analysis, which is an initial exploration into its potential as a theoretical framework for examining IPs and the UK innocence movement. Furthermore, this analysis draws on ideas from scholars such as Nobles and Schiff, who have already extracted aspects of the theory and applied it to their own context.

Priban and Nelken discussed how it was difficult to know what aspects of the theory were open to empirical verification or disproof.<sup>6</sup> They suggested the claim that subsystems and discourses can never do more than reconstruct each other in their own terms, potentially lends itself to empirical testing; insofar as this allowed for the sampling of “documents and opinions produced by the human agents behind such discourses.”<sup>7</sup> King appears to have done this in his application of systems theory to child welfare. He utilised research interviews in his analysis, for example he discussed how a child psychiatrist he had interviewed explained she felt required to exaggerate the inadequacy of parents’ child care in order to have her evidence accepted in court.<sup>8</sup> However, King emphasised that his focus was not on the difficulties of collaboration in and between people (lawyers and social workers), which would fall outside of a strict application of systems theory; but on demonstrating the impossibility of achieving a

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<sup>2</sup> J Priban ‘Book Review: Andreas Philippopoulos-Mihalopoulos, Niklas Luhmann: Law, Justice, Society, Oxford: Routledge, 2010.’ (2010) 73(5) *The Modern Law Review* 893 p.893

<sup>3</sup> Ibid.

<sup>4</sup> J Priban (n.2) p.893

<sup>5</sup> J Priban (n.2) p.894

<sup>6</sup> J Priban and D Nelken ‘Introduction’ in J Priban and D Nelken *Law’s New Boundaries: The consequences of Legal Autopoiesis* (Dartmouth Publishing Company, Ashgate Publishing Ltd. 2001) p.15

<sup>7</sup> Ibid. p.15

<sup>8</sup> M King, ‘Child Welfare within Law: The Emergence of a Hybrid Discourse.’ (1991) 18(3) *Journal of Law and Society* 303 p.314-315

hybrid discourse which combines law and child welfare science.<sup>9</sup> Thus, his analysis remained true to a focus on social communicative discourses, and people were simply examined as agents to explain their interaction with it. To a certain extent, this will be done here: the analysis will examine the interaction of IPs with the legal system and how law reconstructs communications and events from its environment.

However, the decision to analyse IPs as systems of ‘meaning’ based on the communications of IP leaders is likely to provoke more difficult questions. Priban and Nelken reflected that it was difficult to know when a researcher’s efforts remain consistent with the theory.<sup>10</sup> They discussed a contribution from Nobles and Schiff in which they utilised systems theory to analyse different ‘interpretive communities’ within criminal justice: they said whether this was consistent with Luhmann’s theory depended on whether one could only ever focus on subsystems and discourses, or whether it could also discuss groups and individuals.<sup>11</sup> They question: is ‘meaning’ a property of systems of social groups?<sup>12</sup> The same question arises in relation to the application of systems theory in this chapter, which will draw on insights from Nobles and Schiff in both applying the theory to the empirical data and interpreting it. Priban and Nelken explained that Nobles and Schiff thought a merit of social systems theory was its focus on communications between different groups of social actors and the difficulties of translation.<sup>13</sup> Autopoiesis prompts the researcher to look for the meaning that actors impose on their actions through their participation in systems of communication, and to track changes in meaning through these processes.<sup>14</sup> This analysis will be adopting this approach in analysing the communications used by IP leaders and how they account for their interaction with different social systems: this will feed into a reflection on the autopoietic nature of law as a social system.

Nobles and Schiff have also used autopoietic theory to suggest that individuals are constrained by the systems within which they operate.<sup>15</sup> Within Luhmann’s theory, people exist outside of social systems, which are part of their environment.<sup>16</sup> However, in order to respond to social

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<sup>9</sup> M King ‘The Construction and Demolition of the Luhmann Heresy.’ in J Priban and D Nelken (eds.) *Law’s New Boundaries: The consequences of legal Autopoiesis* (Dartmouth Publishing Company, Ashgate Publishing Ltd. 2001) p.143-144

<sup>10</sup> J Priban and D Nelken, (n.6) p.15

<sup>11</sup> J Priban and D Nelken, (n.2) p.15

<sup>12</sup> J Priban and D Nelken, (n.2) p.15

<sup>13</sup> J Priban and D Nelken, (n.2) p.12

<sup>14</sup> R Nobles and D Schiff ‘Criminal Justice: Autopoietic Insights’ in J Priban and D Nelken (eds.) *Law’s New Boundaries: The consequences of legal Autopoiesis* (Dartmouth Publishing Company, Ashgate Publishing Ltd. 2001) p.201

<sup>15</sup> R Nobles and D Schiff, *Observing Law Through Systems Theory* (Hart Publishing 2013) p.252.

<sup>16</sup> R Nobles and D Schiff, (n.15) p.253

systems, people must couple with them through making systemic communication.<sup>17</sup> When individuals participate in systems they are offered roles which provide context for the available communications, and they become constituted by that system (i.e. legal subjects in law, economic actors in the economy).<sup>18</sup> Nobles and Schiff suggest that individuals become “fractured socially” by the systems which name and construct them, which can lead to disassociation from the social world and potentially a sense of frustration in their inability to control the operations of systems.<sup>19</sup> It will be suggested that the interview data provides evidence for how individuals are “socially fractured” through how participants’ discuss their interaction with law; and furthermore, that the systemic limitations placed on people can explain the failure of Naughton’s aspirations for IPs to be realised and why the “Factual Innocence Model” was largely not adopted at the majority of IPs.

## **2. Conceptualising IPs within Social Systems Theory**

At the outset it is worth acknowledging that, most simply, IPs could potentially be understood as “organisations” within Luhmann’s theory. Luhmann saw organisations as a relatively recent social system which have evolved alongside functional differentiation (i.e. as politics has emerged as an autopoietic system, political parties have developed as organisations; similarly, the emergence of the education system has led to the development of organisations such as universities and schools).<sup>20</sup> Moeller explained that organisations will not be confined to necessarily one function system; for example, universities are simultaneously involved in education and science, but also play an economic role.<sup>21</sup> A central characteristic of organisations is membership, in that they include people by accepting them into themselves (i.e. grades for a university).<sup>22</sup> Organisations can also be described as systems of decision-making. What an organisation does depends on its decisions; these decisions typically lead to further decisions, and thus decision-making forms the basis of the autopoiesis of organisations.<sup>23</sup> Moeller gives the example of serving on a management committee in

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<sup>17</sup> R Nobles and D Schiff, (n.15) p.253

<sup>18</sup> R Nobles and D Schiff, (n.15) p.253 Teubner developed this idea, explaining how law as a social process needed to attribute communication to actors in order to continue self-reproduction: these actors become role-bundles, character-masks of internal produces of legal communication. (G Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law.’ (1989) 23(5) Law and Society Review 727 p.741). Other systems would be required to do the same.

<sup>19</sup> R Nobles and D Schiff, (n.15) p.253

<sup>20</sup> HG Moeller *Luhmann Explained: From Souls to Systems* [2006] Open Court Publishing, Carus Publishing company p.31

<sup>21</sup> Ibid. p.31

<sup>22</sup> HG Moeller (n.20) p.31

<sup>23</sup> HG Moeller (n.20) p.31

university or making a managerial decision in a company.<sup>24</sup> IPs could be understood to exist as sub-organisations within universities, which base their existence and continuation on decision-making: deciding to take on a case; deciding what lines of enquiry to investigate; deciding whether or not to instigate further legal proceedings within a case; and then reproducing and maintaining their own existence through deciding whether or not to take on further cases. They also require membership in that university students must apply and be accepted onto the project. In fact, the empirical data seems most supportive of this conceptualisation of IPs as will be discussed later.

However, based on the literature model of IPs and their unique aims and objectives, this chapter argues that IPs could potentially be seen to have more significance and to represent something further within Luhmann's theory, rather than simply existing as organisations. This section will discuss three possible ways of conceptualising IPs within systems theory. The first two suggestions are completely new, whilst the third builds on a previous suggestion by the authors Roberts and Weathered. How we conceptualise IPs depends on the aims, objectives and model which they subscribe to. The first two suggestions focus on the "Factual Innocence Model" of IPs and Naughton's aspirations for the innocence movement; whilst the third suggestion from Roberts and Weathered arguably reflects a different model of IPs. The potential implications of analysing IPs in these ways will be considered.

The suggestions are:

**IPs as a Social or Protest Movement:** This is based on Naughton's aspirations for INUK to "release the discourse of innocence from its shackles"<sup>25</sup> and to challenge the existing legal framework.<sup>26</sup> Luhmann analysed protest movements as another communicative subsystem within society, which he thought emerged as a consequence of dissatisfaction with the functional differentiation of modern society. This first suggestion is premised on analysing IPs as a challenge to the legal system and protesting against its constructions: in this sense, IPs are operating outside and against the legal system.

**IPs as their own communicative subsystem:** This questions whether IPs under the "Factual Innocence Model" could amount to having developed their own communicative subsystem. This will propose that IPs potentially could be analysed as having their own binary coding

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<sup>24</sup> HG Moeller (n.20) p.32

<sup>25</sup> M Naughton, 'The Importance of Innocence for the Criminal Justice System.' in Naughton, M. (ed.) *The Criminal Cases Review Commission – Hope for the Innocent?* (Palgrave Macmillan 2009) p.30

<sup>26</sup> M Naughton, 'Can lawyers put people before the law?' (July 2010) *Socialist Lawyer* 31) p.32

system and their own programmes for resolving post-conviction appeals, which are aimed to rival state law. This will discuss how these rival communications have failed to “take-off”<sup>27</sup> and have been reconstructed within the social system of law, according to state law and law’s institutional purpose.

**IPs as Linkage Institutions:** This builds on a previous analysis by Roberts and Weathered where they suggested IPs were “linkage institutions” within systems theory.<sup>28</sup> Their analysis was brief as systems theory was not the main focus of the article: here, this suggestion will be extended and developed. Unlike the previous two suggestions, IPs as “linkage institutions” would not involve a challenge to the existing legal framework, but rather would be aimed at working in and between different social systems. This arguably reflects the differences between Roberts and Weathered’s model of IPs as discussed in the literature.

The discussion over these different potential ways of conceptualising IPs will also reflect upon the second research question, which is whether systems theory can explain why the majority of sampled IPs did not identify with the “Factual Innocence Model.”

## **2.1 Social or Protest Movement**

This first suggestion for how we might conceptualise IPs draws on Luhmann’s analysis of social or protest movements as an important subsystem of communication within society.<sup>29</sup> The potential for analysing IPs in this way draws primarily on Naughton’s aims for INUK and its reform agenda. This section will explore Luhmann’s account of protest movements in his translated works<sup>30</sup> alongside Bluhdorn’s interpretation of this.<sup>31</sup> Bluhdorn describes Luhmann’s concept of social movements as abstract and not easily translated into analysing specific movements.<sup>32</sup> Bluhdorn also questions the viability of empirical research to test the

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<sup>27</sup> HG Moeller, (n.20) p.23

<sup>28</sup> S Roberts and L Weathered, ‘Assisting the factually innocent: the contradictions and compatibility of innocence projects and the Criminal Cases Review Commission.’ (2009) 29(1) Oxford Journal of Legal Studies 43) p.52

<sup>29</sup> It was discussed in the literature review how the American innocence movement has been likened to a “civil-rights movement” or a “revolution.” Thus, aspects of the innocence movement literature suggested such an interpretation was possible. However, social movement literature has not been explored beyond that considered here in relation to Luhmann.

<sup>30</sup> N Luhmann, *Theory of Society – Volume 2* (Stanford University Press 2013)

<sup>31</sup> I Bluhdorn, ‘Self-description, Self-deception, Simulation: A Systems-theoretical Perspective on Contemporary Discourses of Radical Change.’ (2007) 6(1) Social Movement Studies 1.

Luhmann’s work on social movements has been mentioned by others, but Bluhdorn’s analysis was found to give the most helpful summary of Luhmann’s work, and was sufficient for the purposes of this thesis, which is only a pilot exploration into this area. For other authors, see for example: C Fuchs, ‘The self-organization of social movements.’ (2006) 19(1) Systemic Practice and Action Research 101; JS Juris, ‘Networked social movements: global movements for global justice.’ (2004) Networked Social Movements 341; J Handler, ‘Postmodernism, Protest and the New Social Movements.’ (1992) 26(4) Law and Society Review 697

<sup>32</sup> I Bluhdorn, (n.31) p.7



theory,<sup>33</sup> a scepticism which reflects Luhmann's own discomfort with empirical research.<sup>34</sup> However, this analysis will suggest that Naughton's aims for the UK innocence movement do resonate with Luhmann's conception of protest movements; crucial to this is INUK's aim to "release the discourse of innocence from its shackles" and to "re-establish the bridge between the public and the legitimate operations of the criminal justice system."<sup>35</sup> This section thus primarily focuses on Naughton's aims for INUK; in doing this it will also draw on his broader literature where it was relevant to his reform agenda. As demonstrated in the previous chapters, the sampled IPs largely did not identify with these ideas; however, one participant in the sample will be considered as potentially engaging in protest communication. Analysing the UK innocence movement as a protest movement is of importance to considering the viability of INUK's aims and objectives.

Luhmann's analysis was unique in social movement theory because it shifted the traditional focus from individuals to examining social movements as systems of protest communication.<sup>36</sup> Luhmann thought the act of protest itself was what was important, rather than the goals of social movements, which he thought had become too heterogeneous to justify being central to theory.<sup>37</sup> Luhmann saw protest movements as constructing their own topic; the fact society has disregarded this topic or paid too little attention to it is the conditions for the movement to develop.<sup>38</sup> Luhmann suggested the rise of protest movements was explicable because of the switch of society to functional differentiation.<sup>39</sup> He questioned: "what happens if generalized values can no longer be accommodated in differentiated society? If, although formulated and recognised they are inadequately realised?"<sup>40</sup> Thus, Bluhdorn said, Luhmann saw protest communication manifesting as a critique of the functional differentiation of modern society. Protest systems would address subject matter which none of the function systems (law/politics/economy/religion etc.) would acknowledge as their own.<sup>41</sup> In this way, protest communication compensates for modern society's inadequacies of reflection, by dealing with issues that are neglected by other function systems as a "side effect" of functional

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<sup>33</sup> I Bluhdorn, (n.31) p.16

<sup>34</sup> N Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System.' (1991-1992) 13 *Cardozo L. Rev.* 1419

<sup>35</sup> M Naughton, (n.25) p.30

<sup>36</sup> I Bluhdorn, (n.31) p.7

<sup>37</sup> N Luhmann, (n.30) p.155

<sup>38</sup> N Luhmann, (n.30) p.162

<sup>39</sup> N Luhmann, (n.30) Press p. 154

<sup>40</sup> N Luhmann, (n.30) p.154

<sup>41</sup> I Bluhdorn, (n.31) p.8

differentiation.<sup>42</sup> Thus, Bluhdorn explained that Luhmann saw social movements as increasing the reflexivity of modern society through identifying undesirable side effects of its structure.<sup>43</sup>

Luhmann explains that the form of “protest” does for protest movements what functional systems achieve through their coding. This is also two-sided: with the protesters on one side, and what or whom they are protesting against on the other.<sup>44</sup> Luhmann said: “although protest communication takes place *within* society (otherwise it would not be communication) “*it proceeds as if it were from without*,”<sup>45</sup> and “it considers itself to be (the good) society.”<sup>46</sup> He says “it expresses itself from a sense of responsibility *for* society but *against* it.” In this sense, social movements take the form of another paradox, through expression in protest by society against society.<sup>47</sup> Bluhdorn describes the communication of protest as thus establishing the dichotomy of us or society.<sup>48</sup> The protest pretends to adopt an external view from where it can observe modern society, by diagnosing societal problems and suggesting remedial strategies.<sup>49</sup> However, protest movements remain situated within a functionally differentiated society, which cannot be observed and described from the outside: therefore, the self-description of the social movement system is thus societal self-description, but from a fictitious external standpoint.<sup>50</sup> This acts to generate a particular image of itself, which enables social movements to believe they represent the “good society” and take responsibility for society as a whole.<sup>51</sup>

Luhmann suggested today’s<sup>52</sup> social movements<sup>53</sup> were more about strongly “individualized individuals” who feel that their life situation is paradoxical.<sup>54</sup> Such individuals stand for the demand not to have their self-determined way of life curtailed or impaired, unless for cogent

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<sup>42</sup> I Bluhdorn, (n.31) p.8

<sup>43</sup> I Bluhdorn, (n.31) p.9

<sup>44</sup> N Luhmann, (n.30) p.158

<sup>45</sup> Emphasis in source

<sup>46</sup> N Luhmann, (n.30) p.157

<sup>47</sup> N Luhmann, (n.30) p.155

<sup>48</sup> I Bluhdorn, (n.31) p.8

<sup>49</sup> I Bluhdorn, (n.31) p.8

<sup>50</sup> I Bluhdorn, (n.31) p.8-9. As discussed above, self-descriptions represent selective choices through which a system conveys a particular impression at a particular time of itself and its activities: thus protest movements self-description is “societal self-description” – but this is from a fictitious external standpoint, and so again protest movements are paradoxical.

<sup>51</sup> I Bluhdorn, (n.31) p.8-9 citing N Luhmann, *Die Gesellschaft der Gesellschaft*, 2 vols (Frankfurt: Suhrkamp 1998). p.862

<sup>52</sup> Luhmann originally wrote this publication in 1998

<sup>53</sup> Luhmann said the socialist movement of the 19<sup>th</sup> Century, given the class situation and factory organisation could proceed on the basis of a relatively responsive motivational situation and one that could be addressed relatively uniformly. However, he thought today’s new social movements potential for recruitment is based on the weakening of the importance of affiliation. N Luhmann, (n.30) (p.156-157)

<sup>54</sup> N Luhmann, (n.30) p.156

reasons.<sup>55</sup> Protest is their way of seeking to resolve this. Luhmann explained that whilst participants in protest movements seek political influence “*they do not do so in normal ways.*”<sup>56</sup> Rather, they use different channels of influence which suggest the current issues are urgent and profound; they seek to alert those on the other side of the protest form through using alarming communication and mass protests, and by developing “a covert alliance” with the mass media.<sup>57</sup> This urges those on the other side of the protest form to accept the protest form’s definition of the situation, rather than their own constructions.<sup>58</sup>

Luhmann suggests that protests lack consideration of the self-descriptions of those against whom they protest, but they keep to the form of protest. He says “there is no attempt to understand. Views on the other side are taken into account at best as tactical elements of one’s own action. And the temptation is therefore strong to ride the other side’s moral high horse.”<sup>59</sup> Protest “negates overall responsibility” as it assumes there are others to carry out what is being demanded.<sup>60</sup> Therefore, protests differ from the form of opposition in the political system (which is part of the political system from the outset),<sup>61</sup> because ultimately the opposition has to be capable of upholding its own views and implementing them as government.<sup>62</sup> Rather, protestors “invoke ethical principles; and when one has ethics, it is of secondary importance whether one is in the majority or in the minority.”<sup>63</sup> Protestors need not take into account any of these considerations.<sup>64</sup> Therefore, Bluhdorn said Luhmann saw protest as essential for modern society, providing it with a means to comfort itself by its good intentions without having to address the difficulties of political interpretation.<sup>65</sup> As an external view of society is impossible, the observations from social movements are only constructions of their own interpretations and understandings of modern society.<sup>66</sup> Thus, none of the issues offered by

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<sup>55</sup> Interestingly, Luhmann thinks young people are university graduates are the most sensitive to the paradoxes of their existence.

<sup>56</sup> Emphasis in source, N Luhmann, (n.30) p.157

<sup>57</sup> Luhmann considers there is a strong structural coupling between protest movements and the mass media; and we see protest movements constructing “pseudo-events” for press attention, which they would not otherwise do. N Luhmann, (n.30) p.159

<sup>58</sup> N Luhmann, (n.30) p.159

<sup>59</sup> N Luhmann, (n.30) p.159

<sup>60</sup> N Luhmann, (n.30) p.158

<sup>61</sup> Within social systems theory, the binary code within the social system of politics is government/opposition. Thus here Luhmann is saying protest is different because it is not part of the political system, and often acts to represent opposition to the political system as a whole.

<sup>62</sup> N Luhmann, (n.30) p.159

<sup>63</sup> N Luhmann, (n.30) p.159

<sup>64</sup> N Luhmann, (n.30) p.159

<sup>65</sup> I Bluhdorn, (n.31) p.10 citing Luhmann, N. “Die Politik der Gesellschaft” [2008] (Frankfurt: Suhrkamp). at p.318

<sup>66</sup> I Bluhdorn, (n.31) p.9

social movements can be deemed a better solution, or to represent a more accurate interpretation of society than that formed by other social systems.<sup>67</sup>

Luhmann's account of protest movements is a persuasive way for analysing the conditions under which the UK innocence movement arose. Naughton saw INUK as required to "release the discourse of innocence from its shackles," illustrating how he perceived this as suppressed within society.<sup>68</sup> Luhmann thought protest communication emerged when "generalized values" cannot be accommodated in a functionally differentiated society, and questions what, "if, although formulated and recognised they are inadequately realised?"<sup>69</sup> Arguably, "factual innocence" represents a value which cannot be incorporated within a functionally differentiated society. Whilst "innocence" seemingly is a legal concept, and avoidance of punishing the innocent is a value within the social system of law; "factual innocence" was identified to distinguish between this legal construction (i.e. not guilty at trial; or conviction unsafe on appeal) and actual innocence in objective truth (i.e. factually did not commit the crime.) According to systems theory, law's function is to resolve disputes and generate behavioural norms. To do this, law must reduce information and events from its environment into legalistic constructions and distinctions, which do not represent objective reality, but law's version of reality. When a person is found guilty/not guilty, or a conviction is determined safe/unsafe, this is a legal construction and interpretation of events decided according to its programmes; not a statement of truth/untruth. Therefore, "factual innocence" in the sense meant by the innocence movement cannot be incorporated into law. What then about the system of science which is the realm of objective fact determination?<sup>70</sup> Science cannot incorporate this concept either; because determining wrongful action and resolving disputes caused by alleged criminal behaviour is not part of its function. Therefore, arguably "factual innocence" is a value which is formulated and recognised, but which is inadequately realised in a functionally differentiated society. Significantly, Nobles and Schiff suggested that the search for a legal process recognising actual innocence results in a perception of crisis within the criminal justice process.<sup>71</sup> Thus, the UK innocence movement arose as a reaction to this crisis and society's inability to protect the innocent from wrongful conviction.

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<sup>67</sup> N Luhmann, (n.30) p.165

<sup>68</sup> M Naughton, (n. 25) p.30

<sup>69</sup> N Luhmann, (n.30) p.154

<sup>70</sup> As discussed, this is the function of science; but science is also unable to directly access objective reality, and thus this is still a construction of the system.

<sup>71</sup> Nobles and Schiff wrote about this as being caused by the media, but there is the potential for others to recognise this and seek to draw attention to it.

Furthermore, Naughton's criticisms of the system are often directed towards 'side effects' of functional differentiation. He was critical of how the understanding of "miscarriage of justice" underwent a "*legalification*"<sup>72</sup> process," shifting it from the possible wrongful conviction of an innocent to "an entirely legal notion," that sees miscarriages of justice in terms of a need for convictions to be "safe in law."<sup>73</sup> He described how miscarriages of justice were inherently "legalistic" because they are wholly determined by the rules and procedures of the appeal court,<sup>74</sup> which make appeals "highly technical affairs governed by strict rules and procedures."<sup>75</sup> As a consequences of functional differentiation, only law can determine what is lawful/unlawful; and to fulfil its function, it must construct its environment in ways which enable it to perform its operations. Therefore, how else could law resolve criminal appeals but in a "legalistic" way? His criticisms of the limitations of law's construction of a miscarriages of justice is arguably a protest against the side effects of functional differentiation. Naughton has also discussed the "retrospective" nature of miscarriages of justice and how wrongful convictions are only recognised as such when acknowledged by the CACD: in systems theory terms, a wrongful conviction not yet corrected by the CACD raises the paradox of "lawful unjust." In a functionally differentiated society, only law can determine what is lawful/unlawful, and nothing can be simultaneously "lawful unjust." The innocence movement can be seen to protest against this, questioning "but what if law is wrong?" Thus acting as though to take responsibility for modern society's inadequacies of reflection.

Naughton also appealed to "ethical values" and questioned the "integrity" of the criminal justice process. He argued that "quashing the convictions of terrorists, murderers and violent offenders" because of an abuse of process or points of law, which do not undermine the reliability of evidence supporting an appellants' factual guilt, "represents a form of integrity that is at odds with a lay perspective on the function of the criminal justice system."<sup>76</sup> He emphasised a distinction between "a legal notion of "integrity," defined as strict compliance with criminal appeals procedures, and a lay understanding of "integrity"" of which "the latter would distinguish between successful appeals overturned on the basis of factual innocence"

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<sup>72</sup> Emphasis in original

<sup>73</sup> M Naughton, (n.25) p.17-18

<sup>74</sup> M Naughton, 'Redefining Miscarriages of Justice: A Revived Human-Rights Approach to Unearth Subjugated Discourses of Wrongful Criminal Conviction.' (2005) 45 British Journal of Criminology 165 p.165

<sup>75</sup> M Naughton 'Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education.' (2006) 3 Web JCLI <http://www.innocencenetwork.org.uk/wp-content/uploads/2014/09/wrongful-convictions-innocence-project.pdf> (accessed 30/09/16) p.5

<sup>76</sup> M Naughton, 'The Criminal Cases Review Commission – Innocence versus safety and the integrity of the criminal justice system.' (2012) 58 Criminal Law Quarterly 207 p.212

and those on abuse of process.<sup>77</sup> His criticism that the system lacks “integrity” is arguably characteristic of a protest movement in representing itself as the “good society” and taking responsibility for modern society’s lack of reflection. Furthermore, this is without reflection on the self-description of law (to achieve justice) and its function (to exploit conflicts for generating behavioural norms); acting with “integrity” in the lay sense meant by Naughton is not law’s function.

Luhmann described how protest movements pretend to adopt an external view from which they can observe modern society by diagnosing societal problems and suggesting remedial strategies.<sup>78</sup> Naughton thought there was a discord between law’s operations and what society expected of it: he said INUK IPs would focus on factual innocence and would thus reflect “both the popular belief and the public aspiration that the criminal justice system should convict the guilty and acquit the innocent.”<sup>79</sup> In this way, it could “re-establish the bridge between the public and the legitimate operations of the criminal justice system.”<sup>80</sup> Naughton pretends to adopt an external view of society from which it can be determined that law fails to meet these expectations. The implication from Naughton’s claims is that somehow INUK IPs are better able to determine factual guilt or innocence, and thus better access objective reality. However, protest movements can only offer constructions of their own interpretations and understandings of modern society<sup>81</sup> and cannot be deemed to offer a better solution. The innocence movement points to law’s inability to establish objective truth and argues for a focus on “factual innocence,” but is unable to offer a better solution; because accessing objective truth remains impossible within modern society. Therefore, the UK innocence movement according to Naughton arguably also exists as a paradox. It claims to focus on truth-finding and factual innocence, which makes a claim to objective truth; but as with other social systems, like law, this remains entirely a construction and interpretation of the IPs themselves.

Although this analysis has suggested Naughton’s aims for INUK did resemble protest communication, it is debatable whether how this was approached was enough to constitute being a protest movement within Luhmann’s theory. Luhmann said protest movements do not seek influence “in normal ways;” their willingness to resort to stronger means when protest

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<sup>77</sup> Ibid. p.212

<sup>78</sup> I Bluhdorn, (n.31) p.8

<sup>79</sup> M Naughton, ‘Can lawyers put people before the law?’ (July 2010) *Socialist Lawyer* 31 p.32

<sup>80</sup> M Naughton, (n.25) p.30

<sup>81</sup> I Bluhdorn, (n.31) p.9

was not heeded was what distinguished their efforts from reform.<sup>82</sup> Neither INUK nor other IPs in the UK have resorted to “typical” acts of protest (such as a protest march/mass demonstrations) like other social movements. At times there has been engagement with the media, there was a television programme on UoBIP made in 2007, but they have not utilised the media in the way we might expect other protest movements to by resorting to extreme demonstrations. Thus, it is debatable whether the operation of INUK or IPs supports an analysis of them as protest movements. Nevertheless, there are certainly aspects of Naughton’s aims for the UK innocence movement which strongly identify with Luhmann’s account of protest movements.

The previous two chapters discussed how the majority of participants did not identify with Naughton’s original aims and aspirations: therefore, there is little evidence of IPs within the sample subscribing to this. Project7 had a strong reform agenda, and arguably participant/g did engaged in protest communication. He saw IPs as valuable for exposing the “*societal illusion*” that we can prove innocence or guilt.<sup>83</sup> Thus participant/g thought IPs could expose the paradoxical nature of law and society’s inability to access objective truth. He described IPs as fighting a cause, and considered: “*in a way IPs are, I think they’re more part of that, than part of the legal world.*” Thus, participant/g suggests IPs are on the protest side of the form, rather than within the legal system; this arguably reflects the protest communication dichotomy of “us versus [the legal system].” Participant/g also reflected that he was unsure “*whether it’s better to work within the system and continue being polite and cooperative with people; or whether it’s actually better to do something more radical you know, set fire to yourself outside the court of appeal.*” This latter reference to radical action appears to illustrate the type of act which Luhmann would see as amounting to an act of protest; seeking political influence (not in “normal ways”) but in ways which suggest the current issue is urgent and profound; this willingness to resort to stronger means was what distinguished protests from reform.<sup>84</sup> Participant/g does thus appear to identify with Luhmann’s idea of protest and would potentially see the IP as being part of a social or protest movement.

Although the empirical data did not support an analysis of the sampled IPs as protest movements, Naughton’s aims for INUK and IPs do appear to resonate with Luhmann’s account of protest. What would be the consequences for IPs if we analysed them as part of a protest

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<sup>82</sup> N Luhmann, (n.30) p.157

<sup>83</sup> See Section 1

<sup>84</sup> N Luhmann, (n.30) p.157

movement? For Luhmann, the act of protest was what was crucial, rather than the solutions.<sup>85</sup> He considered protest movements live on the tension between the topic and protest and thus “success and failure are equally fatal.”<sup>86</sup> Luhmann explains, at best, success is a “historical accomplishment” for the movement, but a lack of success is discouraging for participants and so the cause may be dropped.<sup>87</sup> Bluhdorn said Luhmann’s theory should not be interpreted as a criticism of those striving for social change, or as an attempt to legitimise the established systems approach and resistance to change.<sup>88</sup> Furthermore, it should not be equated with denying the possible impact of social movements (which is supported by empirical evidence).<sup>89</sup> Luhmann acknowledged that the function systems have responded and taken in and reabsorbed a considerable range of protest topics: this is unsurprising as the political system orients itself on public opinion.<sup>90</sup>

Neither Luhmann nor Bluhdorn discussed how social movements influence change in the function systems but it is assumed that: where we perceive social movements as having caused changes in the function systems, this results from a function system responding to the perturbation of protest communications at its boundaries. This can resonate within the receiving function system in deciding to make certain changes. But crucially these changes will be made according to the will of that function system; and the protest communication will be reconstructed by the function system according to its own understandings and constructions of reality.<sup>91</sup> We might expect protest communication to be a powerful irritant for a system when it involves the potential unfolding of the paradox upon which a system rests, as explained by King.<sup>92</sup> For example, in miscarriages of justice, the eventual quashing of the convictions of the Guildford Four and Birmingham Six resulting from long entrenched protests and campaigns resulted in the Royal Commission on Criminal Justice (RCCJ) being established and a substantial review of the criminal justice system (which was discussed above by Nobles and Schiff). Thus, if IPs were to be conceived of as protest movements, depending on whether they wanted change within law or legislative change, they would be relying on perturbing the social

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<sup>85</sup> I Bluhdorn, (n.31) p.9

<sup>86</sup> N Luhmann, (n.30) p.161

<sup>87</sup> N Luhmann, (n.30) p.161

<sup>88</sup> I Bluhdorn, (n.31) p.16

<sup>89</sup> I Bluhdorn, (n.31) p.16

<sup>90</sup> N Luhmann, (n.30) p.160

<sup>91</sup> This can be likened to Moeller’s example discussed in the literature: of how a media scandal involving a politician may cause the political system to act, but how the political system responds is never determined by the media.

<sup>92</sup> M King, *A Better World for Children: Explorations in Morality and Authority*. (Routledge 1997). This was discussed in Chapter 2 when looking at the “Consequences of Autopoiesis.”



system of either law or politics to resonate with their reform agenda. Inevitably, IPs' communications would be reconstructed within law so that they were recognisable as legal communications, and as Nobles and Schiff discussed in relation to the RCCJ, there is a risk that such recommendations would be distorted when enacted into law. The specific reform agenda of IPs and the potential difficulties which this causes for the legal system will be considered below.

There is one further issue which is of potential importance to thinking about the UK innocence movement within Luhmann's account of protest movements. As Luhmann thought the act of protest was crucial, he thought new protest issues would be identified and adopted when old ones had run their course.<sup>93</sup> The RCCJ and their review into the criminal justice system leading to the CCRC's creation is an important backdrop for the innocence movement. Prior to this, there were several campaigning groups concerned with wrongful conviction. One core group was JUSTICE which undertook casework and campaigned for those claiming wrongful conviction. However, they closed down following the CCRC's establishment, because they no longer thought they were needed. Naughton thought JUSTICE's closure was premature and he claimed INUK was needed precisely because of the absence of other campaigning groups. This potentially illustrates the constant regeneration of protest issues as suggested by Luhmann: the innocence movement manifested as a protest against the lack of protest.

However, whilst aspects of Naughton's aims and objectives for INUK do appear to engage with protest: the creation of IPs does potentially suggest they evolved beyond this. Luhmann was clear that protest "negates overall responsibility" as it assumes there are others to carry out what is being demanded.<sup>94</sup> The creation of IPs to undertake such investigations thus steps beyond engagement with the act of protest, to implementation of these aims: the following section will question then whether we could see IPs as having evolved into their own communicative subsystems.

## **2.2 IPs as communication subsystems**

A second way we might conceptualise IPs within systems theory is based on the "Factual Innocence Model" of IPs, which analyses IPs as their own subsystem of communication. Moeller explained how Luhmann's theory allowed for the possibility that there were many different systemic types below the level of function systems.<sup>95</sup> This is based on examining the

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<sup>93</sup> I Bluhdorn, (n.31) p.9

<sup>94</sup> N Luhmann, (n.30) p.158

<sup>95</sup> HG Moeller (n.20) p.32

“Factual Innocence Model” of IPs as representing its own communicative subsystem with its own coding and programming, and suggests IPs have arisen as a challenge to state law<sup>96</sup> due to dissatisfaction with law’s operations. This will examine IPs as an attempt to introduce alternative communications into the criminal justice process which rival state-law.

Key to developing this analysis are insights from Nobles and Schiff. This analyses IPs as representing a challenge within the criminal justice process, by presenting a rival system of coding and programming. This view is premised on analysing IP communications around “factual innocence” as rival to legal communications. Luhmann’s theory enables an analysis of all communications relating to legal/illegal as legal communications, whether or not these align with state-law.<sup>97</sup> Nobles and Schiff thought there needed to be an understanding of law which encompasses legal pluralism without abandoning legality.<sup>98</sup> They thought autopoiesis provided an understanding of law that accounts for the co-existence of multiple interpretations of what law requires, which explains why situations arise when law is challenged as a normative system.<sup>99</sup> The innocence movement could be seen to represent one such challenge.

To analyse IPs as their own communicative subsystem, we must identify a binary code and the programmes through which IPs apply it. Based on the “Factual Innocence Model,” or Naughton’s portrayal of IPs in the literature, IPs sought to examine claims of wrongful conviction through the lens of innocence, making the binary code for performing their operations (communicating about miscarriages of justice) guilt/innocence. Although, “innocence” could be seen as a legal communication, it is generally not a communication in the state system of law. Nobles and Schiff emphasised the need to distinguish between state-law and other legal communications, because in state-law a differentiated system for the pronouncement of legality has been achieved.<sup>100</sup> The criminal justice process generally avoids references to “innocence” when carrying out its operations: the criminal justice process at trial only recognises guilty/not guilty, or on appeal, safe/unsafe as valid applications of the code legal/illegal.<sup>101</sup> Thus, IPs focus on innocence/guilt is arguably distinct for this reason.

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<sup>96</sup> Legal pluralists would take issue with the suggestion that the IP communications are not ‘legal communications’; rather they are communications which belong to the social system of law (related to legal/illegal) but they are opposed to state law.

<sup>97</sup> See G Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism.’ (1991) 13 Cardozo Law Review 1443

<sup>98</sup> R Nobles and D Schiff, (n.14) p.200

<sup>99</sup> R Nobles and D Schiff, (n.14) p.200

<sup>100</sup> R Nobles and D Schiff, (n.14) p.208

<sup>101</sup> Law obviously applies the coding distinction legal/illegal, but Nobles and Schiff suggested we can identify sub-codes within criminal justice, which they suggested are conviction/acquittal or conviction upheld/conviction

However, the focus of IPs on “innocence” is not unique: this has been described as a “lay”<sup>102</sup> construction of a “miscarriage of justice,” which is adopted by other social systems such as politics and the media. So what distinguishes IPs from the other function systems which adopt this construction? Why are they their own communicative subsystem, rather than part of these other social systems? Arguably, this lies in IPs’ function. Nobles and Schiff explained that law’s monopoly of coding legality remains, not because other systems cannot generate rival positions of right or wrong, but because they are simply not systems for coding legality.<sup>103</sup> Although IPs are not formal institutions for coding legality, their function is to investigate cases and prepare applications for appeal, as would a lawyer when participating in the system of law. IPs under the “Factual Innocence Model” claim to carry out truth-finding investigations, and therefore they are required to develop their own programmes for doing this. Thus, arguably this distinguishes them from other social systems that use a lay construction of miscarriages of justice.

The casework approach of IPs in the literature could be interpreted as representing IPs own programmes for investigating wrongful conviction. Naughton explained he assessed case eligibility on the basis of a “typology of prisoners maintaining innocence,”<sup>104</sup> which analysed prisoners’ motivations for maintaining innocence.<sup>105</sup> Naughton’s casework approach as reflected in the “Factual Innocence Model,” also saw IPs as neutral inquiries into alleged wrongful conviction, examining all the evidence and focusing on establishing the ‘truth’ behind events. This distinguishes IP programmes from the criminal appeal programmes, which only assess where fresh evidence or errors in law or procedure impact on the safety of the conviction to sub-code on the basis of convictions as (safe/unsafe). Contrastingly, IPs, which claim to assess all the evidence in the case, apply the coding distinction (guilt/innocence.) Another

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quashed (R Nobles and D Schiff, ‘Miscarriages of Justice: A Systems Approach’ (1995) 58 *Modern Law Review* 299)

<sup>102</sup> Roberts and Weathered clarified that within systems theory, general social communication which did not belong to a function system is deemed to be “lay communication.” See S Roberts and L Weathered, (n.28) p.52 & footnote 44

<sup>103</sup> R Nobles and D Schiff (n.14) p.211

<sup>104</sup> Appendix A “Typology of prisoners maintaining innocence,” IP Protocols, [www.innocencenetwork.org.uk](http://www.innocencenetwork.org.uk) (accessed 31/10/2013; no longer available); M Naughton, ‘Confronting an uncomfortable truth: Not all victims of alleged false accusations will be innocent!’ (2007) *FACTion Magazine* 8, p.8

<sup>105</sup> This is discussed in the literature review. Naughton constructed this based on his experiences assessing prisoner questionnaires, and thought this typology could better exclude false claims of innocence. He recommended focusing on why individuals may make false claims of innocence, when assessing applications. He gives as examples where applicants hope to overturn their conviction on the basis of an abuse of process; where the applicant is ignorant of criminal law and does not know their behaviour is criminal; those who disagree that their actions should be considered a criminal offence; and finally those who may maintain innocence to protect loved ones from the knowledge of their culpability in the offence. (M Naughton, (n.104) p.8)

potential difference in programming could be the adversarial contest nature of criminal appeals, versus the IP approach as an “inquiry” into all the evidence.<sup>106</sup>

Therefore, we could potentially analyse IPs as building their own rival subsystem of communication, with its own coding and programming and procedures for validating reality, which structurally couple with the legal system over post-conviction appeals. This conceptualisation is based on the “Factual Innocence Model” of IPs, which was not subscribed to by the majority of IPs within the sample. Systems theory can also provide a potential explanation for why these alternative communications failed to “take-off”<sup>107</sup> within society.

Firstly, as discussed by Nobles and Schiff, references to actual innocence at appeal stage might simply be seen as a misreading of legal operations. Perhaps those who regularly participated in the world of state law understood innocence movement communications as just this; a misreading or misinterpretation of legal operations. The vast majority of IP leaders interviewed had a background in either academic law or practice (with the exception of participant/g; participant/b; participant/k) and, as demonstrated in Section 1, the criminal law practitioners running IPs were those furthest away from the “Factual Innocence Model.”

Some participants rejected the alternative communications adopted by the innocence movement for these reasons.

Participant/a<sup>108</sup> was a solicitor by background, although not in criminal law. He expressed discomfort with the factual innocence concept: *“I’m not very comfortable with the old factual innocence term but let’s face it none of us are really are we? It doesn’t really stack up because facts have a special status in law, or a different meaning in law.”* This is a recognition of the status of outside ‘facts’ (or events) within law, which are reconstructed into legal communications or understandings. He explained further: *“it’s often very difficult to distinguish between what you mean by innocence and what you mean by technically not guilty, because in law we don’t have a concept of innocence, we just have a guilty or not guilty...”* As was discussed in Chapter 4 (Section 1 of the results) to illustrate the difficulties in determining what factual innocence means, participant/a discusses a case they worked on where the client had locked someone in the room who subsequently died after falling or jumping from the

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<sup>106</sup> It was considered that this model of IPs could potentially provide a means for contrasting adversarial and inquisitorial approaches to investigation; but this issue is not considered in particular detail within this thesis.

<sup>107</sup> Moeller used this term to explain how the function systems in society have evolved: he suggested that they develop into autopoietic systems when their communications “take-off” in society: thus this is considered an appropriate use of the term. HG Moeller, (n.20) p.23

<sup>108</sup> Project6

window. He reflected: *“I think wherever you do that, you’re going to get into legalistic definitions and whilst I’m quite happy to go with the flow on that one, I do think it’s a flawed notion.”* This reflects from a systems theory perspective how law is required to construct “legalistic definitions,” in order to communicate about, and perform operations upon, its external environment. Therefore, participant/a does not accept the alternative innocence movement communications, and considers they are “flawed,” because of the necessity of using legalistic constructions when seeking to participate in criminal justice.

Participant/d<sup>109</sup> was now a criminal barrister (although he had run an IP in a journalism school prior to this). His comments on “factual innocence” and its relationship with law were significant: *“as a barrister, there’s no such thing as technical or factual. You’re either found innocent or you’re found guilty, I don’t separate them. It’s completely bizarre. As a lawyer it’s a completely bizarre concept as a project. I don’t agree with it.”* His description of it as a “bizarre” concept for him as a lawyer reflects how this distinction between “factual” and “technical” innocence cannot be applied within legal communications. He continues: *“In my world there is no such thing as a technicality, if the law says to be guilty of theft you have to have dishonestly, appropriated property, belonging to another, with the intention to permanently deprive...the burden of proof is on the crown. If the crown can’t prove all the elements of that, that person is innocent, it’s not a technicality, it’s the law.”* Here, participant/d invokes the idea of the legal system as an autopoietic system which is closed to its environment by describing it as his “world.” His comment also reflects how the legal system necessarily reconstructs outside events into legal communications which enable it to reach a decision. He continues: *“this notion of technicality is a sort of everyman discourse around criminal law, which is completely inaccurate. Every crime is defined by law... so this idea that you get off on a technicality, its complete rubbish.”* This reference to an “everyman discourse” is an implicit recognition of other social systems misreading and misunderstanding legal communications. Thus, participant/d analyses law as his social world, which influences his reality constructions.

Chapter 4 also illustrated how some participants initially appeared to identify with the innocence movement communications but had evolved away from the “Factual Innocence Model” because of tensions around its premise. Their comments are arguably of interest to thinking about the difficulties with adopting a construction of “justice as based on truth.”

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<sup>109</sup> Project4

Participant/h<sup>110</sup> co-directed Project1 and explained that initially she thought: “*you could look at everything and speak to the client, and you’d have a gut feeling they were innocent, but I’ve got to be honest, the Simon Hall confession probably made me think the other way.*”<sup>111</sup> She mused: “*What is innocence? How do you know someone’s innocent? That’s when the problems arise.*” This reflects recognition of the impossibility of accessing objective truth behind past events. Participant/h then suggests: “*perhaps the concept of IPs and the word innocence, causes more problems than it actually resolves. It could be perhaps called a ‘Justice Project’ or straightforward ‘Miscarriages of Justice Unit’ within a university...it’s that word innocence, because it is impossible to prove innocence in 99.9% of cases.*” This suggests a graduation away from the innocence movement coding of guilt or innocence. Nobles and Schiff suggested there were rival concepts of justice: that of “justice as based on truth,” which reflects lay perceptions of the role of law in criminal justice, and “justice as based on fairness,” which reflects a legal understanding based on due process.<sup>112</sup> As participant/h suggests she is moving away from a focus on “factual innocence” and thus justice as truth, this suggests she is graduating towards more of a legal construction of justice based on fairness.

Participant/h also explained that she thought IPs were intended to approach “*potential wrongful convictions in a different way,*” and they “*wouldn’t be constrained by what the law says, because the law says if there is no real possibility that it will be overturned, then it isn’t going to go any further.*” This reflects Naughton’s vision of IPs as representing a challenge to the legal framework and not being bound by the legal grounds of appeal when carrying out investigation. However, as discussed above, there are clearly tensions with taking such an approach, and she explained that whilst IPs could do that: “*you’re not going to get past the CCRC if you’re coming up with a beautiful argument of how the jury got it wrong, because the evidence was there all along, it’s not going to cut any ice, so you have to play the game.*” This reflects the self-referential nature of law, and its inability to deal with ‘environmental’ communications without reconstructing them within law’s meaning systems: thus, any facts or evidence which are not framed within state law ‘legal communications’ will not be ‘read’ by the legal institutions which are bound to apply the law. Nobles and Schiff stress that (according to autopoietic theory) what counts as a communication within the legal system requires one to integrate what one wishes to say/argue/claim with existing legal communications, which is a

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<sup>110</sup> Project1

<sup>111</sup> The case of Simon Hall was worked on by Bristol IP and had a significant amount of support publicly as well as within the miscarriage of justice world: but he confessed in 2013 to the murder of Joan Albert.

<sup>112</sup> R Nobles and D Schiff, (n.101)

state construction of legality.<sup>113</sup> Thus, participant/h's recognition of the tension reflects Nobles and Schiff's caution that whatever one's opinion on the appeal court and its procedures, there is a need to accept the "authority and legality" of the appeal court in order to have one's issues decided by it in the first place.<sup>114</sup> This is particularly problematic for IPs, where their objection is to the grounds which they need to meet to re-enter the legal system.

Participant/b was a journalist and ran Project2 in a journalism school. He explains when looking at the case, he is not interested in "*the claims and the counter-claims, and the hearsay and the possibilities, and the theories and meh. I just want to find out what are the facts. What are the absolute concrete facts, and what actually happened in this case?*" Here, participant/b rejects 'claims' and 'counter-claims' and 'hearsay' and 'theories' which he suggests are irrelevant to establishing what actually happened in the case: these concepts all have significance in the culture of the social system of law, to the extent that each party constructs their version of events. Participant/b also suggested there were key differences in how journalists and lawyers approached issues: "*Law students and solicitors and barristers, they will look at the evidence and then they will see how the evidence can be pushed through the system; where this evidence sits; the significance of the evidence... it strikes me that they very rarely look up and think is this person innocent? Did they actually do it? They entirely avoid these sort of meta-questions, and they just deal with the detail, they are detail people. Journalists are largely not detail people, they are sort of kind of broad generalists.*" This reflects the misreading between journalism and law. Within law, lawyers can only examine facts which are admissible as 'evidence' according to law; their role is not to establish whether their client is innocent or guilty, but to advance a client's best interests within the limits of the law and its rules of procedure. Journalists however, within systems theory, code on the basis of information/not information and their function is to identify information deemed of importance to communicate to their audience. This reflects the point discussed by Nobles and Schiff that "The media, necessarily, simplify. In order for the knowledge of a complex area of social life to be communicated to a lay audience, matters have to be less technical than would be possible with a professional one."<sup>115</sup> Thus, as discussed above, conviction is often read as equating to factual guilt, and a successful appeal as equating to factual innocence, which is 'information' or 'news' for the public.

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<sup>113</sup> R Nobles and D Schiff, (n.14) p.201

<sup>114</sup> R Nobles and D Schiff, (n.15) p.12

<sup>115</sup> R Nobles and D Schiff, 'A Story of Miscarriage: Law in the Media.' (2004) 31(2) Journal of Law and Society 221, p.223

However, participant/b said there had been an evolution in his approach: *“I think that the longer you’re involved in the IPs, the more you move away from that naïve point of view of ‘I want to know what happened,’ to the legal point of view, the solicitors, the QC’s point of view of ‘let’s just try and process the detail, let’s find interesting pieces of detail and see if the system will eat them.’”* If we view participant/b as having originally adopted the innocence movement communications of guilt/innocence and truth-finding, this may provide evidence of the inability of these constructions to withstand irritation from the legal world. Participant/b also comments on the impossibility of finding out what actually happened, which reflects the difficulties faced by the criminal justice process; and perhaps his recognition of the legal system’s need to construct its external environment in order to reach a decision. He also commented that he thought innocence project was a *“horrible name,”* and that he prefers to call it a *“Justice Project.”* This again reflects the move away from a *“Factual Innocence Model,”* focused on truth-finding and innocence, for a preference of a more legal construction, such as *“justice.”* Although the same issues apply to this interpretation as discussed above for participant/h.

The difficulty (or according to systems theory, the impossibility) of determining *“factual innocence”* and objective truth was clearly a problem recognised by participants. Participant/c<sup>116</sup> was the only participant who emphasised the focus on factual innocence, but pinpointing what this meant was difficult to articulate: *“there are people who say factual innocence is a very high standard, but that’s only a very high and impossible standard if what you’re wanting is 100% proof of innocence. I don’t think we actually go as far as that, but I think we look at the question in a different way to what a jury would when they’re determining it on reasonable doubt.”* Thus participant/c saw the factual innocence standard as existing somewhere in between these two certain concepts: innocence, and the legal construction of reasonable doubt. This illustrates the difficulty in seeking to apply a factual innocence standard to the environment. Systems theory explains how social systems produce constructions about their environment which reduce it into manageable proportions to process it: thus, we create constructs to capture a version of reality (the whole of which is inaccessible). The legal system is required to reproduce its application of the distinctions legal/illegal consistently to fulfil its function of providing society with generalised behavioural expectations: this requires the development of certain, fixed constructions which can be continuously be applied to environmental communications. Hence the difficulty posed by the uncertainty of a *“factual*

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<sup>116</sup> Project3



innocence” standard. A supplementary point relates to participant/h,<sup>117</sup> who explained that she originally thought you could have a “*gut feeling*,” about innocence; and similarly participant/j<sup>118</sup> also suggested he would get a “*gut feeling*” about which cases he wanted to take on. This is a social communication about a psychic operation, and illustrates the difficulty and limitations of putting psychic communications into social constructions. But such a subjective, psychic operation is clearly inadequate for the social system of law which requires certainty in application of its distinctions.

The above examples arguably provide an empirical example of Nobles and Schiff’s claim that individuals are “socially fractured:” there is an implicit recognition that they must adopt available social communications to participate in society. Arguably, the examples also illustrate empirical evidence of the autopoietic operation of social systems in society.

As demonstrated in Chapter 4, the majority of participants rejected the “innocence movement” communications around “factual innocence,” and truth-finding inquiries, and showed a preference for the constructions of state-law. For example, through emphasising how the focus should be on the conviction’s “safety,” or making sure all the possible grounds of appeal have been explored.<sup>119</sup> Thus, for the sampled IPs, we can conclude there was a failure of these rival communications and programmes to be adopted by other projects.

There are two possible explanations for this derived from insights from systems theory.

Firstly, that a number of participants simply did not identify with the innocence movement communications at the outset, either because they disagreed with this reading of legal communications, or because they recognised the need to adopt legal communications in order to progress cases through the criminal appeal process. For some of those who practised law, they could not accept the viability of a distinction between factual innocence and technical innocence,<sup>120</sup> and so would fall in the former category. Whereas others who emphasised the need to work within the legal system, and to focus on appeal grounds would fall in the latter category.<sup>121</sup>

Secondly, for those that initially identified with the “Factual Innocence Model,” and adopted the coding and programming of the innocence movement, they eventually dropped these

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<sup>117</sup> Project1

<sup>118</sup> Project8

<sup>119</sup> See section 1

<sup>120</sup> This is discussed in Section 1, particularly in relation to participant/d, participant/a, participant/f, participant/p

<sup>121</sup> This is also discussed in Section 1, particularly see participant/j and participant/l

communications in favour of legal communications following increased irritation from the criminal justice process. IPs are clearly linked to the subsystem of the criminal justice process and they could be deemed as having been in a structural coupling with the legal system through claims of “miscarriages of justice.”<sup>122</sup> Teubner explained that where two systems are in a structural coupling, their co-evolution can determine the viability and survival of certain systemic structures as they are exposed to environmental perturbations.<sup>123</sup> Therefore, perhaps IP communications were dropped by certain individuals through recognition of their unviability in light of interaction with the criminal appeal process.

There is evidence beyond this empirical data that IPs have been under pressure from criminal justice institutions to adopt legal communications. In November 2013, the CCRC addressed IPs at an INUK conference and said: “you may disagree with the Court of Appeal’s focus on safety and its rules on the admissibility of evidence, but how you feel about these things does not matter when it comes to dealing with a potential application to the Commission.”<sup>124</sup> The CCRC suggested that IPs should concentrate on just two questions when making an application: is the evidence new? And is it significant in that it may contribute to a referral and, ultimately the quashing of a conviction? Thus, the CCRC encouraged IPs to apply the coding procedures of the criminal appeal system and its programmes for assessing the safety of convictions.

Therefore, it is possible to analyse Naughton’s aspirations for the innocence movement and the “Factual Innocence Model” of IPs as representing a rival, communication subsystem to the current operation of criminal justice: potentially as simply a subsystem within criminal justice, or perhaps as amounting to a subsystem of protest communication. However, the empirical data suggests these communications were not adopted by the majority of IPs sampled, and where they were, they failed to withstand irritation from the legal system. The participants have reconstructed the “innocence movement communications” into communications which they see as amenable to those currently available within the legal system; this arguably demonstrates how individuals are required to adopt the available social communications to participate within society. It also illustrates the difficulties caused by the side effects of functional differentiation

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<sup>122</sup> However, these would be limited to those claims of miscarriages of justice recognised as eligible by INUK; thus where there is a claim of actual innocence; and those involving conviction for serious offences

<sup>123</sup> G Teubner, (n.97) p.1460

<sup>124</sup> CCRC; INUK Conference

and the inability of accessing objective truth, making it impossible for certain generalised values to be accommodated.

### **2.3 Linkage Institutions**

The third suggestion for how we might conceptualise IPs within systems theory comes from Roberts and Weathered. They briefly discussed Nobles and Schiff's analysis of miscarriages of justice and systems theory in an article about IPs, and concluded that IPs could be seen as a "production regime" or a "linkage institution."<sup>125</sup> The differences between Naughton and Roberts and Weathered's accounts of the aims and objectives of IPs may be important to whether we conceptualise them as rival communicative subsystems, or as "linkage institutions." Whilst Naughton saw them as challenging the existing legal framework, Roberts and Weathered claimed IPs worked in and between different social systems, and they focused on the potential for compatibility between IPs and other criminal justice agencies: this difference is key. This conceptualisation of IPs most closely relates to IPs which might be analysed as "Mixed Models" in that they adopt elements of the "Factual Innocence Model" and "Formal Legalism Model." This section will thus seek to explore Roberts and Weathered's analysis of IPs as "linkage institutions" and situate this in the broader literature; before considering whether there is any support for this conceptualisation within the empirical data.

Roberts and Weathered only briefly engaged with systems theory in an article about IPs, which sought to examine why IPs were needed despite the CCRC and how they could be compatible with the legal institutions. Their account of IPs within systems theory was therefore brief, but was approached in the following way. They cited Nobles and Schiff and explained how systems theory understands law as self-referential, which meant it was impossible to make the same communications in different systems: they referred to the different understandings of a miscarriage of justice in law and the media as discussed above. Roberts and Weathered then said within systems theory, IPs would be a "linkage institution" or a "production regime." They explained that IPs have a variety of roles: to educate law students; to investigate cases on behalf of applicants; to campaign<sup>126</sup> for the wrongly convicted and propose reforms; and to send case

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<sup>125</sup> Teubner refers to this as a "linkage institution" in his article, G Teubner, (n.97), however in a later piece he seems to have reformulated this as a "production regime" (G Teubner, 'Alienating Justice: On the Surplus Value of the Twelfth Camel.' in Priban, J. Nelken, D. (Eds.) *Law's New Boundaries: The consequences of legal Autopoiesis* (Dartmouth Publishing Company, Ashgate Publishing Ltd. 2001). However the terms have been used interchangeably so the same approach will be taken here.

<sup>126</sup> In systems theory, campaigning is seen as an important operation within the political system, as the way the public makes its opinion known to politicians. Politics is made up of three subsystems, politics, administration and public. Politics includes discussions and debates between cabinet members, politicians and civil-servants: the

applications to the CCRC, seeking to obtain a referral to the CACD.<sup>127</sup> The authors said in doing this, IPs participate in different social systems and selectively engage in different communications: when talking to the media, prisoners and politicians they define a miscarriage of justice in lay terms, which is actual, factual innocence. Whereas when they educate law students about the appeal system, and prepare and send applications to the CCRC, they define a miscarriage of justice in terms of what is legal/illegal, in order to comply with the statutory tests of the CACD and the CCRC.<sup>128</sup> Therefore, if IPs are understood as “linkage institutions” in the sense described by Roberts and Weathered, we would see them as working in and between different social systems, rather than presenting a challenge to them.

Roberts and Weathered then explain that because the IP “allows its actors to participate simultaneously in the communication of the media and politics and the legal communications of the law”<sup>129</sup> it could provide “an opportunity for structural coupling between media, politics and law which is perhaps greater than is possible within the CCRC or the Court of Appeal.” They clarify: “this does not mean that there will be a common meaning as to what amounts to a miscarriage of justice,” but it means that IPs “can help in stabilizing the use of different meanings of miscarriages of justice by the law and the media, thereby achieving a structural coupling.”<sup>130</sup> This is Roberts and Weathered’s only engagement with systems theory in their article, and thus their analysis is underdeveloped. They do not explain beyond this what a “linkage institution” is within systems theory, or what “structural coupling” means.

Roberts and Weathered’s description of IPs is based on the account of “linkage institutions” by Nobles and Schiff.<sup>131</sup> Nobles and Schiff analysed the RCCJ as a “linkage institution.”<sup>132</sup> They describe “linkage institutions” as “necessarily precarious” because they are required to

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outcomes of these discussions form decisions and go to the administration which transforms the decisions into law; law is how the administration relates with the public, and the public then externalises its relation to politics through campaigning, complaining and voting in political elections: see M King and C Thornhill *Niklas Luhmann’s Theory of Politics and Law* (Palgrave Macmillan 2003) p.89-90

<sup>127</sup> S Roberts and L Weathered, (n.28) p.52

<sup>128</sup> S Roberts and L Weathered, (n.28) p.52

<sup>129</sup> It is worth noting that there is nothing unique about IPs enabling their actors to participate in different areas of communication. Nobles and Schiff note that participating in different social systems is an “everyday experience” for individuals in a functionally differentiated society (R Nobles and D Schiff, (n.15) p.251). However, IPs could potentially facilitate this, which would increase the interaction of individuals in and between different social systems.

<sup>130</sup> They make a similar claim over the CCRC in that when talking to the media they use the media communications, but when talking to the Court of Appeal, they use legal communications. Therefore, they suggest the CCRC could also stabilise the meanings of a miscarriage of justice used by the media and the legal system. (see S Roberts and L Weathered, (n.28) p.53).

<sup>131</sup> It is of note that Roberts and Weathered thank Nobles and Schiff for their feedback on the article, and therefore this also suggests their dealings with systems theory is informed by Nobles and Schiff’s analysis.

<sup>132</sup> R Nobles and D Schiff, (n.101) p.314

understand the reality constructions of different social systems (here law, politics and the media) and to attempt to make proposals that can be read and incorporated into the discourses of these different systems. In analysing the RCCJ they said it was “necessary to offer evaluations of the processes and proposals of the Royal Commission in the different contexts of these different systems.”<sup>133</sup> They suggested the RCCJ was unsuccessful, and that autopoiesis may require an acceptance that the RCCJ was unable to achieve a “meta-language” which allowed different systems to talk to each other. Rather, the RCCJ borrowed communications from each of the different systems and ultimately produced a report which each system had to construct for itself.<sup>134</sup> Nobles and Schiff suggest that, having an ability to identify what changes occur when events are reconstituted within different systems (and therefore to understand the reality constructions of different systems) makes it possible to suggest reforms “which may lead to greater congruence (or ‘structural coupling’) between the expectations which other systems have of law, and the ability of law to meet those expectations.”<sup>135</sup>

Returning to Roberts and Weathered’s description of IPs as “linkage institutions,” their account is potentially clearer. They suggest IPs have the potential to increase awareness of the different understandings of a miscarriage of justice between society and the legal system. When they argue that IPs could provide “an opportunity for structural coupling” between media, politics and law, they are essentially claiming that IPs could increase the congruence between law and the expectations which the media and politics have of it. Therefore, preventing the crisis which Nobles and Schiff said ensues for the legal system when external observers search for a legal process that recognises an individual’s innocence.<sup>136</sup>

It is useful to situate Roberts and Weathered’s account of IPs as “linkage institutions” in the context in which the concept was developed. Teubner developed the concept of “linkage institutions” when discussing legal pluralism; he suggested they could make law more “responsive” towards society.<sup>137</sup> Teubner gave the example of “contracting” as a modern linkage institution between law and economy; and “standard-setting” between law and technical, medical and scientific processes.<sup>138</sup> He described how “linkage institutions” bound law more tightly to other social discourses and were responsible for determining the duration,

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<sup>133</sup> R Nobles and D Schiff, (n.101) p.314

<sup>134</sup> R Nobles and D Schiff, (n.101) p.318

<sup>135</sup> R Nobles and D Schiff, (n.101) p.301

<sup>136</sup> R Nobles and D Schiff, (n.101) p.312

<sup>137</sup> G Teubner, (n.97) p.1460

<sup>138</sup> G Teubner, (n.97) p.1459

intensity and quality of the structural couplings between law and other social systems.<sup>139</sup> Teubner said “if social systems coevolve under conditions of transitory structural coupling, the result is mere survival of certain structures which have proved resistant to environmental perturbations.”<sup>140</sup> This can let a system know its structures are viable, but not whether they are ecologically compatible.<sup>141</sup> However, Teubner thought linkage institutions which “permanently link parallel processes of social self-reproduction to each other” can mean “the number of possible viable eigenvalues will decrease since they are exposed to increased perturbation under which they have to endure.” Eigenvalues are those values which are unique to a system and created internally and cannot be used anywhere else.<sup>142</sup> Teubner suggested that “linkage institutions” help systems to determine whether they are ecologically compatible with social, psychic and natural environments.<sup>143</sup> They do this through stabilising a structural coupling and directing it so that systems act on each other in a cyclical fashion.<sup>144</sup> He suggested this could enable self-reproduction to operate outside the boundaries of the systems, causing ecological recursiveness rather than systemic.<sup>145</sup> Teubner clarified that “linkage institutions” do not impair the autopoiesis of the systems involved, but exploit it to build up ecological cycles which respect system boundaries, even though crossing them.<sup>146</sup> He said linkage institutions thus increase law’s responsiveness to society by binding it to diverse social discourses, which can become a source for law’s tacit knowledge about its social ecology.<sup>147</sup>

Nobles and Schiff,<sup>148</sup> and Roberts and Weathered<sup>149</sup> use the terms “linkage institutions” and “production regimes” interchangeably. Teubner appears to reformulate “linkage institutions” into “production regimes.”<sup>150</sup> Here, he describes them as structural links between autonomous social systems (i.e. economy, law, and politics) but which do not evolve into autopoietic

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<sup>139</sup> G Teubner, (n.97) p.1447

<sup>140</sup> G Teubner, (n.97) p.1460

<sup>141</sup> G Teubner, (n.97) p.1460

<sup>142</sup> See N Luhmann *Law as a Social System* (English Translation, Oxford University Press 2004) p.125; and R Nobles and D Schiff ‘Luhmann: Law, Justice and Time.’ (2014) 27 Int J Semiot Law 325 p.326)

<sup>143</sup> G Teubner, (n.97) p.1460

<sup>144</sup> G Teubner, (n.97) p.1460

<sup>145</sup> Teubner does not explain this, but he appears to be suggesting that where linkage institutions consistently bind social systems, if social systems begin to act on each other cyclically, and this stabilises, there is recursiveness in the environment of social systems. (n.97). p.1460

<sup>146</sup> G Teubner, (n.97) p.1461

<sup>147</sup> G Teubner, (n.97) p.1461

<sup>148</sup> R Nobles and D Schiff, (n.101)

<sup>149</sup> S Roberts and L Weathered, (n.28)

<sup>150</sup> G Teubner, ‘Alienating Justice: On the Surplus Value of the Twelfth Camel.’ in Priban, J. Nelken, D. (Eds.) *Law’s New Boundaries: The consequences of legal Autopoiesis* (Dartmouth Publishing Company, Ashgate Publishing Ltd. 2001) p.29

systems themselves: they merely link law to other social discourses.<sup>151</sup> A linkage institution or production regime involves several participating operationally closed systems.<sup>152</sup> The result is a multitude of co-evolving, autonomous processes within one regime which, in turn, can influence each other via mechanisms of co-evolution.<sup>153</sup> Teubner suggests that the legal doctrine cannot follow its own logic in this setting, which is shaped by a common law type history of accumulating particular conflicts. Rather, it is shaped by co-evolutionary forces within the production regime which directs law into a narrow space of compatibility with economic, political and other non-legal institutions.<sup>154</sup>

Teubner's account is arguably quite abstract, however he appears to suggest that, through binding different social discourses more tightly together, "linkage institutions" create a smaller environment for systems to reproduce themselves, in which they are exposed to intense and increased environmental irritation; this forces systems to dispose of their unique systemic eigenvalues which cannot be sustained in this context. As they co-evolve within this smaller environment and dispose of those eigenvalues which are incompatible, the number of possible communicative selections available to each system reduces, and thus they become more responsive to one another.

There are potentially some important differences between how "linkage institution" was applied by Teubner, compared with Nobles and Schiff and Roberts and Weathered, which is important for thinking about their application to IPs. Teubner analysed social processes, such as contracting as "linkage institutions," and reflected upon how this permanently linked law to other discourses enabling it to evolve more closely with its environment. However, Nobles and Schiff appear to base their analysis on the RCCJ as a "linkage institution" because it is comprised of people from different social systems: this is also not a "social process" but a temporarily created institution of people.<sup>155</sup> Following on from this analysis, Roberts and Weathered then appear to take this concept further and suggest that actors within IPs participate in different social systems and selectively engage in different communicative selections. This difference is important, as Roberts and Weathered's analysis suggests that the focus is on how

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<sup>151</sup> Ibid. p.29

<sup>152</sup> G Teubner, (n.150) p.29

<sup>153</sup> G Teubner, (n.150) p.29

<sup>154</sup> G Teubner, (n.150) p.29-30

<sup>155</sup> This seems to reflect their view in 1995 that autopoietic theory is a "reification" of human action, and that reformers should recognise they are trying to "alter the practices of actors who have distinct forms of communication and self-perception." This position is discussed further later. (R Nobles and D Schiff, (n.101) p.319)

actors comprising IPs work in and between social systems: this is a different take on the concept from how Teubner originally developed it. However, if we follow Roberts and Weathered's line of thinking, what does Teubner's account add to their conception of IPs in this way?

Arguably, Teubner's account does appear to suggest if IPs were "linkage institutions" they would potentially go beyond simply stabilising the different understandings of a miscarriage of justice. As a "linkage institution" IPs could make law more responsive to its environment, which in this instance, would be aimed towards increasing law's responsiveness to the lay construction of a miscarriage of justice (factual innocence). Roberts and Weathered make no further reference to systems theory or linkage institutions beyond what was discussed above. However, they do discuss how IPs in England and Wales could be compatible with the CCRC. They ask: how will IPs persuade the CCRC to take on a case which is based solely on actual innocence."<sup>156</sup> They suggest IPs can do this through finding fresh evidence which supports factual innocence, which is something the CCRC can refer to the CACD.<sup>157</sup> Thus, in systems theory terms, IPs can squeeze lay communications around "factual innocence" into a structural coupling with the CCRC, by providing fresh evidence which may arise to a "real possibility" the CACD would quash the conviction. IPs are referring cases based on likely "factual innocence;" although the CCRC and CACD would still construct this in terms of legal safety, IPs would still be increasing law's responsiveness to claims of factual innocence, and therefore to society's (and other social systems') expectations of what law should be doing. Luhmann did explain that "compatibility" was key to structural coupling,<sup>158</sup> and there were several possibilities of exerting influence on a system provided its autopoiesis is not destroyed.<sup>159</sup> Therefore, if IPs were focusing on identifying fresh evidence to support factual innocence they would be increasing law's compatibility with its environment.

However, this role of IPs in increasing law's responsiveness to factual innocence through a structural coupling with the CCRC over fresh evidence, is likely not enough for them to amount to "linkage institutions." Teubner suggested such institutions would permanently link law to other social processes, and thus would go beyond a transitory structural coupling: if IPs couple with the CCRC/CACD over fresh evidence, this is only increasing law's responsiveness to factual innocence at the point in time of the coupling. To increase law's responsiveness to a social construction of a miscarriage of justice in a more permanent way, IPs would be looking

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<sup>156</sup> S Roberts and L Weathered, (n.28) p.59

<sup>157</sup> S Roberts and L Weathered, (n.28) p.59

<sup>158</sup> N Luhmann, *Introduction to Systems Theory* (Polity Press 2013) p.85

<sup>159</sup> Ibid. p.85



to encourage a change to law's programmes to better protect "factual innocence": where this related to substantive law, IPs would have to pursue this within the political system through a reform agenda. For those IPs who participated in the Justice Select Committee Review of the CCRC in 2014-2015, this could be considered an attempt at this (this will be discussed further below).

Whilst it is debatable to what extent IPs qualify as "linkage institutions" based on the discussion in this chapter, it needs to be addressed whether the empirical data provides any support for this analysis of IPs. Roberts and Weathered's understanding of IPs was based on their having very distinct aims: having a focus on factual innocence and seeking to find supporting fresh evidence for that; campaigning for the wrongly convicted; educating law students; and preparing cases for consideration by the CCRC and the CACD. Clearly, as we saw in Section 1, the majority of IPs did not engage with the reform or factual innocence aims to a significant extent. However, when discussing whether they saw reform as part of their role, two IP leaders emphasised how this needed to be pursued separately to casework and therefore indirectly acknowledged the need to participate in different social systems for different ends. For example, participant/l explained: *"you can also have the campaigning bit to you as well if you want to do that, and the consultation thing but you have to work within the law as it stands."* However, it was only participant/g and participant/h who actually described themselves as having a role in campaigning. In relation to the factual innocence focus, participant/c was only participant to strongly emphasise the factual innocence focus of IPs, and finding fresh evidence was an aim in pursuit of that. Participant/k<sup>160</sup> also described their main aim as to find fresh evidence to test the claim of factual innocence. However, beyond this, the account of IPs as "linkage institutions" was not supported by the empirical data, largely because the sampled IPs did not identify with the main aims of IPs as set out in the literature.

Nevertheless, this last conceptualisation of IPs is of significance to thinking about how IPs could use a lay construction of "miscarriages of justice" and still participate within the legal system. Roberts and Weathered's account was different from Naughton's in their search for compatibility, rather than presenting a challenge to the legal system's constructions. Thus, they argued that IPs would adopt different constructions of a "miscarriage of justice" depending on which system they participated in; for example they would use the legal construction when educating law students, whilst Naughton said he would encourage his students to focus on

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<sup>160</sup> Project8

“factual innocence” and whether the client may be telling the truth. If IPs were to be successful in pursuing their different aims, such as advancing cases through the appeal system and encouraging reform, then according to autopoietic theory, this model would be the most effective means of them doing so. However, as will be discussed, IPs have had little success in terms of achieving their casework or reform aims as set out in the literature: thus, so far, IPs appear to have had little success in trying to increase the structural couplings in and between these different social systems as envisaged by Roberts and Weathered. It is debatable whether this is because the majority of IPs did not identify with these aims (as is suggested in this research), or whether this is due to the difficulties with pursuing such a task as was acknowledged by Nobles and Schiff when discussing the RCCJ.

#### **2.4 Discussion: IPs and the empirical data**

Systems theory has provided a useful theoretical tool for considering why the majority of sampled IPs did not identify with the aims and objectives of IPs in the literature. This is particularly relevant to looking at Naughton’s “Factual Innocence Model” for IPs as it was suggested that, according to Luhmann’s theory, this would involve some potentially significant tensions, which were identified as relevant to why the majority of sampled IPs did not identify with this model. However, the above discussion has concluded that the empirical data does not support any of the three conceptualisations of IPs which were proffered based on the aims and objectives of IPs in the literature. Thus, how should we understand IPs within systems theory according to the empirical data?

The empirical data from the sampled IPs appears only to support an analysis of them as “organisations” within Luhmann’s theory, as was briefly discussed above. As has been demonstrated within Section 1 of the results, despite being committed to truth-finding investigations within the literature, the majority of sampled IPs saw themselves as taking a legal approach to investigation, which was focused on determining whether there are legal grounds of appeal: this suggests they are in a strong structural coupling with the social system of law. However, being based within universities, the majority of the sample also suggested that education was a significant and primary aim. Luhmann distinguishes between legal education and legal practice, and comments that legal education can have more abstraction and philosophy than legal practice, which is so “even though it is the education system’s training which prepares people to work in legal practice.”<sup>161</sup> IPs educational aims could be seen as

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<sup>161</sup> See N Luhmann *Law as a Social System* (English Translation, Oxford University Press 2004) p.54

directed towards their structural coupling with law in terms of training future lawyers for practice. However, they did also have broader educational aims, which sought to encourage students to critically reflect upon the criminal justice system. Therefore, we should perhaps see IPs as organisations which bridge legal education and practice, and thus structurally couple with both the social systems of law and education.

It is also worth considering the relationship of IPs to the social system of science. According to Luhmann's theory, the system of science applies the code true/false and is tasked with producing 'truths' for society. Although the criminal justice system within England and Wales does see itself as truth-finding in aiming to acquit the innocent and convict the guilty,<sup>162</sup> its concept for achieving this and resulting programmes are rooted in adversarial tradition and create a legal construction of this "truth": this was discussed in Chapter 2 when considering literature by Nobles and Schiff. Notably, although the literature on IPs had suggested that they would not confine themselves to legal constructions and communications, but would carry out 'truth-finding investigations' which looked beyond the legal grounds of appeal, the empirical data has suggested that IPs are driven to construct arguments mainly in distinctively legal terms. Thus, the relationship of IPs with the system of science is no different to that of other legal organisations concerned with criminal trials or appeals, such as the courts. All such legal organisations must structurally couple with science in terms of utilising forensic evidence; but in so doing, scientific opinion is reconstructed into legal communications. For example, scientific estimates concerning gunshot residue and the number of particles are reconstructed in the social system of law into an evidential rule, whereby there is a minimum number of particles required for the judge to leave the evidence of gunshot residue to the jury: in essence, it only gains probative value and becomes 'evidence' for the purposes of criminal law at this point. Thus, whilst IPs may structurally couple with science when reviewing forensic evidence, they do this within their role as legal organisations and thus reconstruct this into legal communications.

To conclude, the literature model of IPs appeared to be of significant interest in terms of Luhmann's Social Systems theory, because of their aims to challenge the legal approach to examining post-conviction appeals, or to work in and between the different social systems. Based on these unique aims, three different conceptualisations were presented. The first two suggestions that IPs may be seen as either protest movements or as independent communicative

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<sup>162</sup> The Criminal Procedure Rules (October 2015)

subsystems were formulated based on the “Factual Innocence Model” of IPs. The third questioned whether we could see IPs as “linkage institutions,” which drew on literature from Roberts and Weathered. This discussion illustrated that, according to the empirical data (which showed that the sampled projects largely did not identify with the literature model of IPs), IPs cannot be conceptualised in any of these three ways. Rather they are best understood simply as organisations which structurally couple with the systems of law and education. However, despite these conceptualisations being rejected, this discussion has demonstrated that Social Systems theory provides useful insights into tensions experienced by the IP leaders in practice, and thus why the sampled projects did not identify with the literature model of IPs.

### **3. The innocence movement reform agenda: autopoietic insights**

Applying Nobles and Schiff’s analysis as discussed in Chapter 2, we would potentially expect the innocence movement reform agenda to be met with resistance. This section will consider the Justice Select Committee (JSC) Review of the CCRC in 2014-2015 and discuss the submissions from IPs. This will demonstrate that IPs are essentially pushing for the same reforms to criminal appeals as discussed by Nobles and Schiff back in 1995, and will reflect on the outcome of the JSC review.

#### **3.1 The Justice Select Committee Review of the CCRC: 2014-2015**

In February 2014 the JSC invited submissions from a select few academics and solicitors on their views of the CCRC and its operation:<sup>163</sup> one of these was Michael Naughton. This suggests Naughton’s reform agenda had resonated within the political system: potentially through protest, or campaigning and political engagement. After receiving the initial evidence, the JSC launched an inquiry into the CCRC, and called for evidence from interested parties from October 2014. This inquiry concerned: whether the CCRC fulfilled its expectations and remit as envisaged by the RCCJ; whether it has appropriate and sufficient statutory powers and resources to carry out its function; and whether the real possibility test under s.13 Criminal Appeal Act 1995 was the appropriate test.<sup>164</sup> These were criticisms of the CCRC raised within the innocence movement literature.

Some IP leaders provided written evidence to the committee: Cardiff Law School IP, which also prepared another joint petition for signatories, and Nick Johnson who runs Nottingham Trent’s former IP. This analysis will concentrate on the written evidence from Naughton and

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<sup>163</sup> <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/85004.htm> (accessed 02/04/16)

<sup>164</sup> As discussed in the literature review, s.13 Criminal Appeal Act 1995 states that the CCRC can refer a case to the CACD where there is a “real possibility” that they would quash the conviction.

Cardiff Law School IP, along with the oral evidence of Naughton and Eady (of Cardiff) to the Committee: this is because they were both called to give oral evidence in their position as IP leaders.<sup>165</sup> Their submissions echoed the reform agenda of IPs in the literature, with criticisms of the “real possibility” test of the CCRC and the restrictive approach to appeals by the CACD. Thus, we could analyse the IP reform agenda as directed towards changing law’s programmes through which it applies its sub-coding distinction in criminal appeals (safe/unsafe).<sup>166</sup> Submissions from Naughton and Cardiff Law School IP will now be respectively discussed.

Naughton argued that the “real possibility” test should be changed, and suggested an alternative statutory test of: “a *“real possibility,” is there a miscarriage of justice?*”<sup>167</sup> Naughton explained: this would not require proof of innocence, but “*innocence has to be the lens through which we are looking.*”<sup>168</sup> Thus Naughton continued to emphasise the importance of considering potential factual innocence. He criticised the CCRC for emulating the CACD in assisting, “*factually guilty offenders to overturn their convictions on points of law.*”<sup>169</sup> He cites the case of *Clarke and McDaid*<sup>170</sup> as an example, where the Supreme Court quashed the appellants’ convictions because the CPS had not signed the indictment. He emphasised: “*It is claims of innocence that we should be interested in, not claims of technical miscarriage of justice, of terrorists and murderers and rapists, who are overturning their convictions on technicalities.*”<sup>171</sup> Thus, Naughton promotes the “justice based on truth” rationale, which Nobles and Schiff said caused problems for the legal system.

Naughton explained how there were cases where “*the whole country thinks that it is a miscarriage of justice,*” yet the CCRC continues to reject referral. This reflects the potential difference between lay (non-law) constructions of a miscarriage of justice and how this is

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<sup>165</sup> Carole McCartney, the former founder and director of Leeds University IP, was also called to give oral evidence. However, she was on a different panel, and no longer works in her capacity as the Leeds IP director. Thus her evidence was considered less significant in representing the current innocence movement in the UK.

<sup>166</sup> Nobles and Schiff suggested we could identify sub-codes in the criminal justice process through which it achieves its operations, such as conviction/acquittal, or conviction quashed/conviction upheld. These sub-codes then feed into law’s operations in applying the code legal/illegal. I chose the code safe/unsafe to reflect how the CACD assess convictions according to current substantive law.

<sup>167</sup> M Naughton, Oral Evidence: Tuesday 13<sup>th</sup> January 2015 HC850 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/criminal-cases-review-commission/oral/17545.html>

<sup>168</sup> Ibid.

<sup>169</sup> M Naughton, ‘Written evidence on the CCRC,’ (February 2014) p.5 <http://www.parliament.uk/documents/commons-committees/Justice/02%20A%20Michael%20Naughton%20letter.pdf> (accessed 23/05/16)

<sup>170</sup> [2008] UKHL 8. In this case the CACD did acknowledge that they were quashing this specifically on grounds of a technical breach; they did not order a re-trial because the appellants in question had already served their time in prison.

<sup>171</sup> M Naughton, Oral Evidence (n.167)

determined legally. Naughton argued that the current test fails “*potentially innocent victims of miscarriages of justice*” when their case does not fulfil the “‘*real possibility test*’ and the *prevailing procedures of the Court of Appeal*. ”<sup>172</sup> He referred to a dossier of 40 INUK cases which were made public as part of their campaign to encourage the CCRC to consider factual innocence. He explained that despite evidence supporting innocence, the CCRC refused to refer these cases because the evidence was not fresh, or because the jury decided to convict despite conflicting evidence. Naughton thought the current approach had simply shifted the problem from the political sphere, “*failing to refer the cases of potentially innocent individuals...if those cases were thought to conflict with political interests,*” to the legal one, with the CCRC “*failing to refer and overturn cases of the potentially innocent if they are believed to conflict with the dictates of the legal system.*”<sup>173</sup> This reflects the side effects of functional differentiation and self-referential autopoietic systems, which reconstruct environmental events in accordance with their own functions and constructions of reality.

Naughton also implicitly suggested that the RCCJ recommendations were reconstructed and misread when the statutory “real possibility” test was created.<sup>174</sup> Corbyn asked Naughton during his oral evidence whether the CCRC had become a “*tool of the Court of Appeal.*” Naughton responds: “*It has always been one, because of the statute...what you were calling for 20 years ago and what you got do not relate to each other. You never got what you thought you were asking for.*”<sup>175</sup> This indirectly reflects the impossibility of translation between social systems. This could have occurred either through reconstruction into political communication in parliamentary debate, or through reconstruction into legal communications during the drafting of the legislation.<sup>176</sup> This is relevant to thinking about Nobles and Schiff’s suggestions that the RCCJ failed to achieve a “meta-language” that enabled systems to talk to each other, but simply provided proposals to be reconstructed by each social system.

Price and Eady from Cardiff Law School IP argued for a change to the “real possibility” test, because it prevents, “*genuine miscarriages of justice*” from being overturned where significant

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<sup>172</sup> M Naughton, (n.169) p.5

<sup>173</sup> M Naughton, (n.169) p.10

<sup>174</sup> S.13 Criminal Appeal Act 1995

<sup>175</sup> M Naughton, Oral Evidence (n.167)

<sup>176</sup> The drafting of legislation is seen as part of the communicative subsystem of law, whereas debates over Parliamentary bills are seen as political communication, although King and Thornhill recognise the line is finely drawn. M King and C Thornhill, (n.126) p.44

new evidence or a legal infringement cannot be found.<sup>177</sup> They suggested a better test was that proposed by JUSTICE to the RCCJ: “*whether there is an arguable case that there has been a wrongful conviction.*”<sup>178</sup> They thought this would encourage the CACD to quash a conviction following a consideration of all the evidence, even without fresh evidence or a legal or procedural error. Nobles and Schiff suggested the CACD would be resistant to such a test, because undermined the system’s normative commitment to the jury trial and threatens the finality and authority of law. Price and Eady address this issue by saying: “*the current notion that the jury is infallible is clearly fanciful.*”<sup>179</sup> They emphasise that there is “*no ethical basis*” for justifying the refusal to revisit jury’s verdicts in order “*to maintain the credibility of an institution, especially when that institution has been expected to perform to an immaculate level beyond what can reasonably be expected.*”<sup>180</sup> Thus, they call for the court to take a broader approach which recognises the fallibility of the system. This argument reflects what Nobles and Schiff suggested as being particularly threatening to law, where critics justify a broader discretion for the CACD because of a scepticism over the procedures through which convictions are legally constructed, such as jury verdicts.<sup>181</sup> Price and Eady also argue that post-conviction investigation provides a more informed view than was available to the jury, “*without the selective and potentially misleading adversarial process of information presentation that both sides present to juries.*”<sup>182</sup> Thus, they question the validity of the legal programmes which lead to convictions and appeals: the laws of evidence and the contest model of the adversarial tradition.

Price and Eady suggest a “*fundamental problem*” is the CCRC’s “*excessive subservience*” to the CACD, which “*means that innocence is sacrificed to legal rules.*”<sup>183</sup> This represents a criticism of how the legal system reconstructs its environment through its programmes. They also argue that: “*it is not purely the Court of Appeal that might conclude that there has been an injustice. The concerns will have been apparent to the CCRC, defence lawyers and often*

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<sup>177</sup> J Price and D Eady, ‘Written Evidence on the CCRC’ (December 2014) <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Criminal%20Cases%20Review%20Commission/written/16120.html>

<sup>178</sup> Ibid. p.2

<sup>179</sup> J Price and D Eady, (n.177) p.9

<sup>180</sup> J Price and D Eady, (n.177) p.9

<sup>181</sup> R Nobles and D Schiff (n.101). p.306

<sup>182</sup> J Price and D Eady, (n.177) p.9

<sup>183</sup> J Price and D Eady, (n.177) p.13

journalists and others.”<sup>184</sup> As King discussed, where such an issue arises, this creates a paradox for law, as what is lawful can never be unjust.

Eady from Cardiff Law School IP gave oral evidence, where he suggested the CCRC should be looking “*at all the evidence and its cumulative effect*” and be taking a “*holistic approach*.”<sup>185</sup> Eady explained that applicants find rejections from the CCRC most difficult when “*nothing has been investigated*” and “*there are bland comments, usually, “This is not new,” or, “It was available at the time of trial,” or, “It is not significant,” or, “It is not a ground for appeal.”*”<sup>186</sup> This observation illustrates how the CCRC rejects communications relating to evidence or information that does not arise under a specific ground of appeal (and therefore not legally valid) despite perceptions of its potential importance. This is how law closes its boundaries to its environment to preserve the finality of its original decision.

Eady was particularly critical of the CA and suggested it was a “*cultural problem*.” He asks: “*How do we change the Court of Appeal? It is a very difficult problem. That is why we say the first step is to change the [real possibility] test, because at least you are beginning then to think culturally differently.*”<sup>187</sup> However, Eady reflected that until the CACD are “*prepared to entertain the new thinking, they are always going to obstruct this.*”<sup>188</sup> Eady argued there may be “*a case for removing the decisions from the Court of Appeal; that may be the only solution.*”<sup>189</sup> Eady’s views concerning the CACD are of interest in light of Nobles and Schiff’s argument in 1995, that the CCRC would struggle to overcome previous problems, because “so long as the Court continues to deal with the problems of finality by a constitutional deference to the jury, the new Authority will have no prospect of a successful referral unless its investigations and determinations exhibit a similar deference.”<sup>190</sup> Eady suggested there was a systematic protection of the CACD: “*If the problem is the Court of Appeal...what we are tending to do with the test and all the rest of it is make all the rest of the system go wrong...instead of fixing that bit, we just adjust all the others so they are wrong as well.*”<sup>191</sup>

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<sup>184</sup> J Price and D Eady, (n.177) p.9

<sup>185</sup> D Eady, Oral Evidence to the Committee: Tuesday 13th January 2015 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/criminal-cases-review-commission/oral/17545.html>

<sup>186</sup> Ibid.

<sup>187</sup> D Eady, Oral Evidence (n.185)

<sup>188</sup> D Eady, Oral Evidence (n.185)

<sup>189</sup> D Eady, Oral Evidence (n.185)

<sup>190</sup> R Nobles and D Schiff, (n.101) p.315

<sup>191</sup> D Eady, Oral Evidence (n.185)



From a systems analysis, this observation could be seen to refer to law's self-referentiality and self-perpetuation, and how it seeks to conceal the paradox of its existence.

Therefore, Naughton and Price and Eady continue to push the reform agenda of the innocence movement in the literature. These submissions echo the systemic reforms being discussed in Nobles and Schiff's analysis in 1995, which they suggested would be met with resistance.

The outcome of the JSC review potentially supports Nobles and Schiff's systems analysis concerning the difficulties with criminal appeal reform. The JSC produced a report in March 2015. They explained there were mixed reviews over changing the CCRC "real possibility" test, and concluded, whilst a different test could demonstrate independence from the CACD, it would only enable the CCRC to refer cases with no real possibility of success.<sup>192</sup> Thus, no reform of the test was recommended. However, they urged the CCRC to be less cautious in applying the test, and not to reject referral because of fear of rebuke from the CACD.<sup>193</sup> The JSC also expressed concern that some miscarriages of justice were going uncorrected because of the hurdle of the "real possibility" test and the CACD's approach. They recommended the Law Commission should review the CACD's grounds for allowing appeals, so as to "*encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument.*"<sup>194</sup> They explain: "*We are aware that this would constitute a significant change to the system of criminal appeals in this country and that it would qualify to a limited extent the longstanding constitutional doctrine of the primacy of the jury.*"<sup>195</sup> However, they clarify, "*neither of these things should be allowed to stand in the way of ensuring that innocent people are not falsely imprisoned.*"<sup>196</sup> Thus, this aspect of the innocence movement reform agenda, and the IP's written submissions was reflected in the JSC recommendations.

This recommendation for potential reform of the CACD echoes that discussed by Nobles and Schiff in 1995. Their analysis suggested the CACD would be resistant to broadening their discretion because it risked undermining the authority and finality of law. It is thus of potential interest that Lord Judge intervened at a late stage in the JSC review. He said, whilst the CACD must acknowledge that the jury has had the advantage of seeing the witnesses first hand, if after

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<sup>192</sup> House of Commons: Justice Committee Report: Criminal Cases Review Commission, Twelfth Report of Session, 2014 - 2015 (17<sup>th</sup> March 2015) <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/850.pdf> p.11

<sup>193</sup> Ibid. p.12

<sup>194</sup> House of Commons: Justice Committee Report (n.192) p.27-28

<sup>195</sup> House of Commons: Justice Committee Report (n.192) p.27

<sup>196</sup> House of Commons: Justice Committee Report (n.192) p.27

examining all the evidence the Court is left in doubt about a conviction's safety, it can and must quash the conviction; and the "real possibility" test should not prevent the CCRC from referring a case on this basis.<sup>197</sup> The JSC took note of this and expressed uncertainty over whether these views could be reconciled with Judge's views in *R v. Pope*.<sup>198</sup> This case discussed the "lurking doubt" doctrine, which was created in *R v. Cooper*:<sup>199</sup> this provided a discretion for the CACD to quash a conviction without fresh evidence or a legal or procedural error, if they concluded some "lurking doubt" existed in their mind that an injustice had been done. This doctrine reflects the submissions and recommendations to the JSC called for the CACD to do. However, Lord Judge was considered to have "probably killed off"<sup>200</sup> the "lurking doubt" doctrine in *R v. Pope*. In *Pope*, Judge said, where this ground arises at all, lurking doubt will require a "reasoned analysis of the evidence or the trial process" and must lead to "the inexorable conclusion that the conviction is unsafe." Such an argument could succeed only "in the most exceptional circumstances" and would be "even more exceptional if the attention of the court is confined to a re-examination of the material before the jury."<sup>201</sup> Thus, Lord Judge was clear this would only rise as a ground extremely rarely, and especially so where the CACD was restricted to trial evidence. This potentially brings into question his evidence to the JSC.

In October 2015, the Justice Secretary revealed that the government would not be acting on the JSC recommendations to review the CACD approach. The reasoning was: "*We note the views expressed by the former Lord Chief Justice, Lord Judge, and we do not believe that there is sufficient evidence that the Court of Appeal's current approach has a deleterious effect on those who have suffered miscarriages of justice.*"<sup>202</sup> Thus, Lord Judge's evidence was considered to dispel any concerns raised in the JSC evidence. Eady has written about the decision not to implement the recommendations, and considered Lord Judge's evidence to "fly

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<sup>197</sup> Lord Judge, 'Supplementary written evidence submission on the CCRC' (March 2015) <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Criminal%20Cases%20Review%20Commission/written/18446.html>

<sup>198</sup> [2013] 1 Cr. App. R. 14

<sup>199</sup> [1969] 1 Q.B. 267 p.271; paragraph F-G

<sup>200</sup> M Zander 'The Justice Select Committee's report on the CCRC - where do we go from here?' (2015) 7 Criminal Law Review 473 p.481

<sup>201</sup> *R v. Pope* [2013] 1 Cr. App. R. 14 (para 14)

<sup>202</sup> Justice Select Committee Correspondence: Letter from Rt Hon Michael Gove MP, Lord Chancellor and Secretary of State for Justice, 30 September 2015, on freedom of information; the Criminal cases Review Commission; and joint enterprise: (Published 14<sup>th</sup> October 2015) <http://www.parliament.uk/documents/commons-committees/Justice/correspondence/15-09-30-Michael-Gove-to-Chair-on-FOI-Court-of-Appeal-Joint-Enterprise%20.pdf>

in the face”<sup>203</sup> of his comments in *R v. Pope*.<sup>204</sup> Eady thought it absurd not to act on the JSC recommendations on the word of a CACD judge: he questioned how a government review which found significant problems within an institution could be dismissed on the word of a senior member of that institution.<sup>205</sup> This arguably illustrates law successfully concealing its paradox, reaffirming that what is lawful is also just. Lord Judge assures external observers that the CACD will quash a conviction when it has “doubt” over its safety. However, there will likely remain a misreading between law and external observers over when this doubt arises and what constitutes a safe or unsafe conviction. Thus, the difficult relationship between the CACD and IPs and other external observers will continue, and no reconciliation between a legal and lay construction of a miscarriage of justice is reached. This reflects Nobles and Schiff’s view on the continued difficulties for those engaged in reforming the criminal process.

### **3.2 Discussion**

Nobles and Schiff have said that “reforming criminal justice has been a frustrating career for many radicals.” They explain: “Despite episodic moments when change for the better seems inevitable, there is an overall sense of failure.”<sup>206</sup> It is significant that the JSC recommendations which may have marked a step forward in the innocence movement reform agenda have not been implemented. This issue becomes more significant when put in the context of Nobles and Schiff’s article written over twenty years ago, where the same debates over miscarriages of justice were current: the gulf between a legal and lay understanding of a wrongful conviction and encouraging the CACD to take a broader approach. Furthermore, the critique of the CCRC’s relationship with the CACD and of the “real possibility” test all support Nobles and Schiff’s prediction that the new authority would not overcome previous problems. The experience of the innocence movement lends weight to Nobles and Schiff’s caution that we must “take systems seriously” and think about how they differentiate and maintain themselves.<sup>207</sup>

To a certain extent, the innocence movement’s premise on the “factual” and “legal” innocence distinction was a recognition of the differences between a legal construction of a miscarriage of justice and a lay understanding. However, it is debatable whether the innocence movement

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<sup>203</sup> D Eady, ‘Lurking Doubt – and a snowball’s chance in hell.’ (March 14<sup>th</sup> 2006) *The Justice Gap* <http://thejusticegap.com/2016/03/malice-in-wonderland/>

<sup>204</sup> *R v. Pope* [2013] 1 Cr. App. R. 14

<sup>205</sup> D Eady, (n.203)

<sup>206</sup> R Nobles and D Schiff (n.14) p.212

<sup>207</sup> R Nobles and D Schiff, (n.101) p.319

sought to work in and between these different systemic constructions or to challenge them: it was suggested there was a difference between Naughton's aims and model for IPs, and that of Roberts Weathered. Naughton's model of IPs represented a protest movement, and a protest subsystem of communication presented as a rival to criminal justice coding and programming because of what he perceived as a disregard of "truth-finding" at appeal stage. This promoted a "justice based on truth" rationalisation that Nobles and Schiff suggested led to the RCCJ back in 1995. Nobles and Schiff suggested such arguments overlook the impossibility of law coding in such a way. Whereas, Roberts and Weathered's model of IPs as "linkage institutions" potentially provided a means of working in and between different social systems and finding compatibility with the legal tests through finding fresh evidence that supports factual innocence. However, this does nothing to encouraging the CACD to take a broader approach to assessing criminal appeals; an issue which has continuously arisen over the last century.<sup>208</sup>

To what extent should we accept there is likely to be a continuing failure of reforms looking to broaden the CACD's approach to criminal appeals?

Of importance to the issue of reform is Nobles and Schiff's expression of surprise that criminal justice practices in England and Wales continue to be presented as mechanisms of fairness without challenge, despite their obvious cultural specificity.<sup>209</sup> Field and Brants describe how different jurisdictions develop "cultural trust" in certain procedures, which are based on fundamental assumptions about the best means of finding facts: this can become damaging when it prevents the acknowledgement of weaknesses.<sup>210</sup> They suggest this is apparent in the CACD's investment in the jury trial in England and Wales and their deference to the jury on appeal. The CACD's approach to protecting law's finality through deference is a cultural construction, rather than an inevitable requirement of the criminal justice process's operation; or in Eady's words, a "cultural problem" with the CACD. Other countries such as France, which is based on an inquisitorial tradition, allow for an appeal by way of rehearing, where all the evidence leading to the conviction is reheard. This has not caused the legal system in France to collapse. Thus, looking to other procedural traditions is an important means for thinking about reforming the current approach to appeals within England and Wales: the CA approach

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<sup>208</sup> See K Malleon, 'Appeals against Conviction and the Principle of Finality.' (1994) 21(1) *Journal of Law and Society* 151

<sup>209</sup> R Nobles and D Schiff, (n 101) p.305

<sup>210</sup> C Brants and S Field, 'Truth-finding, procedural traditions and cultural trust in the Netherlands and England and Wales: when strengths become weaknesses.' [2016] *International Journal of Evidence and Proof* DOI: 10.1177/1365712716658893

to jury deference cannot be upheld as an essential requirement of protecting law's authority and finality.

However, procedural tradition is also important to thinking about what values the legal system aims to protect. Nobles and Schiff suggested the CACD deflects challenges to its authority through suggesting criminal programmes protect other values beyond truth-finding. Damaska suggested that the inquisitorial tradition provided procedures which were designed to promote truth-finding,<sup>211</sup> whilst adversarial procedures were designed to better protect other values, such as protecting the individual from state abuse.<sup>212</sup> Given that the adversarial tradition is based on a distrust of state interference, allowing a judge to interfere with a jury's verdict may be perceived to undermine an important value within adversarial tradition. Furthermore, adversarial procedure is based on a contest and appeal judges have refused the admission of evidence that was available at trial because of the perceived unfairness in allowing an appellant to benefit from evidence that was excluded for tactical reasons by their counsel.<sup>213</sup> This logic differs from an inquisitorial tradition where the model is based on a state inquiry into the truth. Thus, there are potentially other issues at play which explain the CACD's deference to the jury's verdict which require consideration.

Of importance is the disparity between the CACD's refusal to rehear trial evidence from jury trials, yet the automatic right to a full re-hearing in appeals from the Magistrates Court to the Crown Court. Nobles and Schiff did refer to this discrepancy and how it had not seemed to cause any problems to law's authority and finality. They then discuss how appeals from jury have always involved deference, and suggest perhaps this is because the jury do not provide reasons for their decision. They explain: in a civil trial, the judge provides a reasoned judgment which provides a basis for an appeal court to agree or disagree with the decision: law can thus control appeals through self-reference to the law's doctrine.<sup>214</sup> But with a jury trial, the judges did not hear the evidence and have no reasoned judgment to support conviction; thus, suggesting the jury reached an inappropriate verdict would undermine the normative commitment of the system to jury trial.<sup>215</sup> Perhaps they thus thought it was significant that the

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<sup>211</sup> M Damaska, 'Evidentiary barriers to conviction and two models of criminal procedure: A comparative study.' (1973) 121(3) University of Pennsylvania Law Review 506 p.580

<sup>212</sup> Ibid. p.583

<sup>213</sup> See for example, R v Sion David Charles Jenkins [2004] EWCA Crim 2047 (paragraph 13)

<sup>214</sup> R Nobles and D Schiff, (n.15) p.236

<sup>215</sup> R Nobles and D Schiff, (n.15) p.235

Magistrates provided a reasoned judgment. However, this explanation overlooks that reasons for a previous decision are completely irrelevant to a full re-hearing.

A significant issue which Nobles and Schiff do not appear to discuss is the resource restrictions faced by the criminal justice process in England and Wales. A full rehearing on appeal from a conviction in the Magistrates Court will require significantly less time and resources than a rehearing of a Crown Court trial, which sometimes extends to several weeks of court time. Systems theory would not deny that economic resources irritate law, but only that law can ever communicate economically. For example, the CACD will refuse to interfere with judgments about witness credibility because it has not had the benefit of seeing the trial witnesses like the jury: this is a legal communication, but essentially there is no legal reason why they cannot call those witnesses back, but likely an economic one (as well as other competing interests such as protecting the rights of witnesses and victims by not habitually putting them through a second trial.) This area gets into the complex interactions between systems under systems theory, but is of significant importance.

Therefore, whilst the innocence movement represents another failed attempt to reform the criminal appeal system; arguably, we should not view the CACD's approach to defending finality as essential to maintaining law's authority. The question remains over what autopoietic theory can reveal about how reform should be approached. Nobles and Schiff suggested in 1995 that systems theory was simply a "reification" of what is essentially human action: one which enables us to see the "wood for the trees" but "there is no separate empirical entity which makes up the wood, there are only trees."<sup>216</sup> They said, those who aim to reform the system are not addressing a "fiction" or a "myth" but they are trying to "alter the practices of actors who have distinct forms of communication and self-perception."<sup>217</sup> This view seems to depart from an orthodox view of Luhmann, who thought a "communicative dynamic" lived on in the absence of the human(s) who created it<sup>218</sup> and King suggested Luhmann's theory rejected the view that "it's all down to people."<sup>219</sup>

Sandberg has argued that systems theory does not deny human agency, but rather enables analysis of how the actions of people over time have reached an understanding which has become so entrenched that it is perpetuated by the system.<sup>220</sup> He emphasised how Luhmann

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<sup>216</sup> R Nobles and D Schiff, (n.101) p.319

<sup>217</sup> R Nobles and D Schiff, (n.101) p.319

<sup>218</sup> J Mingers 'Can social systems be autopoietic?' (2002) 50(2) *The Sociological Review* p.287

<sup>219</sup> M King 'The Truth about Autopoiesis.' (1993) 20(2) *Journal of Law and Society* 218p.228

<sup>220</sup> R Sandberg, 'The Failure of Legal Pluralism.' (2016) 18 *Ecclesiastical Law Journal* 137 p.148

recognised systems to be shaped by their environment, and thus the role of human agency in the development of law as a social system should not be overlooked.<sup>221</sup> In later work, Nobles and Schiff appear to change their position: they suggest individuals are constrained socially, but it is possible for them to irritate systems. They suggest that whilst individuals are not fractured psychically, they are socially; and if they wish to participate in society they must adopt the communications that are available.<sup>222</sup> They explain how communications are not static and continue to evolve, and suggest that individuals can participate in this evolution by using their creative abilities and aptitudes; this may enable them to perturb the systems within which they are constructed and encourage them towards adopting new redundancies.<sup>223</sup>

However, Nobles and Schiff cautioned legal reformers that effecting change within the legal system is more difficult where the opportunities for participating in its evolution are rigorously constrained. In relation to criminal appeals, this requires creating arguments which the legal system recognises as potential reconstructions of its own appeal practices.<sup>224</sup> As articulated by participant/h, the notion that IPs would approach investigating miscarriages of justice in a different way and would not be “*constrained by what the law says*” was “*all very well*” but “*you have to play the game*” if you want to participate in the legal system. In relation to reforming the legal system, Nobles and Schiff cautioned that reformers “are not pushing at a closed door, but they are pushing at a system’s doors” and with criminal appeals, reformers are pushing towards the Centre of that system.<sup>225</sup> Their cautions over resistance thus far seem to be supported by the perpetuating cycle of reform failure.

Therefore Nobles and Schiff’s account does not deny the possibility of human agency and the influence of social systems; but it does emphasise how it is constrained through the available social communications and the functional differentiation of society. Arguably, the innocence movement illustrates this. The empirical data supported an analysis of viewing people as “socially fractured” as participants recognised the necessity of using legal communications to

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<sup>221</sup> Sandberg uses scholarship from Watkin to complement this: Watkin suggests that social groups form to protect their members, and law promotes the social coherence of groups by preventing disputes which endanger social goals and resolving them when they do arise. Watkin also emphasises that there would be no legal system without human beings, and urges for theory to be kept in touch with social realities. (R Sandberg, (n.220) p.149-150 citing T Watkin, ‘The Nature of Law’ (Amsterdam and Oxford 1980) p.108, p.88, p.117)

<sup>222</sup> R Nobles and D Schiff, (n.15) p.252

<sup>223</sup> Nobles and Schiff use the term redundancy to explain essentially the established meaning within a social system; or the necessary background information we have in order to interpret new meanings. They give the example of time; when we are told it is 9.25, this makes sense to us given our background understanding of communicating about time as 60 minutes to an hour (R Nobles and D Schiff, (n.15) p.29-30).

<sup>224</sup> R Nobles and D Schiff, (n.15) p.252

<sup>225</sup> R Nobles and D Schiff, (n.15) p.252

participate within the legal system. However, the data also illustrated that several participants felt discomfort over the “factual innocence” concept; this demonstrated a recognition of the need for law to create “order from noise” and reduce its environment into legal constructions. This is illustrative of Nobles and Schiff’s point that “reductionism through differentiated systems of communications makes complex social life possible.”<sup>226</sup> Thus, the innocence movement in the UK represents another example of the problems caused for law when there is an increasing focus on ideas related to “justice based on truth.”

## **Conclusion**

This chapter has attempted to provide a theoretical framework for analysing the UK innocence movement through social systems theory: this has been the first in-depth attempt at exploring IPs in this way. This chapter has sought to provide theoretical insights into the evolution of the innocence movement in the UK; simultaneously it has argued the innocence movement provides an empirical illustration of the operation of social systems theory in society.

This chapter has discussed how IPs, at least those under the “Factual Innocence Model,” are significant in systems theory terms because of their unique approach to miscarriages of justice. The focus on “factual innocence” as a distinction from a legal construction of “innocence” raises tensions between legal communications and constructions, and other “lay”<sup>227</sup> communications. Beyond this, the UK innocence movement raises questions over idealised social values and the need for social systems to fulfil certain social functions despite the impossibility of accessing objective reality. Or, in Nobles and Schiff’s words, how coordination in society is achieved through “the use of common reductive terms, self-referential communication, and (at the level of discourse) widely shared values.”<sup>228</sup> There were three potential conceptualisations of IPs within systems theory offered in this chapter. The first two were developed in this thesis, on the basis of analysing the innocence movement literature. Firstly, it questioned whether we might see Naughton’s aims for INUK as a form of protest. It was then questioned instead whether the creation of IPs in fact implies the innocence movement has evolved beyond protest and perhaps represented its own communicative subsystem. In relation to this second suggestion, it was suggested that IPs could potentially be seen to represent a failed attempt at introducing rival communications into the social system of law.

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<sup>226</sup> R Nobles and D Schiff, (n.14) p.200

<sup>227</sup> Roberts and Weathered say “lay communication” simply refers to social communication within systems theory (S Roberts and L Weathered, (n.28) footnote 44. p. 52)

<sup>228</sup> R Nobles and D Schiff, (n.14) p.201



Whereas, the third suggestion was derived from the literature, and was considered to represent a slightly different model to that portrayed by Naughton in the literature. The key difference lay in whether IPs were analysed as presenting a challenge to law, or working in and between different social systems. It was concluded that if IPs were operating as “linkage institutions,” as suggested by Roberts and Weathered, this would circumvent a number of the tensions considered to arise from the “Factual Innocence Model” of IPs: this would be the best way for IPs to pursue their different aims within a functionally differentiated society.

However, it was argued that in relation to Naughton’s ambitions for the UK innocence movement, and his aims to launch a counter-discourse of “factual innocence” within the legal system, this most closely resembled a form of protest communication. Characteristic of Luhmann’s concept of a protest movement, the counter-discourse of factual innocence manifested itself as a protest against society’s inability to protect the innocent from punishment; in this way, it sprung up as society’s immune system, protesting against the potential unjust nature of legality. Perhaps we should view protest movements as an act of human agency, as Luhmann suggested protest was about “individualized individuals” who feel that their life situation is paradoxical.<sup>229</sup> However, whilst aspects of the UK innocence movement (such as its reform agenda) could be analysed as a failure of individual human agents to perturb the system of law, there was also a degree of unviability within the innocence movement agenda. As was demonstrated, even where participants identified with the “Factual Innocence Model” there was a sense they were evolving away from it towards an acceptance of legal communications. Thus, characteristic of protest movements, the UK innocence movement was unable to offer any better solutions and was unable to overcome the irresolvable problem of the impossibility of accessing objective reality.

To what extent can autopoietic systems theory provide insight into the results of this thesis? This chapter suggests that Social Systems theory can provide important insights into why the aims and objectives of IPs in the literature have failed to translate into practice. It has been demonstrated how data from the participants illustrates the tensions which exist within the “Factual Innocence Model” of IPs: the data suggests that for the majority of participants, they either recognised these tensions at the outset, or rather experienced these tensions as they manifested, which consequently led to an evolution away from the “Factual Innocence Model.” Therefore, this failure could be seen to represent the impossibility of reconciling the tensions

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<sup>229</sup> N Luhmann, (n.30) p.156

between different systemic communications: here between legal constructions and communications, and what can generically be termed as “lay” communications around actual innocence and guilt. This chapter has also considered an alternative model of IPs put forward by Roberts and Weathered, which suggests they were aimed towards working in and between different systems as “linkage institutions:” however the sampled IPs largely did not identify with these aims, and even where they did, it was concluded that IPs have failed to establish a stable structural coupling between a focus on “factual innocence” and the social system of law. Rather, the empirical data suggests that we should analyse IPs as having undergone a “reconfiguration” as a result of several systemic tensions which has resulted in them developing a strong and stable structural coupling with the social system of law. Therefore, this chapter has concluded that Luhmann’s Social Systems theory can provide important insights into the failure of the original aims and objectives of the “innocence movement” as detailed in the literature.

## **Conclusion**

This thesis is the first in-depth empirical study into the development of IPs and the UK “innocence movement.” The research findings are based on an analysis of interviews with sixteen current and former IP leaders from thirteen IPs; along with four further interviews with leaders of other criminal appeal units. The literature review revealed there was limited academic research on the operation of IPs in the UK, despite up to thirty-eight IPs having been established between 2005 and 2014. It was argued that IPs merited academic discussion because of their unique aims and objectives and their distinctive approach to investigating miscarriages of justice. This thesis explored the UK innocence movement in three distinct ways. Firstly, based on the participants’ accounts of their IPs aims, objectives and approach to casework, it sought to determine whether we could construct a typical IP model in the UK, and to what extent this reflected, or differed from, the model of IPs in the literature. Secondly, it questioned whether we could analyse the UK innocence movement in terms of a “rise and fall,” given the difficulties IPs have experienced in achieving their aims and reflected on the future landscape for university involvement with miscarriage of justice work. Thirdly, it used social systems theory as a theoretical framework for understanding the dilemmas faced by IPs and why many respondents did not subscribe to the model of IPs within the literature, as well as using it to reflect on the challenges IPs may face in pursuit of their reform agenda. This conclusion will firstly summarise the research findings; secondly, it will discuss their relevance to the comparative context of the international innocence movement; thirdly, it will discuss how we can situate this research within academic literature; and lastly, it will discuss recent developments within the field and reflect on the future.

### **1. Research Findings: Summary**

#### **1.1 Results Section 1: Constructing an IP model**

Firstly, it was suggested that the sampled IPs could be placed on a spectrum between two ideal models: the “Factual Innocence Model” and the “Formal Legalism Model.” The “Factual Innocence Model” was based on the literature model of IPs and suggested IPs would be committed to investigating the potential factual innocence of their client and would pursue this by conducting a neutral truth-finding inquiry; other characteristics suggested were a commitment to a reform agenda, and encouraging students to engage with miscarriages of justice as a cause. When analysed in terms of the theoretical framework of Social Systems theory, IPs under this model would adopt a “lay” construction of a wrongful conviction, and

examine convictions in terms of potential guilt or innocence, rather than examining convictions in terms of legal safety. Alternatively, the “Formal Legalism Model” was based on a more traditional, legal approach to criminal appeals, which adopted the legal construction of wrongful conviction for examining the case; the case investigation would be orientated towards identifying potential appeal grounds, and there would be a practice focused educational goal. In terms of Social Systems theory, IPs under this model would adopt a legal construction of a miscarriage of justice which includes an examination of its technical and procedural “legal safety;” thus IPs under this model would utilise legal communications and work towards the statutory tests of the CCRC/ CACD. This section demonstrated that the majority of IPs did not identify with the “Factual Innocence Model” of IPs. Rather most were better understood as “Mixed Models” adopting certain characteristics of the IP model in the literature, such as looking at claims of factual innocence referred by INUK, but which were closer to the “Formal Legalism Model” in their approach and aims. “Mixed Model” IPs were seen to recognise the importance of utilising legal communications when undertaking casework, and where they identified with some of INUK’s reform aims, they recognised the importance of keeping these separate to their casework role. It was concluded from the empirical data that we should not necessarily distinguish the majority of IPs in the UK from other types of criminal appeal clinics in terms of their aims, objectives and functions. This raised the question not only whether we still have an “innocence movement” in the UK, but whether we ever had one as envisioned in the literature. The research findings suggested not.

## **1.2 Results Section 2: The UK innocence movement – a rise and fall?**

Secondly, it was suggested that, whilst there had been a “rise and fall” of INUK and its philosophy, the UK innocence movement was better analysed as a “rise and reconfiguration.” The suggestion that the movement had undergone a “rise and fall” arose because of the perceived, limited success of IPs in their casework; the decline in the number of IPs; and the INUK fold in July 2014. This question also arose as a theme within the data. A significant number of tensions underlying the UK innocence movement contributed to the challenges faced by IPs, such as competing tensions around aims and objectives; difficulties with reconciling an IP model within a university as a clinical legal education tool; and beyond this there were further tensions underlying the INUK approach and within the network itself. The data suggested these tensions were becoming increasingly apparent leading up to the INUK fold, and that there were already signs of IPs “reconfiguring” as IPs began leaving the network to operate independently. Then, following the INUK fold in July 2014, former member IPs

were forced to reconfigure themselves as independent clinics; this resulted in the majority of former IPs changing their names, and in doing so, electing to be completely independent of the international Innocence Network and innocence movement. In reconfiguring, former (and remaining) IPs have sought to overcome some of the tensions underlying the INUK era, developing a new way of assessing case eligibility; more productive working relationships and new collaborations in an attempt to resolve some of the previous problems with the IP model. Thus, this research has suggested the future landscape of university miscarriage of justice work looks very different to the picture portrayed within the literature.

### **1.3 The UK innocence movement: Insights from Social Systems Theory**

Lastly, the thesis explored the use of Social Systems theory as a theoretical framework for examining the UK innocence movement. This was the first detailed attempt at applying this theory to examining IPs; although it did build on a previous attempt at analysing IPs as “linkage institutions.” How we conceptualise IPs within systems theory depends on whether we analyse IPs according to the INUK model, or the model suggested by Roberts and Weathered.

The first two suggestions, based on the INUK aspirations for the “innocence movement,” were completely new. Naughton’s aims for INUK identified with Luhmann’s account of protest communication; because the emphasis on releasing the discourse of “factual innocence” reflected a dissatisfaction with functional differentiation and the inability of society to protect the innocent from punishment. However, it was questioned whether the UK innocence movement had evolved beyond being a protest movement, and that through the creation of IPs, it had developed into its own communicative subsystem. IPs, based on the “Factual Innocence Model,” were analysed as having their own coding and programming into the investigation of miscarriages of justice: it was suggested they represented a rival communicative subsystem to state-law within criminal justice. They were analysed as a failed attempt at introducing an alternative communicative subsystem into law, and insights from systems theory were used to reflect on why the majority of sampled IPs did not subscribe to the “Factual Innocence Model.” These communications were either recognised by other IP leaders as “misreadings” of legal communications; or, for some IPs which initially adopted these communications and programmes, they were eventually dropped for their unviability following increased irritation from the legal system. This suggested Social Systems theory could explain the difficulties faced by the “innocence movement” in introducing and sustaining rival communications to state-law within a functionally differentiated society.

The third suggestion was derived from a different model of IPs based on an account from Roberts and Weathered, which suggested that we could view IPs as “linkage institutions.” This analysis was based on their view of IPs as working in and between different social systems: this would potentially be the most effective way of IPs to navigate the systemic communicative barriers within a functionally differentiated society. Roberts and Weathered’s model for IPs appeared distinguishable from Naughton’s because their emphasis was on identifying areas of compatibility, whilst Naughton sought to challenge the existing legal framework: thus the concept of IPs as “linkage institutions” was reflective of different aims and objectives from the previous two conceptualisations of IPs within the theory. Roberts and Weathered’s analysis of IPs as “linkage institutions” was extended in an attempt to better reflect Teubner’s account: this suggested IPs increased law’s responsiveness to its environment through constructing an area of compatibility between the lay construction of miscarriages of justice as “factual innocence,” and the legal construction of “safety.” However, it was concluded this only increased law’s responsiveness if and when, and for the duration of, IPs succeeding in getting a conviction referred by the CCRC or quashed at the CACD. Therefore, to increase law’s responsiveness to factual innocence in a more permanent way, IPs would be relying on different means: they would either have to ‘perturb’ law to respond to these communications by adjusting its own internal structures, or try to encourage political reform through campaigning, which was another role of IPs suggested by Roberts and Weathered. However, these alternatives would inevitably result in either the political or legal reconstruction of IP communications when they were adopted by the system.

It was concluded that the empirical data did not support any of these analyses. The majority of sampled projects did not identify with the “Factual Innocence Model” which was used as the basis for analysing IPs as either protest movements, or as having developed their own independent communicative subsystem. Furthermore, whilst some of those IPs under the “Mixed Model” were seen to recognise the importance of working in and between different social systems, the majority still did not actively identify with the aims of IPs as identified by Roberts and Weathered in formulating their concept of IPs as “linkage institutions.” Therefore, based on the sample, it was concluded that the projects were best understood as organisations which had evolved to develop a strong structural coupling with the social systems of law and education.

Leading on from this, insights from Nobles and Schiff’s systems theory analysis of miscarriages of justice and criminal appeal reform were applied to the innocence movement

reform agenda, and the recent contribution of IPs to the Justice Select Committee review 2014-2015. It was argued that whilst the failure of the innocence movement to affect these reforms provided weight to Nobles and Schiff's account, we could not analyse the Court of Appeal's defence of finality as an essential requirement of maintaining law's authority. Thus future efforts would be prudent to approach reform from a different perspective, rather than from "justice based on truth" philosophy: as the latter requires something of law which is impossible within a functionally differentiated society.

Overall, it was concluded that Social Systems theory could provide an explanation for the failure of the innocence movement to achieve the aims and objectives envisaged in the literature. Although the original IP model was aimed towards focusing on a "lay" construction of wrongful conviction as "factual innocence," as opposed to a "legal" construction based on "legal safety," the inherent systemic tensions involved with this approach meant IPs have "reconfigured" away from these ideas to exist simply as organisations in a strong structural coupling with law. Thus, this theoretical framework arguably can provide important insights into the UK innocence movement. Additionally, this research has arguably also provided an important basis for exploring empirically the autopoietic nature of social systems and how individuals interact with this. The way in which respondents experienced tensions around their relations with the criminal appeal system provides an illustration of the concrete effects on individuals of the difficulties of communication within a functionally differentiated society. This demonstrated what Nobles and Schiff have described as the 'socially fractured' nature of human existence.

## **2. Research Findings: Comparative Context**

The research findings about IPs in the UK are important to thinking about the global movement. In the US, the innocence movement has been likened to a "civil rights movement"<sup>1</sup> or an "innocence revolution,"<sup>2</sup> and there appeared to be aspirations for a similar movement in the UK. However, whilst the "innocence movement" has expanded globally and IPs are continuing to grow in numbers, the UK movement has had limited success and there has been uncertainty over its viability. This thesis has sought to explore some of the reasons why the UK innocence movement has struggled to make progress in casework and reflected on the potential differences between how IPs operate in the UK and the US. One key difference is the existence

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<sup>1</sup> D Medwed, 'Innocentrism.' [2008] University of Illinois Law Review 1549 p.1550

<sup>2</sup> K Findley, 'Innocence Found: The New Revolution in American Criminal Justice.' in S Cooper (eds.) *Controversies in Innocence Cases in America* (Ashgate Publishing Ltd. 2014) p.3

of the CCRC in the UK which presents IPs with an extra hurdle to overcome. The CCRC can also take several years to investigate cases and therefore it is possible there is a backlog of innocence cases at the CCRC, some of which may succeed in getting referred to the CACD. Nevertheless, the fact that only three cases have ever reached the CACD (from two IPs), despite the existence of around thirty-eight IPs, does suggest there have potentially been problems with the UK movement.

This thesis has also examined why Naughton's model of IPs under the "Factual Innocence Model" failed to take-off within the UK. The American movement was also concerned with claims of factual innocence and reform orientated; so how has it not been met with the same resistance? Firstly, it is important to note that there was criticism of IPs in the US for focusing on factual innocence and thus neglecting due process, so this aspect of their approach has not been without controversy. There are some potential differences between the US and UK which could explain why Naughton's model was met with greater resistance. However, it is only possible to speculate on this, as there has been no research published that explores the focus of American IPs on factual innocence in the same way as this thesis does for the UK. Firstly, the US movement's origin in The IPNY at Cardozo Law School is potentially important. The IPNY based their factual innocence focus on claims which could be subjected to DNA testing; as DNA presence is considered a powerful tool in testing truth, this provided a solid basis for a factual innocence focus. Furthermore, the numerous DNA exonerations which it achieved through this method potentially provided a more receptive environment for other IPs that are focused on factual innocence. Another potential key difference is that Naughton aimed for IPs to work outside the existing legal framework, which he perceived as inadequate for dealing with claims of factual innocence. He urged IPs not to restrict their focus to finding appeal grounds but to act as "truth-finding inquiries;" this approach is alien to the partisan approach of criminal defence in the adversarial tradition, and lays claim to a superior method of establishing truth. In the US, the literature did not suggest they approached their investigations in this way. Thus, this could be why the factual innocence focus in the US has not appeared to raise significant difficulties to their operation.

Beyond the potential difficulties caused to the UK movement through the INUK model and philosophy, a major limiting factor to its success appears to be funding. Until there is a broader base of international literature on IPs, it is unknown how IPs are progressing in other countries, or what factors appear to promote and limit their success. Therefore, it is currently difficult to know whether it is the UK movement which has been particularly unsuccessful; or the US



movement which has been particularly successful. Although the apparent lack of success for Australian IPs does suggest perhaps the UK is not alone in this respect.

### **3. Situating the Research in the Literature: Contributions**

Firstly, and most obviously, the research findings are an important contribution to literature on IPs in the UK, which is limited and out-dated.<sup>3</sup> The existing literature about IPs only featured authors from four UK IP's, whilst this research has examined the experiences of IP leaders from across 13 projects in the UK. Further, it has developed two ideal models of IPs (or now more generally miscarriage of justice clinics) to account for the different aims, objectives and approaches to investigation. These models provide a basis to account for the different approaches to investigating miscarriages of justice within university projects. This research was also carried out at a critical time, tracking the development of the UK movement between December 2013 and January 2015: during this time there have been significant changes to the landscape of university miscarriage of justice work following the folding of INUK as a central network. This data is irreplicable in providing means for analysing the situation both immediately prior to, and immediately after, the INUK fold; this provides a firm basis for exploring the contributing factors to this decline. Thus, the research will be of significant interest, not only to those engaged in the UK innocence movement, but also for those engaged internationally.

However, this thesis has sought to demonstrate that IPs merit academic attention in a broader sense. The philosophy of the innocence movement around the construction of miscarriages of justice is relevant to thinking about how we want the criminal justice system to operate, and for how we deal with errors within the criminal justice process. Applying a systems theory analysis entails accepting that establishing objective truth is impossible, and thus, in Nobles and Schiff's words: "There is no direct access to truth, nor are there objective standards of justice, and to the extent that systems rely on concepts such as truth and justice, such concepts are the particular constructions within those systems."<sup>4</sup> According to systems theory, whilst we cannot challenge the legal system's coding, because it must continue to reproduce itself through application of the code legal/illegal, we can challenge the programmes through which this code

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<sup>3</sup> With the exception of the recent study by M Alexander discussed at various points: but this has not been published in any length and is not as in-depth as this thesis (Alexander M, 'Innocence Projects – Green Shoots.' (10<sup>th</sup> June 2016) *Criminal Law & Justice Weekly* <http://www.criminallawandjustice.co.uk/features/Innocence-Projects-%E2%80%93-Green-Shoots> (accessed 31/08/16)

<sup>4</sup> R Nobles and D Schiff, 'Miscarriages of Justice: A Systems Approach' (1995) 58 *Modern Law Review* 299 p.319

is applied. IPs represent another challenge to these criminal appeal programmes in England and Wales, and they join the line of other previous failed attempts to encourage the CACD to take a broader approach to reviewing convictions. There remains an important argument for reviewing the programmes through which the criminal justice process examines criminal appeals, or at least the way in which these programmes are defended. Therefore, arguably the UK innocence movement and its aims are important to thinking more broadly about how we want the criminal justice system to operate. The interview data about the systemic difficulties which IPs have faced provide a basis for thinking about the challenges faced by those trying to appeal their conviction; but there is scope for exploring this further in future research.

This thesis also makes a contribution to literature on clinical legal education in the UK. It provides an insight into the ongoing challenges faced by those who aim to integrate law clinics into the undergraduate law degree. It was evident that participants experienced significant difficulties around staffing, time and money for IPs, which led to some participants either leaving their role or closing the project. Furthermore, some participants also reflected on the difficulties in succeeding in an academic career when engaging in clinical work, with participant/e describing it as career “suicide.” The lack of academic literature on UK IP’s also suggests that the majority of IP leaders have not used the IP to contribute to academic research, which could either be because they are not researchers or due to a lack of time. Therefore, the experience of some IP leaders suggests that law clinics still exist on the margins of several universities.

This thesis also contributes to literature on systems theory. The data from the IP leaders provides an empirical illustration of the operation of autopoietic social systems, and has demonstrated that human beings are socially fractured when seeking to participate in society. Furthermore, it has also suggested that the “innocence movement” according to INUK provides an empirical basis for examining Luhmann’s account of social or protest movements in that IPs can be seen as representing the emergence of a “protest communication subsystem” as a rival to state law’s coding in criminal appeals. Given the criticism of systems theory that its abstract conceptual structure makes it difficult to test empirically, this is rare and valuable.

#### **4. Future developments: insights from this thesis**

There is an interesting juxtaposition between developments in the UK movement and the international innocence movement. As part of their “reconfiguration” in the wake of the INUK fold, universities in the UK working on criminal appeals are looking towards future

collaboration. The University of Sheffield is aiming to establish a ‘Miscarriage of Justice Review Association,’ for UK universities to join. They were clear this would not amount to a replacement network governing criminal appeal clinics in the UK; but would be an association for sharing training materials and discussing problems with casework. It may also keep a database of prisoner requests and which cases are being worked on at what university. Significantly however, whilst the UK is moving away from the “innocence movement,” there have been discussions about creating a European Innocence Network: this was discussed at a conference in Prague in June 2016. This network would bring together different IPs across Europe: the UK; Italy; Netherlands; Germany; Spain; Poland; Armenia; and Greece have all indicated an interest. This is in its early stages, but would involve member projects signing up to a constitution and certain protocols. It was clear from discussions at the Prague conference that whilst the UK was disassociating itself with the innocence movement philosophy and “factual innocence,” these ideas still remained central internationally.

This thesis can provide potential insights into these future developments. Firstly, in demonstrating that university criminal appeal clinics have variations in their structure, aims and objectives, and approach to investigating alleged miscarriages of justice; this suggests future collaborations would be required to account for this were there intended to be any shared protocols or constitution. The University of Sheffield was very clear when discussing the Miscarriages of Justice Review Association that it would not be a replacement INUK and would not adopt a supervisory role in this way. However, if UK projects were to have any involvement in the European Innocence Network, they would be required to sign up to a constitution. Depending on what this involves, this may require such clinics to modify their approach where they wished to join this collaborative effort. Furthermore, this research has demonstrated that several participants perceived there to be difficulties and tensions surrounding the “factual innocence” focus of IPs. There appeared to be evidence of UK university clinics moving towards a more “legalistic” approach to responding to miscarriages of justice through analysing legal safety. Therefore, the extent to which the UK becomes involved in the European Innocence Network may depend on its constitution and the extent to which it prioritises factual innocence. In light of the tensions revealed in thesis around the “Factual Innocence Model” of IPs, there would be merit in further research to explore the extent to which other jurisdictions prioritise a “factual innocence” focus, and how they approach this in their investigations.

## **Conclusion**

Overall, this thesis has analysed the UK innocence movement in terms of “tension, reconfiguration and theorisation.” This is the first in-depth empirical study on IPs in the UK. It has both critically examined the literature on the UK innocence movement and contributed to it with unique insights into how it has developed and evolved in recent years. Furthermore, this research has also made contributions to literature on clinical legal education and social systems theory; and, has more generally contributed to debates concerning miscarriages of justice and criminal procedure.

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### **Statute**

The Criminal Appeal Act 1995



## **Appendix 1: Interview Guides**

The questions in bold are the ones which were generally asked to all participants, unless they were deemed irrelevant due to their responses in other areas.

### **Interview Guide**

#### **Introductory Questions:**

**How many cases do you work on at a time?**

**How many students do you have on the project?**

**What disciplines do you select your students from?**

**What is your operating schedule?**

**Are you the sole director? Are there other staff members involved?**

**How did you come to set up or direct the project?**

**What were you hoping to achieve?**

#### **Aims of Organisation:**

**What do you consider the aims of your organisation to be?**

Depending on response: i.e. **Education of Students**

- How do you seek to educate students?
- What are you seeking to teach them?

#### **Research**

- What research do you conduct?
- How do you go about this?
- What are you hoping to achieve through this?
- What would you say are your principal research conclusions?

#### **Helping clients overturn their conviction**

- What do you consider your function to be for your client? What do you aim to do for them?

How do you rank or reconcile these competing objectives?

### **Process of Taking on a Case**

#### **How do clients first come to your attention or notice?**

When receiving an application to your organisation from an individual asking you to take on their case, what is the process you go through?

#### **How do you make the decision to take on someone's case?**

What do you base your decision on?

How certain do you have to be of their innocence before you take the case on? [very probably, probably, likely, might be].

Or do you consider the potential for making an application rather than thinking about their culpability?

### **For INUK Projects:**

#### **From INUK:**

**Are you able to choose between cases referred by INUK or are you just given one to work on?**

Is this after they have been accepted for investigation by INUK or do you decide whether the case should be pursued?

**What are your first steps when receiving a case?**

**What are your general expectations of the case?**

Do you always consider they are likely to be innocent? Or just that they might be?

Or do you consider the potential for making an application rather than thinking about their culpability?

How does someone become a client? On what basis?

### **Investigating the Case:**

**What are your first steps once you have accepted a case?**

**Do you see yourself as conducting a new ‘investigation’ or as reviewing the investigations that have already taken place? How do you set about this?**

What are you looking for?

**Are you looking for factual evidence of innocence or of legal grounds to support an application to appeal the conviction? Do you distinguish between the two?**

What do you hope to achieve through your investigation?

What exactly are you looking for and where do you look for it?

**Supplementary question:**

Are there any specific types of evidence or aspects of process upon which you focus? i.e. police investigation, errors in summing up, unused schedule.

What are you looking for in those particular areas? How do you exploit them?

Do you try to generate new evidence and if so how? How do you make use of the evidence?

**What would you see as being a successful investigation? What kind of investigation would you be happy with and what kind would you be dissatisfied with?**

**Making applications:**

**At what point would you decide to make an application to the relevant authority?**

**How do you approach making the applications for the client?**

**Do you see yourself as arguing for the conviction to be overturned? Or are you simply presenting the evidence to the relevant authority?**

What kinds of argument do you rely upon in the application? Are these recurring elements?

How do you present the argument?

**Do you see your role as complete once you’ve made an application?**

**What role would the IP play after that in a case?**

**Do you seek to publicise the case and your application? How and why?**

How do you respond to rejection/success?

**When would you decide to stop working on a case? Why? What does this mean for the client?**

**Understanding the approach:**

**What is the significance to you of being involved in an innocence project as opposed to other organisations looking at criminal appeals?**

**How would you distinguish it from the approach of criminal solicitors or criminal appeal units?**

**How would you distinguish your approach from the CCRC?**

**Concluding questions:**

**What impact do you think you are having on the criminal justice system?**

**What impact do you hope to have?**

**To what extent do you feel you have been successful in achieving your aims?**

**What factors have promoted or limited your success?**

**How do you see the future for your project and your clients?**

## **Interview Guide – Criminal Appeal Units**

### **Introductory Questions:**

How many cases do you work on at a time?

How many students do you have working in the criminal appeal clinic?

What disciplines do you select your students from?

What is your operating schedule?

Are you the sole director? Are there other staff members involved?

How did you come to be involved in the unit?

What were you hoping to achieve?

### **Aims of Organisation:**

**What do you consider the main aims of your criminal appeal unit to be?**

Depending on response: i.e. **Education of Students**

- How do you seek to educate students?
- What are you seeking to teach them?

#### **Research**

- What research do you conduct?
- How do you go about this?
- What are you hoping to achieve through this?
- What would you say your principal research conclusions?

#### **Helping clients overturn their conviction**

- **What do you consider your function to be for your client?**  
**What do you aim to do for them?**
- Do you only work for clients who you think are entitled to appeal?

**How do you rank or reconcile these competing objectives?**

## **Process of Taking on a Case**

**How do clients first come to your attention or notice?**

**When receiving an application to your organisation from an individual asking you to take on their case, what is the process you go through?**

**How do you make the decision to take on someone's case?**

What do you base your decision on?

Do you consider the potential for making an application rather than thinking about their culpability?

## **Investigating the Case:**

**What are your first steps once you have accepted a case?**

**Do you see yourself as conducting a new 'investigation' or as reviewing the investigations that have already taken place? How do you set about this?**

What are you looking for?

Are you looking for factual evidence of innocence or of legal grounds to support an application to appeal the conviction? Do you distinguish between the two?

**What do you hope to achieve through your investigation?**

What exactly are you looking for and where do you look for it?

## **Supplementary question:**

Are there any specific types of evidence or aspects of process upon which you focus? i.e. police investigation, errors in summing up, unused schedule.

What are you looking for in those particular areas? How do you exploit them?

Do you try to generate new evidence and if so how? How do you make use of the evidence?

**What would you see as being a successful investigation? What kind of investigation would you be happy with and what kind would you be dissatisfied with?**

## **Understanding the approach:**

**How would you distinguish your approach with that of an innocence project?**

How would you distinguish it from the approach of criminal solicitors if at all?

How would you distinguish your approach from the CCRC?

**Making applications:**

**At what point would you decide to make an application to the relevant authority?**

**How do you approach making the applications for the client?**

**Do you see yourself as arguing for the conviction to be overturned? Or are you simply presenting the evidence to the relevant authority?**

What kinds of argument do you rely upon in the application? Are these recurring elements?

How do you present the argument?

Do you see your role as complete once you've made an application?

Do you seek to publicise the case and your application? How and why?

**How do you respond to rejection/success?**

When would you decide to stop working on a case? Why? What does this mean for the client?

**Concluding questions:**

**What impact do you think you are having on the criminal justice system?**

**What impact do you hope to have?**

**To what extent do you feel you have been successful in achieving your aims?**

**What factors have promoted or limited your success?**

**How do you see the future for your project and your clients?**

## **Appendix 2: Coding ‘Nodes’**

### **Adversarial notions**

Playing a game

Winning

### **Aims**

Casework aim

Education aim

Education re. MOJ

Experience

Practical legal experience

Traditional legal education

Black letter law

Evolution of aims

Interaction of aims

Reform or change

Research

Success in achieving

### **Appeals**

### **Background of participant**

### **Case Selection**

Claim of factual innocence

Under INUK

### **Casework**

Approach to investigation

Both fresh and review

Fresh investigation

Holistic approach



Preliminary investigation

Reviewing investigations

Successful investigation

Approach to the case

Aim of investigation

Aim to get CCRC/CA application

Fresh evidence

To reach a conclusion

Casemap

Defining approach

Distinguishing approach

Journalism approach

Legal approach

Case status

CCRC applications

Aim for CCRC applications

Judicial review

Response stage of app

Standard of CCRC app

Difficulties of

Evolution of approach

Tasks undertaken

Time

When to stop working on a case

### **Cause-lawyering**

Broader cause

Political approach

Practice setting

### **Centre for Criminal Appeals**

### **Comparative approaches**

With America

With campaigning orgs

## **Criminal Appeal Units**

Aims of institution

Casework

Education

Preparation for practice

Reform

Aims of participant

Benefits of

Case selection

Casework

Function

Types of cases

Differences to IPs

Module

Opinion of participant

On CJS

Problems

Participant's role

Students

Tensions

Reconciling functions

Role of participant

Similarities to IPs

Student body

## **Criticisms of the system**

Cases

Legal aid

Legal test of CCRC or CA

Of legal profession

Procedure

Reform suggestions

Resources

## **Defining a MOJ**

## **Differences**

## **Ethical issues**

Casework

Client

Case progression

False hope

Using client for education

Students

## **Evidential issues**

## **Expectations**

Client expectations

Disillusion

Evolution of expectations

Expectation management

Naivety

Negative expectations

Positive expectations

Realistic expectations

Shared expectations

Student expectations

## **Features of Project**

Age

Casework

Relationship with clients

Types of clients

Changes of directorship

Co-directors

Module

Organisation

Division of labour

Renaming from innocence project

Role

Personal approach

Tensions re. role

Setting up project

Status within university

Student body

Criminology

History

Journalism

Law

Selection process of students

Sociology

### **Innocence Network UK**

Approach or views of INUK

Collapse of INUK

Left INUK

Membership of INUK

Training

### **Innocence Projects**

Adversarial or inquisitorial

Benefits of IPs

Criticisms of IPs

Defining or distinguishing an IP

Quality control

Referrals

Relationship with each other

Reputation

Role

## **Model of organisation**

### **MOJ Issues**

Disclosure

Media interest

Progression for prisoners

Types of cases

### **MOJ movement**

### **Opinions of participant**

Advice for IPs

Concerns

Evolution of views

Experience of participant

Future for IP movement

Future for own IP

Impacting on CJS

Of CJS

Of IPs

Of other institutions

On own role

Views on current climate

### **Problems**

Disorganisation

Personal frustration

Re. casework

Re. management

Re. reform

Re. students

Re. time  
Resources  
Shared problems  
With IPs

## **Public perceptions**

## **Relationship with other institutions**

Campaigning groups  
    Benefits  
    Fundraising  
With CCRC  
    Approach of CCRC  
    Benefits of CCRC  
    Criticisms of CCRC  
        Funding or resources  
        Time management  
    Powers of CCRC  
    Relationship with CCRC  
    Standard of proof  
Court of Appeal  
Legal professionals  
Police

## **Standard of Proof**

Doubt  
Factual innocence  
Innocence  
    Uncertainty of  
Reasonable  
Subjectivity  
Technical innocence  
Uncertainty

## **Student experience**

Skills developed

## **Successes**

Re. Cases

Re. students

## **Systems Approach**

Finality

Journalism

Legal approach

Legal world

IPs relationship with

Politics system

Working against system

Working within system

## **Tensions**

Academic role

Casework

IP model

Relationships

System tensions

With aims

## **Truth-finding**

## **Appendix 3: Information Sheet and Consent Form**

### **Information Sheet for Participants**

I am writing to ask you to consider participating in the research which I am carrying out at Cardiff University.

**Title of Research:**     *Investigating Miscarriages of Justice: an exploration of the relationship between the Court of Appeal, the Criminal Cases Review Commission and Innocence Projects.*

### **What is the Research About:**

The research is sponsored by the Economic and Social Research Council. It will seek to compare the approach which innocence projects and other pro-bono organisations take to investigating potential miscarriage of justice cases with that of the Criminal Cases Review Commission (CCRC) and the Court of Appeal. The aim is to examine the effectiveness and fairness of our current approach to such cases within our criminal justice system.

### **What is being asked of you:**

1. To participate in a semi-structured interview
  - The aim of the interview would be to explore the approach of your innocence project/pro bono unit to casework, to understand how your innocence project/pro bono unit operates and the aims of the project.
  - The interview will be recorded on a Dictaphone; if you desire, I will send you a transcript of the interview for you to check and confirm its accuracy, after which the recording will be deleted.

### **Anonymity:**

- I will seek to protect your anonymity in any publication which arises, by the use of pseudonyms for yourselves, the University where your innocence project/pro bono unit is based, your clients, and your students.



- Any identifying details which are not essential for the research will not be revealed or will be altered in accordance with the conventions adopted in social research to conceal identities of research participants.
- **However, it is always possible that an innocence project/pro bono unit might, despite these efforts, be identifiable through particular material facts (for example those revealed in referrals to the CCRC or Court of Appeal hearings).**

### **Publication:**

- The information gathered is intended for use in the publication of a PhD thesis, but may also be used for academic publication or for discussions at conferences; this will only be done in an anonymised form.

### **Data Storage:**

- Any data in its original form will be stored in locked drawers, which only I have access to, in a locked office. Any electronic data will be stored on an encrypted USB stick with a secure password that is regularly changed.
- Once retention of the data is no longer required for academic purposes it will be erased from the memory stick; any data on paper will be shredded.

### **Your Consent:**

You have the right to refuse consent for participation.

If you consent, you may also withdraw consent at any time in the duration of the study (provisionally January 2014 – January 2015).

The consent form is attached to this letter.

**If, at any time, you have any concerns about how the research is being carried out you should contact the Ethics Review Committee at Cardiff Law School: address below.**

### **My details:**

**Please contact for any further information:**

**Holly Greenwood**

PhD Research Student, Cardiff  
Law School

### **Email:**

[greenwoodhc@cardiff.ac.uk](mailto:greenwoodhc@cardiff.ac.uk).

### **Ethics Committee:**

**Rose Cundill**

Research, Finance & Facilities

Administrator

Cardiff Law School

Law Building

Museum Avenue

CARDIFF CF10 3AX

Tel: +44 (0) 29 20874612

Fax: +44 (0) 29 20870056

**Consent Form:**

Please indicate **Yes** or **No** responses to the following:

I have read and fully understood the information given to me in the Information Sheet:

**YES / NO** [where **NO** is indicated consent will be taken as refused].

I understand that any information obtained throughout the study may be used for publication for academic purposes in the PhD thesis, academic papers or conference papers.

**YES / NO** [where **NO** is indicated consent will be taken as refused].

**Consent:**

I hereby **give** / **refuse** consent to participate in a semi-structured interview for the research project outlined above **subject to the terms and conditions outlined in the information sheet.**

Participant Signature .....